GAZETTE

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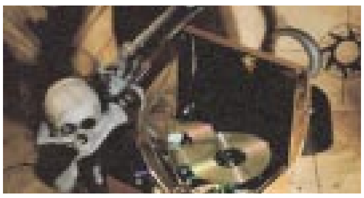

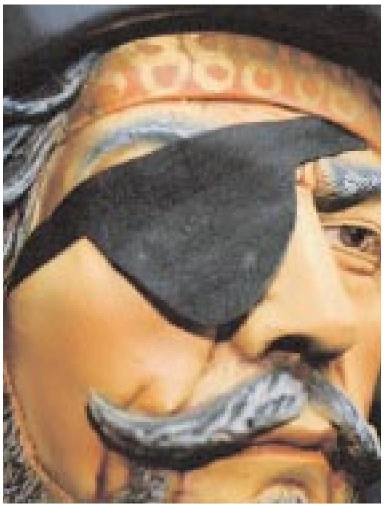

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Keeping up with the pace of change

This is my penultimate message as President of the Law Society. It only seems moments ago that I received the chain of office from Laurence K Shields, my predecessor. The challenge that change brings is not new, but the pace of change is such that we must constantly run even to keep up. When the rate of change outside an organisation is greater than the change within it, we might be led to believe that the end is near! Our profession is at risk of losing ground to the new world order if we lapse into complacency.

How has my time been used? At the beginning of my term, I sought to infuse fresh ideas and bring new people into the workings of the Law Society Council and its committees. The governance of the Society was looked at afresh, shaken a little, and a new vibrance added by a carefully-planned amalgamation of functions of some committees and the absorption of others.

I have travelled more than 50,000 miles in the geographical island of Ireland, attempting to visit all parts of the country and our colleagues in various bar associations. In addition to the many committee and Council meetings, I had the honour of representing the Law Society at numerous conferences in Europe and North America.

I attempted to be in continuous communication and consultation with members of the Law Society, attending numerous seminars, meetings in law firms and with Government departments, visits to members of the judiciary, Ministers of government, the presentation of parchments to new members of the profession and diplomas to qualified solicitors and other community events.

The Law Society, I believe, is ready and well positioned to face the new millennium. Many challenges exist – growing competition for clients, increased client demands and redefined practice areas – these issues have been identified as priorities by the Law Society and will, I know, continue to receive attention in the years to come.

Community service

Lawyers have always been involved in the community, participating in many organisations large and small, political, social, educational and sporting. Solicitors have never shied from 'getting stuck in', leaving the comfortable sidelines and playing an active part in all areas of Irish life.

Voluntary effort is part of community life. It is also very much part of the Law Society, for all of the work that the Council and committee members do is member-driven – time is given freely on a *pro bono* basis for the selfless purpose of ensuring that our profession, its governance, and society in general, are constantly improved.

The legal needs of clients, who may be disadvantaged, whether educationally, socially or economically, are great. The ability and sense of purpose of those in our profession who set out to meet those needs are not to be underestimated – and above all must be acknowledged.

The challenge of the future

Rarely has the life of a solicitor posed so many challenges. The challenge we must all tackle and solve is to improve our quality of life, and not to be slaves to our offices and clients. We must strive to strike a healthy balance in our lives, to maintain our professional status without compromising the really important things – family, friends and life itself.

I have said on a number of occasions during the year that the future for the solicitors' branch of the legal profession is rosy; the profession is thriving, with an unprecedented level of talent, education, diversity, equality, intelligence and enthusiasm.

We are members of an honourable profession and must maintain confidence in our strength in numbers, integrity as a profession, and a readiness to fulfil our responsibilities to our country and its people. G

Patrick O'Connor,
President

New EU commissioner will have a lot on his plate

David Byrne's appointment as a member of the European Commission should be of interest to lawyers throughout Ireland for several reasons. First, Byrne is a lawyer himself and has managed, without unduly sullying himself in the murky world of politics, to achieve appointment to one of the most sought-after political appointments in the gift of the Government. Second, his portfolio, consumer protection and public health, contains many areas which will give rise to legislation affecting ordinary people. So, whereas the developments of competition law under Peter Sutherland, agriculture under Ray MacSharry, and social policy under Padraig Flynn were of interest primarily for business, farmers and employer or staff associations respectively, we will all be affected by new consumer legislation or by threats to public health. Thirdly, and probably of most interest to lawyers, the abundance of legislation concerning consumer protection and public health must surely result in the need to advise clients and to litigate on their behalf.

Dangers to health

The *EC treaty* requires the Community to contribute to the attainment of a high level of consumer protection by adopting directives in the context of the internal market and through specific action which supports and supplements national policy to protect the health, safety and interests of consumers. It is fitting that the commissioner responsible for consumer protection should also be in charge of health protection. The treaty requires Community action, as a complement to national policies, to be directed to improving public health, preventing human illness and diseases, and obviating sources of danger to human health.

A number of directives have already been adopted with the intention of strengthening the protection afforded to consumers in their dealings with suppliers of goods and services. These directives establish rules concerning pricing, advertising, negotiation of contracts, unfair terms, credit finance arrangements and product liability. It should be emphasised that these rules are intended to lay down a minimum level of consumer protection in each country and are not limited to cross-border transactions. They apply to all consumer transactions, not just those involving purchases from suppliers in other Member States.

E-commerce issues

The advent of the euro and the development of e-commerce will certainly result in a significant increase in cross-border trade in the coming years. Consumers will be able to see and understand clearly the availability and price of goods in, say, Germany and place their order over the Internet accordingly. It is intended that, by the end of this year, we will be well on the road to the adoption of a directive on distance selling of financial services. Next year, the Commission will set out its new proposals for a directive on consumer credit, dealing with credit information, advice from credit providers and overdrafts.

Negotiations have also been taking place within the Council of Ministers on the revision of the *Rome convention on contractual*

Euro Commissioner David Byrne: one to watch

obligations and the *Brussels convention on jurisdiction and judgments*, with a view to strengthening consumer protection. In particular, it is currently intended – though widely opposed by business organisations – that the consumer would be able to sue in the courts where he is resident, regardless of where the supplier of the goods or services is based.

Food safety is another major part of the Commission's areas of responsibility. Recent scares over BSE in Britain (not to mention Ireland and France) and dioxin contamination in Belgium, have been only the most notable problems concerning food standards. The Commission must seek extensive new powers of investigation and control in this area. It was quite ludicrous that in the case of BSE, for instance, the European Commission was limited to adopting measures restricting inter-state trade in beef and cattle but actually powerless to order the UK government to protect its own citizens. The result was that contaminated beef remained on the UK market for several years longer than it should have. A new system must be introduced at Community level whereby a rapid response can be made to perceived threats. In this respect, it is also considerably heartening that food safety should be the responsibility of the commissioner for consumer protection rather than the agriculture commissioner as was previously the case.

Full public debate

The use of genetically-modified organisms is the latest subject to fire the public imagination. Without doubt, a full public debate is required as to the merits or otherwise of this scientific development. It may be somewhat premature to rush through legislation requiring all foods containing GMOs to be labelled as such. Nevertheless, for years it has been EC policy to provide the consumer with the information needed to make an informed choice. It should, however, also be recognised that uninformed prejudice against new developments can also be to the detriment of the consumer. A very careful approach to this subject needs to be maintained by the Commission.

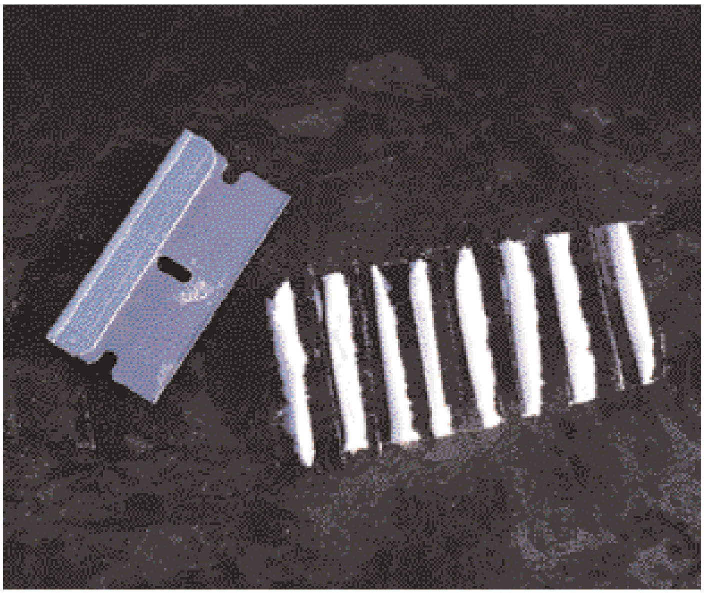
Lawyers, as always, should be vigilant on behalf of their clients in ensuring that the rights which Community law intends individuals to have are properly available and enforced in the national courts. David Byrne's progress will be watched by all with more than just a passing interest. G

Conor Quigley is a barrister specialising in European Union law and practising at Brick Court Chambers, London and Brussels.

Should it matter what you do outside of work?

Conduct of a certain nature, described as discreditable conduct, or conduct bringing the employer into disrepute, has been used frequently as a ground for dismissing a person from employment. What constitutes discreditable conduct? Is justice served by dismissing a person for so-called discreditable conduct committed outside of employment and unrelated to work?

It is not intended to examine here the voluntary or forced exit from public life of politicians, members of the judiciary or senior public figures as a consequence of alleged discreditable conduct outside the scope of the actual duties of the public individual. There are, however, similarities between the position of such people and those subject to a contract of employment.



Cutting it fine: how close should the connection be between misbehaviour and the workplace?

The *Deasy* case

Concrete facts often illustrate a particular issue better than a statement of generalities. The case of *Michael Deasy v Commissioner of An Garda Síochána* (High Court, [1999] ELR 84) brings the issues into sharp focus. Michael Deasy, a Garda sergeant based in Dublin, was directed by the Garda Commissioner, because of alleged discreditable conduct, to resign from the force in accordance with Garda disciplinary regulations – and in the event of his failure to resign, he would be dismissed.

Sergeant Deasy had been accused of a breach of internal Garda discipline. The accusation, classified as discreditable conduct, was to the effect that he on a particular day conducted himself in a 'manner in which [he] ought to have known would be likely to bring discredit on the Garda Síochána in that having given a lift to (Mr KD) while driving on the Castleknock Road [Dublin], the sergeant put his hand on Mr KD's leg and squeezed his testicles'. The accusation continued that at Carpenterstown Road, Dublin, the sergeant parked his car, let back the passenger seat and tried to kiss Mr KD. On judicial review, seeking to quash the decision of the Garda Commissioner, Geoghegan J referred to 'very pertinent questions' submitted in writing by Deasy's then-solicitors Garret Sheehan & Co to the Garda investigating officer. Included in the letter were the following questions:

- Is it alleged that Sergeant Deasy was involved in the commission of any criminal offence?
- Does the fact that Mr KD is a male person form any part of the allegation of the breach of discipline?
- Does the fact that the alleged behaviour has the appearance of being homosexual in nature form any part of the allegation of breach of discipline?

Geoghegan J considered that the letter was never answered satisfactorily.

The sergeant was not on duty at the time, nor was it alleged that any sexual activity was non-consensual or done within the view of third parties. Geoghegan J considered that, if an analogous activity was alleged to have occurred with a female, a major question-mark must arise as to whether it would necessarily be 'discreditable conduct' or, at the very least, whether Sergeant Deasy could necessarily be expected to know that it would be such. Geoghegan J continued: 'Given the statutory and public tolerance of consensual homosexual activity in private between adults, it may be a tenable view, putting it at its very minimum, that in considering whether such conduct was discreditable or not, the homosexual aspect should not be taken into account'.

Fair procedures

Geoghegan J held that the person facing the allegations must know precisely what is alleged against him to constitute discreditable conduct. He held that this was never clear in the *Deasy* case and, on the ground of lack of fair procedures, he quashed the decision of the Garda Commissioner ordering resignation or dismissal in default of resignation.

Discreditable conduct should remain as a ground for dismissing an employee. Discreditable conduct may include criminal offences or behaviour committed outside of employment which may impinge on the work of the employer. But there should be a close nexus between the so-called discreditable conduct and the workplace. That, arguably, was missing in the *Deasy* case.

Issue of trust?

Dr Mary Redmond, in her admirable book *Dismissal law in Ireland* (Butterworths, 1999), refers to trust as being an underlying legitimate concern of an employer in cases of dismissal where an employee has committed a criminal offence outside of the workplace. There are no clear criteria governing such situations and each case should be considered on its merits. For example, in *Brady v An Post* (UD 463/1991), the Employment Appeals Tribunal considered that, as a cleaner, the claimant was 'not in a position of special trust'. There was no evidence that a conviction for criminal assault rendered him unacceptable to others or that the employer's reputation had been adversely affected.

The consequences of dismissal may be horrendous for some employees. There must be a heavy onus of proof put on an employer to demonstrate convincingly that in relation to so-called discreditable conduct outside the workplace there is sufficient nexus between the discreditable conduct and the workplace to warrant serious disciplinary action. G

Dr Eamonn G Hall is Company Solicitor of eircom plc.

New *Mental Health Bill* gets warm welcome

The new *Mental Health Bill* announced by the Government last month has been welcomed by the Law Society, which recently published a report highlighting the need for reform in this area (see last issue, page 11). The Minister for Health and Children, Brian Cowen, said that the heads of the Bill had been approved and that it would be published before Christmas.

Among the main features of the new Bill are the establishment of a Mental Health Commission to protect the interests of the mentally ill and the creation of mental health tribunals which will automatically review all involuntary admissions to psychiatric centres. The tribunals will consist of a lawyer and a consultant psychiatrist and the automatic review will be completed within 28 days of a patient's involuntary detention.

Gallagher: 'Bill is long overdue'

The Bill also proposes that the Mental Health Commission will provide free legal representation for all who wish to avail of it, a measure that the Law Society had been strongly recommending.

The Government says that the provisions contained in the new *Mental Health Bill* will meet the requirements in the *European convention on human rights* for a regular automatic review of the grounds for psychiatric detention.

Responding to the announcement, Brian Gallagher of the Law Society's Law Reform Committee said he was pleased by the Minister's commitment to an automatic independent review of detention decisions. He also warmly welcomed the proposed composition of the mental health tribunals and the fact that free legal representation would be provided. 'This Bill is long overdue', said Gallagher, 'but I am encouraged that the Minister appears to have taken on board many of the principal recommendations made in the committee's recent report'. (*See also* Mental health: the case for reform, *pages 31-37*.)

Society's anger over 'web site' scheme

The Law Society has responded angrily to a company that is apparently setting up web sites for solicitors' firms without consultation and then issuing invoices for the 'service' directly to the firms' accounts departments. Having already received numerous complaints from practitioners, the Society recently found itself on the business end of this unusual practice when it received invoices from the company, EU Digital, for an 'Incorporated Law Society' web site and a 'Gazette' site – despite the fact that the Society has been hosting its own very successful site for the last nine months.

Law Society Director General Ken Murphy has written to EU Digital expressing 'the strongest possible objections' to the company's actions and demanding a written assurance that it 'will desist from this unacceptable practice and will remove all web sites for solicitors' firms from the Internet, for which you have not received prior authorisation'.

And he added: 'It seems clear from your actions that you are unaware of the statutory and regulatory provisions applying to advertising by solicitors'.

Murphy also advised the company to take care in relation to the intellectual and property rights that attach to businesses, their names and services provided.

An example of the company's research can be seen in the content of the what it thinks should be included in the 'Incorporated Law Society' site. It apparently believes that the Society is a 'specialist in accident claims, property transactions, road traffic law and debt collection' and provides 'independent legal advice'.

Members are advised to write to the Director General if they object to the receipt of such invoices for unsolicited services.

LawTech and seminar dates

The continuing effects of the IT revolution on solicitors' practices is the theme of this year's Practice Management/Technology Committee seminar, which will be held in Blackhall Place on Friday 5 November. As usual, the all-day seminar, entitled *Managing change: the Year 2000 and beyond*, will run in tandem with the annual LawTech exhibition.

Speakers from the Companies Registration Office, the Land Registry and the Courts Service will give an overview of how new computer systems have affected their work – and the way that solicitors do business with them. There will also be sessions on new case management and accounts software.

The annual LawTech exhibition will showcase the very latest computer products and services of interest to the solicitors' profession, and most of the big names in legal IT will be there. Further information can be obtained from Veronica Donnelly on 01 672 4800.

BRIEFLY

Second expert witness conference

The second annual *Expert witness conference* will be held on Thursday 11 November at the Museum of Modern Art in Dublin's Royal Hospital, Kilmainham. Among the issues under discussion will be *The compulsory exchange of experts' reports*, *Experts and confidentiality* and *Experts: liability and negligence*. Keynote speakers include Dr Denis Cusack, barrister and Director of Legal Medicine in UCD, solicitor Patrick Groarke, James Nugent SC, and PJ Fitzpatrick, Chief Executive Designate of the Courts Service. This year the conference, organised by La Touche Bond Solon, will also include a number of specialist workshops for delegates. The conference costs £235 per delegate and further information can be obtained from Flor Madden on 1850 750 650 (fax: 01 2788 101).

Human rights seminar at Blackhall Place

The Human Rights Apprentices group on the Law Society's professional course have organised a seminar on *Human rights in the millennium* on 7 October at 8pm in Blackhall Place. The seminar will be chaired by Professor Bruce Dickson, Chief Executive of the Northern Ireland Commission on Human Rights, and it will be followed by a wine reception. All are welcome to attend.

SOS from Swords CIC

The Citizens Information Centre in Swords, Co Dublin, needs more solicitors to help out with its legal advice service which operates every Thursday evening from 7-8.15pm. The service is currently staffed by local solicitors who volunteer their time once a month, but demand for the CIC's free and confidential service means that it urgently needs more volunteers. Anyone interested in helping out should phone Deirdre on 01 8406877 or 840 9714.

Law societies meet to discuss multi-disciplinary practices

The Law Society recently hosted a meeting of representatives of the working groups from the law societies of Northern Ireland, Scotland and England and Wales on the subject of multi-disciplinary practices (MDPs) involving solicitors.

This has been one of the most controversial subjects of debate among lawyers internationally for many years now. The involvement of lawyers in MDPs with other service providers, such as auctioneers, accountants or insurance brokers, raises serious questions in relation to conflicts of interest, confidentiality and the independence of the legal profession.

The Council of the Law Society considered the matter in 1991 and decided that MDPs involving solicitors would be neither in the interests of the public nor of the profession. This remains the Society's position. Since that time there have been major developments internationally, with either *de facto* or full-blooded MDPs being established in a number of jurisdictions in Europe and elsewhere. However, the annual meeting of the American Bar Association recently decided not to adopt a recommendation from a working group that the association's prohibition on MDPs should be even slightly diluted.

Meeting of minds: (*front row, l-r*) MDP working group chairman Ian Stubbs (Scotland), Judge Tom Burgess (Northern Ireland), John Fish (Ireland), Paul Fenton (England and Wales); (*back row, l-r*) Susanne Bryson (Northern Ireland), Director General Ken Murphy (Ireland), Bronwen Still (England and Wales), Owen McIntyre and Therese Clarke (both Ireland) and Michael Clancy (Scotland)

Last year, the Society established a broadly-based working group, chaired by Council member John Fish, to thoroughly examine the issues raised by MDPs. The working group brought an interim report to the Council last year and was requested to continue with its deliberations.

Newly-qualifieds get pay hike

Young solicitors can look forward to a slightly fatter pay-packet after the Law Society Council at its last meeting unanimously passed a resolution to set a recommended new salary scale of £18,000 to £22,000 for newly-qualifieds. The current recommended minimum salary scale of £16,111 to £19,340 was set by the Council in 1997. A recent survey from the Younger Members' Committee found that the median salary for newly-qualifieds was £18,500 a year (see *Gazette*, May, page 15).

Bigger, better *Law directory* on the way

Members can look forward to a bigger and better *Law directory* following a representative survey of members' views carried out recently. The survey found that members were generally very happy with the publication as it stands and the information contained in it.

For example, 73% respondents found the alphabetical listing of solicitors introduced in this year's directory easier to use, and 84% were equally positive about the alphabetical listing of firms in county order. And feedback from the survey suggested overwhelming support for new sections containing, among other things, information on court fees and stamp duties, Land Registry and Companies Office fees, income tax bands, capital gains tax, CAT thresholds, scale fees for counsel and road traffic offences.

Council to consider stage payments

The following motion is going to be debated at the next Council meeting on 15 October: *'That this Council is opposed to the practice by some builders/developers of including in building contracts for new houses that the purchase price be paid by way of stage payments and requests the Minister for the Environment and Local Government to make the necessary regulations to prohibit this'.*

Any members with views on this motion should contact the proposer, John Harte, or the seconder, Sean Durcan, in advance of the Council meeting.

BRIEFLY

Courts Service up and running soon?

The new Courts Service Board is set to take over formal responsibility for the management and administration of the State's court services on 9 November, if the Minister for Justice, Equality and Law Reform accepts the recommendations of the Courts Transitional Board. The Chief Executive Designate of the service, PJ Fitzpatrick, has promised to keep all major users of the courts informed of further progress over the coming months.

Advocate General to address Irish Society for European Law

Advocate General Niall Fennelly will deliver a paper on *Recent EC caselaw relating to intellectual property* at a meeting organised by the Irish Society for European Law on Tuesday 2 November at 6.15pm. The meeting will be held in the European Commission Offices in Dublin's Dawson Street, and all are welcome to attend. ISEL members who wish to dine after the meeting should contact Gerald FitzGerald on 01 8290000 before Thursday 28 October.

Ecumenical law service

An ecumenical law service to mark the start of the legal year will be held in Dublin's Christchurch Cathedral on Sunday 7 November at 11am. All are welcome to attend.

Compensation Fund payouts

The following claim amounts were admitted by the Compensation Fund Committee and approved for payment by the Law Society Council at its meeting in September: Francis G Costello, 51 Donnybrook Road, Donnybrook, Dublin 4 – £40,000; Conor McGahon, 19 Jocelyn Street, Dundalk, Co Louth – £2,233.

News from Member Services

Graphic design service for members

Members contemplating a corporate facelift should note that the Law Society has recently appointed Baseline Creative Services to provide graphic design services to its members at specially negotiated rates. Baseline recently received the Graphic Design Business Association 'idea' award for effective design for their campaign for OSK Chartered Accountants. Baseline will offer a number of specially-tailored packages exclusively to Law Society members, ranging from a basic entry-level package to an advanced-level design service for firms which require a more innovative approach to their identity. Services will include advice on design of stationery, signage and promotional literature and advice and assistance on the creation of a corporate identity. For further information, contact Alec Drew on 01 855 7133.

New members-only area for web site

27 October sees the launch of the members' area of the Law Society's web site. This new area, accessible only by pin number and password, will contain useful information for practitioners, including practice notes, precedent documents, forms, news and an A-Z of the services provided by the Society. It is also intended to provide access to the library catalogue at a later date. Practitioners with an interest in a particular topic are invited to participate in various user groups to share information or seek advice or assistance from other members. For further information, e-mail Claire O'Sullivan at c.osullivan@lawsociety.ie.

BUPA Ireland 'healthline'

Law Society members of BUPA Ireland can now avail of an innovative telephone 'healthline' service providing advice and assistance on a range of medical and health matters. Simply by telephoning 1850 923 500, members will be able to procure up-to-date information on a wide range of health issues, from the possible after-effects of surgery, to the side effects of medication and which inoculations are required when travelling abroad. The 'healthline', which is being run on a pilot basis for Law Society members, is open to BUPA members and their immediate family and is staffed by qualified nurses with extensive clinical experience, including paediatrics, midwifery, intensive care and acute medical and surgical experience. The service is completely confidential, is charged at a local call rate and is available 24 hours a day, 365 days a year. For further information, contact BUPA Ireland on 1850 923 500.

Claire O'Sullivan, Member Services Executive

Solicitors' Serious Illness Plan

Since this scheme was launched in August, there has been a very enthusiastic response from members, with IPT Financial Services processing over 100 applications so far. The plan pays a lump sum benefit of up to £175,000 to members and their spouses in the event of serious illness. No medical examination is required, subject to a satisfactory response to six medical questions. For further information, contact Catherine Keating at IPT on 01 604 8335. G

Can any
the techn

Internet technology changes with such incredible speed that Internet music piracy has moved from being a futuristic threat to an everyday reality in only a couple of years. But will the law ever be quick enough to catch up with the techno-pirates? Denis Kelleher walks the plank in search of some answers

Until recently, the Internet could not be taken seriously as a distribution network for music because of the length of time it took to download even a single song. But digital compression technology – and more specifically the MP3 (MPEG-1 Audio Layer 3) standard – have considerably speeded up this process. The MP3 can squeeze a stereo CD track to about a twelfth of its original size, without any loss of sound quality, which means that a four-minute song can be downloaded to your PC's hard-drive in just 20 minutes.

As computer hardware has become cheaper, the distribution of music over the Net has boomed. As a result, a host of sites have sprung up on the Internet, some offering software and technical advice to help users download music using the MP3 standard, others offering music itself (whether legitimate or pirated).

In the United States, the issue of digital piracy was brought to a head by a device called the 'MP-man', which allows users to save music and listen to it away from their PCs. One such device is the 'Rio', marketed by Diamond Multi-media in the USA, which allows a user to save about an hour of music that has been downloaded from the Internet and to listen to it as he walks, jogs or works.

In *Recording Industry Association of American (RIAA) et al v Diamond Multi-media Systems Inc* (US Court of Appeals, Ninth Circuit, 1999), the RIAA applied to the American federal courts for an injunction to prevent the manufacture and distribution of the Rio, alleging that it did not meet the standards contained in the US *Audio Home Recording Act 1992* for digital audio recording devices. The RIAA was unsuccessful in the US Federal District Court and appealed. Delivering the judgment, Circuit Judge Diarmuid O'Scannlain held that: 'The Rio's operation is entirely consistent with the Act's main purpose – the facilitation of personal use. As the Senate's Report explains, "the purpose of [the Act] is to ensure the right of consumers to make analog or digital audio record-

one stop
o-pirates?

PIC: ROSLYN BYRNE

ings of copyrighted music for their private, non-commercial use". The Rio merely makes copies in order to render portable, or 'space-shift', those files that already reside on a user's hard-drive'.

Judge O'Scannlain cited the decision of *Sony v Universal (*464 US 417 [1984]), where the US Supreme Court held that the time-shifting of copyrighted TV shows with VCRs would constitute fair use under US copyright law and would not be an infringement. He stated that copying of this sort 'is paradigmatic non-commercial personal use, entirely consistent with the purposes of the (Audio Home Recording) Act'. On this basis, the Court of Appeal refused to overturn the decision of the lower court.

The music industry has always perceived home recording as a serious threat. In *CBS Songs Ltd v Amstrad Consumer Electronics* ([1988] AC 1013, [1988] 2 All ER 484), an injunction was sought to prevent the sale and manufacture of twin-deck tape recording machines which had a tape-to-tape facility. This facility meant that one tape could be reproduced on another, and the machines were advertised in a manner likely to encourage home taping and copying of copyrighted material. The plaintiff alleged that in this way the defendant was authorising infringements of copyright or was a joint infringer or, alternatively, was inciting the commission of a tort or a criminal offence. Ultimately, the UK's House of Lords held that the plaintiff was not entitled to the relief sought as the defendant had no control over the use of the machines once they were sold.

The position in Irish law

An application similar to that sought in the *Recording Industry Association of American (RIAA) et al v Diamond Multi-media Systems Inc* would probably be unsuccessful in Ireland too. Section 8 of our *Copyright Act, 1963* provides that copyright will be infringed by any person who reproduces a copyrighted work in any material form without the permission of the rightholder. But any attempt to prevent home copying would encounter significant practical difficulties: home copying is by its nature small scale and is most popular among those who are unlikely to have the means to pay an award of damages, such as teenagers and students.

The inability of copyright law to deal with home recording was acknowledged by the House of Lords in 1988 in *CBS v Amstrad*:
'From the point of view of society, the present position is lamentable. Millions of breaches of the law must be committed by home copiers every year. Some home copiers may break the law in ignorance, despite extensive publicity and warning notices on records, tapes and films. Some home copiers may break the law because they estimate that the chances of detection are non-existent. Some home copiers may consider that the entertainment and recording industry already exhibit all the char-

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acteristics of undesirable monopoly, lavish expenses, extravagant earnings and exorbitant profits, and the blank tape is the only restraint on further increases in the prices of records. Whatever the reason for home copying, the beat of *Sergeant Pepper* and the soaring sounds of the *Miserere* from unlawful copies are more powerful than law-abiding instincts or twinges of conscience. A law which is treated with such contempt should be amended or repealed'.

PIC: ROSLYN BYRNE

Some 11 years after this statement, Irish copyright law is finally being updated, following severe pressure from the USA and Europe. However, once enacted, the *Copyright Bill, 1999* may not make the law on home copying any clearer.

Section 96(1) of the Bill provides that: *'the making for private and domestic use of a fixation of a broadcast or cable programme solely for the purpose of enabling it to be viewed or listened to at another time or place shall not infringe the copyright in the broadcast or cable programme or in any work included in such a broadcast or cable programme'*. This section is entitled 'recording for the purposes of time-shifting' and would appear to be essentially a replication of the US Supreme Court decision in *Sony v Universal*.

Highly persuasive decisions

Although Irish courts are not bound by the decisions of American courts, it is likely that an Irish judge would find highly persuasive the decision of Judge O'Scannlain to extend the remit of *Sony v Universal* to musical recorders. In view of the decisions of the American courts, the Oireachtas should consider specifically extending this exemption to musical works. Even if this is not done, it could be argued that music downloaded from the Internet is included within the term 'cable programme' as defined by section 2 of the Bill.

Criminal proceedings might still be brought: under section 27 of the 1963 Act, it is an offence to make or hold a plate, where a plate is defined as 'including a stereotype, stone, block, mould, matrix, transfer, negative or other appliance'. This is identical to section 23(1) of the English *Copyright Act 1956*. In *CBS Songs v Amstrad*, it was argued that 'when a purchaser of an Amstrad model has in his possession a record in which copyright subsists, that record becomes a "plate" and the purchaser commits an offence as soon as he forms the intention of copying that record'. This submission was rejected, as a record is not a plate but the product of a master recording which is the plate from which the record is derived. This distinction may not necessarily apply to a digital recording, where the recording on a CD may be identical to and indistinguishable from the original master recording.

In any event, section 27 of the 1963 Act is due to be replaced by section 135(2) of the *Copyright Bill, 1999*. This provides that: *'A person who a) makes, b) sells, rents or lends, or offers or exposes for sale rental or loan, c) imports into the State, or d) has in his or her possession, custody or control, an article specifically designed or adapted for making copies of a work, knowing or having reason to believe that it has been or is to be used to make infringing copies, shall be guilty of an offence'*.

At first glance it might appear that this provision could be invoked to prohibit the sale or importation of devices such as the Rio. The problem is that, just as with a twin-deck tape recorder, such devices may have many uses and making infringing copies is only one of them.

In *CBS v Amstrad*, the House of Lords was willing to permit the sale of 'materials which by their nature are almost inevitably to be used for the purpose of an infringement'. When a device such as the Rio or a twin-deck tape recorder or a VCR is sold, there is no way for the vendor to know or have reason to believe that such equipment is to be used to make infringing copies. Such equipment could be used for a host of purposes, for example, for the 'time-shifting' specifically permitted by section 96(1) of the Bill.

Caught in the Web

Although it may still be impossible to prevent home recording, web sites which supply infringing copies may expect to be the subject of both civil and criminal proceedings. The courts would respond swiftly to any application to injunct a specific Irish web site which was blatantly engaged in piracy but any attempt at broader action, such as an application for an injunction to limit the use of a standard such as MP3 on Irish web sites in general, might encounter serious difficulties.

As Judge O'Scannlain also noted: 'In contrast to piracy, the Internet supports a burgeoning traffic in legitimate audio computer files. Independent and wholly Internet record labels routinely sell and provide free samples of their artists' work on-line, while many unsigned artists distribute their own material from their own web sites'. A survey cited in that case suggested that by the year 2002 sales of music on-line will exceed \$1.4 billion, so any effort to prevent Internet music piracy will have to be balanced with the needs of this growing on-line business.

The music industry is not just placing its faith in the courts and legislation: it is also developing new standards which, if adopted, will allow greater control of how and where digital music is copied. In July, the music industry launched its own Secure Digital Music Initiative, which aims to prevent illegal copying. At the same time, a number of companies such as IBM and Xerox are launching what are termed 'Digital Rights Management Systems', which will prevent illegal copies being played and will also enable copyright owners to 'fine-tune' how their music is played.

There are a number of difficulties with this approach. First, imposing a new standard on computer users when they have already adopted another is very difficult, as IBM found when it tried to get users to abandon Microsoft's products for their OS/2 operating system. Second, systems which monitor where and when individuals listen to music must give rise to serious privacy concerns. Inevitably a balance will have to be struck between the competing interests of performers, producers, distributors and consumers. It remains to be seen where that balance will lie. G

Denis Kelleher BCL is a practising barrister and co-author, together with Karen Murray BL, of Information technology law in Ireland *(Butterworths, 1997) and* Information technology law in the European Union *(Sweet & Maxwell, London).*

Nice and e

If, as some people think, the law is a conspiracy against the layman, then the Law Reform Commission aims to blow the whistle on it by recommending that Irish legislation should be written in plain English. So can we look forward to a brand new era of jargon-free legislation? Not without a new *Interpretation Act*, writes Marcus Bourke

It may have escaped the notice of many busy solicitors that the Law Reform Commission has recently published a consultation paper on the use of plain English in the legislative drafting process*. On the face of it, this is an impressive document, running to 126 pages – but it has been a long time coming. In 1976, all of 23 years ago, in its first programme for law reform, the commission proposed a review of statutory interpretation and also made a separate proposal 'to examine the style in which (Irish) legislation is drafted'.

In the intervening quarter-century or so, personalities like Mr Justice Brian Walsh and Roger Hayes of the Department of Justice (to whom we owe the *Succession Act, 1965*), both of whom held strong views on statutory interpretation and drafting style, have come and gone from the commission. Mr Justice Keane too, whose comment on 'the dismal opacity' of drafting is quoted in the new report (a misplaced comment, by the way, because the instrument in question was of a class never seen by a drafter), served as president of the commission without apparently venturing near this subject.

Curiously, opacity is an attribute that occurred to me as I tackled chapter 1 of the paper (*Interpretation*). This chapter, along with the summary of provisional recommendations in chapter 6, takes up exactly half of the commission's report. Some readers may find it easier to skip this section, impressive as the show of learning it contains may appear to the practitioner who is without the advice of learned counsel at the end of a telephone. Much the same may be said of chapter 2 (*Legislative drafting style*), which comprises another 13 pages and contains historical background material, and also attempts to answer the question: 'why are Irish statutes difficult to understand?'

Chapter 3 discusses the pros and cons of plain English (a language which, in the commission's view, is not that used in Irish legislation) without reaching any startling conclusions. The core of the consultation paper is to be found in chapters 4 and 5. The latter is entitled *How can drafting be improved?*, and is hardly calculated to reduce the blood pressure of most of the current legislative drafting staff in Government buildings, while chapter 4 contains the commission's proposals and runs to a mere nine pages. Between them, these two important chapters take up only 32 pages of the 126-page report, or roughly one-third of the entire document. Following 121 pages of discussion, the provisional recommendations are summarised in four pages.

Ordinary meanings

The recommendations, totalling 15, fall under two headings: *Interpretation* and *Statutory drafting*. Under the first, the commission recommends that statutes be interpreted in accordance with their ordinary meaning in the light of their object and purpose, and that this should apply irrespective of whether or not a provision is on its face ambiguous or absurd. A new statutory provision giving effect to this recommendation should not, the commission suggests, affect the common-law rule that penal statutes (including criminal and taxation statutes) should be construed strictly and in favour of the person accused or penalised. In ascertaining the object or purpose of a statutory provision, a court should be permitted to do what it cannot do at present – look to the context of the provision in the statute as a whole, and for this purpose consider marginal notes, headings and any purpose clause. Moreover, a court should be allowed recourse to external aids to construction if this would help it ascertain the meaning of an ambiguous or obscure statutory provision. The consultation paper discusses possible models to give effect to these recommendations, based on Australian legislation.

All these recommendations, if implemented, would involve a new *Interpretation Act*, replacing in whole or in part the existing *Interpretation Act* of 1937. Presumably because the commission's ideas are only tentative and subject to revision in the light of submissions made to it, the consultation paper makes little or no effort to expand on what it has in mind in this area. However, it does make it clear that it is against the inclusion in a new Act of additional definitions of commonly-used words, although this has traditionally been one of the components of *Interpretation Acts*. It appears not to realise that such a recommendation would mean that words or terms not in use in 1937 (for example, 'European Communities') but now frequently occurring in current legislation would have to be defined in each new Act in which they occur. Similarly, terms such as 'Bank of Ireland' which are no longer in frequent use would continue to be included in a new Act. In any event, I understand that a part-

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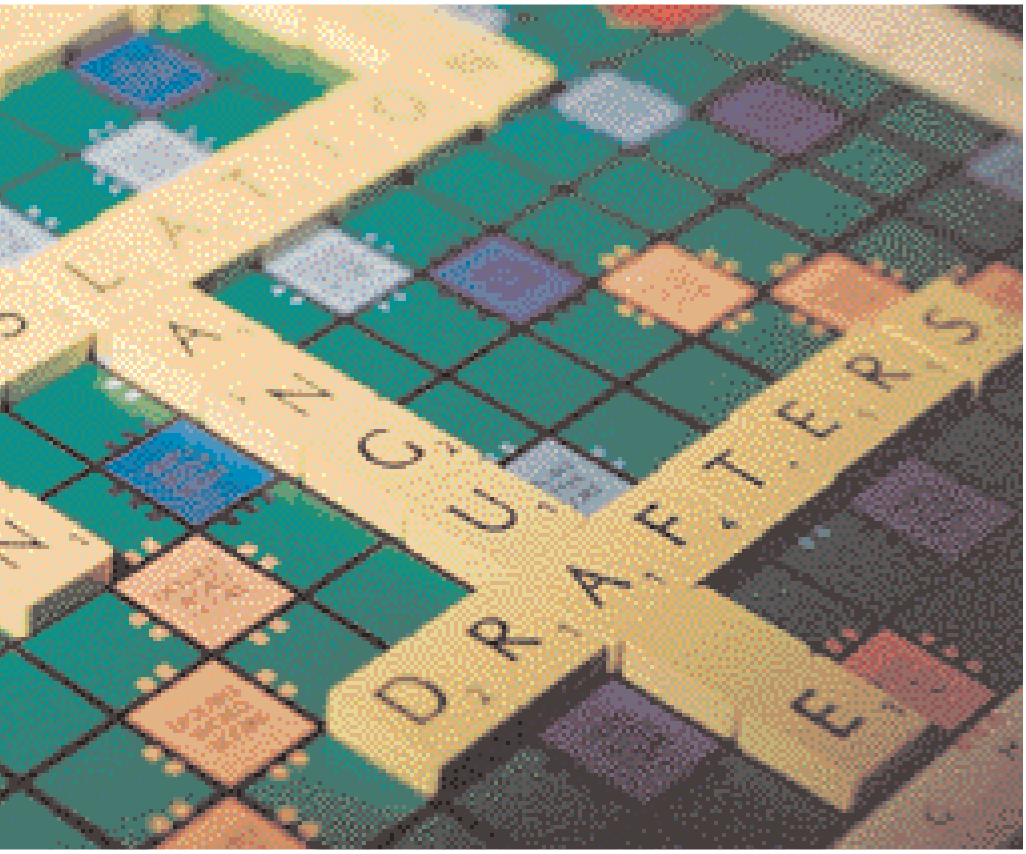

ly-drafted *Interpretation Act* has been gathering dust in Upper Merrion Street since the departure in mid-1997 of Dermot Gleeson as Attorney General.

The two chapters which effectively form the basis of the commission's provisional recommendations on statutory drafting (*Legislative drafting style* and *How can drafting be improved?*) constitute a trenchant critique of the drafting style used by the Parliamentary Draftsman's Office since the foundation of the State three-quarters of a century ago, and point up what might be called a paradox in this document. In its acknowledgements, the commission thanks that office for advice and assistance, yet there is no indication that any drafter has contributed to this report (even though the acknowledgements contain the curious statement that full responsibility for the paper lies with the commission). In any event, the current drafting staff have until 15 October to make detailed constructive submissions, which (they would presumably hope) would be taken into consideration in the commission's final report.

Although the paper's recommendations are only provisional, its advocacy of what would be major changes in drafting style unmistakably show how and where existing drafting practice is, in the commission's view, deficient. Among the recommendations under this heading are a number of new standard drafting practices: shorter sentences; familiar vocabulary; clear grammatical structures; greater use of the active voice and the present tense; simplification of commonly-used sections, such as transitional provisions and repeals; and the substitution of positive statements for negative ones.

Superfluous terms

Solicitors familiar with examples of legalese in documents they have not the courage to modernise – 'give and bequeath', 'null and void', 'rest, residue and remainder', to give but a few examples – will find encouragement in much of the criticism in this consultation paper. For generations practitioners, even in the Law Library, have assumed that what was good enough for (or considered necessary in) an Act of the Oireachtas was something they should copy. Now at last they may see some hope of a moderate amount of plain language being commonly used in Irish statutes, as well as the prospect of (almost invariably superfluous) terms such as 'as the case may be', 'aforesaid' and 'any person being an employee' being eliminated from both Acts and statutory instruments emanating from the Parliamentary Draftsman's Office.

Of course, many of the changes in drafting style recommended by the commission need no statutory backing: all that is required is a style manual to be followed by all drafters. Half a century ago, when I was employed in journalism, two of the three Dublin morning newspapers had a style manual, and no junior sub-editor was let loose on reporters' copy until he or she had mastered the manual. Yet after 77 years of parliamentary drafting, it appears to be implicit in the commission's recommendations that Irish drafters have not yet been able to agree on the content of such a manual. This leaves each drafter to develop his own style. To realise what this involves, it is necessary to appreciate that in the past decade the complement of drafting staff has trebled: there are now potentially 16 different drafting styles, if one includes foreign drafters and retired drafters!

The fact that Irish drafters still make do with an *Interpretation Act* as old as the Constitution is surely an indictment, not so much of successive generations of drafters but of successive Attorneys General, none of whom had the initiative or foresight to update a measure passed 62 years ago. It is only fair to point out that, until his departure in mid-1997 on a change of government, Dermot Gleeson in his brief term of office as Attorney General was well on the way towards implementing some of the reforms advocated in this paper. Whether its publication without any apparent input by drafters is the most effective way to get a new *Interpretation Act* is another matter.

Perhaps the recent arrival of a new Attorney General used to calling a spade a spade in the hurly-burly of party politics may achieve what so many of his predecessors failed to achieve.

* *Statutory drafting and interpretation: plain language and the law* (CP14-1999) is available from the Government Publications Sales Office, Sun Alliance House, Molesworth Street, Dublin 2, price £6. **G**

Marcus Bourke is a former legislative draftsman.

Firing on al

The phenomenal growth of the Irish economy, coupled with a raft of domestic and European employment legislation, has provided solicitors with a great business opportunity. Terence McCrann reviews the broad scope of employment law and urges practitioners to stake their claim to this burgeoning practice area

Every practice in Ireland has clients, including employers and individual employees, in need of employment law advice. Organisations such as the Irish Business and Employers Confederation (IBEC) and the accountancy firms, as well as human resource specialists, are all aggressively promoting their employment law expertise. Some solicitors (but not many) specialise in this area but, by and large, beyond some Employment Appeals Tribunal outings, solicitors have left their clients to seek advice elsewhere. However, there are vast opportunities for solicitors in the area and we should not, like we did with tax advice in times past, lose a valuable source of work.

Given the importance of employment law, this year the President of the Law Society established a new specialist Employment Law Committee under the chairmanship of Hugh O'Neill. The committee's brief is to consider all employment law issues, to promote the employment law practice area and also to address issues concerning solicitors in employment.

What is employment law?

Traditionally solicitors would have associated 'the practice of employment law' with unfair dismissals and personal injury claims arising in the workplace. But employment law covers the entire range of issues surrounding the relationship between employer and employee, from the first point of recruitment contact throughout the employment relationship and during the course of transition and change in the workplace, and – where necessary – termination. It also encompasses industrial relations law issues. Employment law advice includes the following areas.

Recruitment and retention of employees: the form of recruitment advertisement, application form, interviews and pre-conditions, and ensuring that they are not discriminatory in any way, particularly taking into account the new equality legislation. This also covers terms and conditions of employment and incentives, including pensions and employee share option plans.

A summary of the main

Redundancy Payments Acts, 1967–1991
Places an obligation on employers to pay compensation to employees dismissed by reason of redundancy. This arises where an employee's job ceases to exist and he is not replaced because of the firm's financial position, because there is not enough work, because of re-organisation or because the firm is closing down altogether.

***Minimum Notice and Terms of Employment Act, 1973* (as amended by the *Worker Protection (Regular Part-Time Employees) Act, 1991*)**
Provides that employees in continuous service with the same employer for at least 13 weeks and who are normally expected to work at least eight hours a week are entitled to a minimum period of notice before the employer may dismiss them.

***Anti-Discrimination (Pay) Act, 1974* (to be repealed by the *Equality Act, 1998*)**
Aims to ensure that men and women receive equal treatment with regard to pay. It provides that it is a term of the contract under which a woman is employed in any place of employment that she is entitled to the same rate of remuneration as a man who is employed in that place with the same employer if both are employed on like work, and vice versa.

Protection of Employment Act, 1977
Where employers are planning collective redundancies, they are obliged to supply the employees' representatives with specific information about the proposed redundancies and to consult those representatives at least 30 days before the first dismissal takes place to see if the redundancies can be avoided or lessened and other effects mitigated.

***Employment Equality Act, 1977* (to be repealed by the *Equality Act, 1998*)**
Prohibits discrimination on the grounds of sexual or marital status in:
- Recruitment for employment
- Conditions of employment (other than remuneration or a term relating to an occupational pension scheme)
- In training or work experience or in opportunities for promotion.

Unfair Dismissals Acts, 1977–1993
Designed to protect employees from being unfairly dismissed, it lays down guidelines setting the criteria by which dismissals are to be judged unfair. Provides for a forum known as the Employment Appeals Tribunal to deal with claims by employees claiming to have been unfairly dismissed and provides for redress for those whose dismissal has been found to be unfair.

Safety, Health and Welfare at Work Act, 1989
Requires organisations to safeguard the safety, health and welfare of their employees and to manage their activities in such a way as to minimise the risk of occupational accidents and ill health.

Industrial Relations Act, 1990
Establishes the framework for the conduct of industrial relations and for resolution of trade disputes as well as dealing with trade union law provisions, including pre-strike secret ballot rules and restriction on the use of injunctions in trade disputes.

Payment of Wages Act, 1991
Establishes a range of rights for employees relating to the payment of wages. An employer must provide a statement in writing to an employee specifying clearly the gross amount of the wages payable to the employee and the nature and amount of any deductions from such wages. The employer must also take such reasonable steps as are necessary to ensure that both the matter to which the statement relates and the statement are treated confidentially by himself and his agents and by any other employee.

Worker Protection (Regular Part-Time Employees) Act, 1991
Extends the benefits of the various employment legislation to a regular part-time employee who is defined as an employee who has been in the continuous service of the employer for at least 13 weeks and is normally

l cylinders?

Letter of appointment: the contract of employment, and ensuring that it complies with all recent legislation.

Human resource policies: reviewing human resource policies in the workplace, again to ensure that they comply with all recent employment law legislation.

Types of employment contract: different types of contracts, for example, permanent, fixed term, specified purpose, part-time, temporary, agency and seasonal, and the difference between employees and independent contractors.

Industrial relations: relations with employees generally and their representatives, and issues such as trade union recognition. This also covers issues referred to Rights Commissioners and/or the Labour Court and advising organisations that have been affected by works council legislation concerning consultation with employees.

Discrimination: advising on new equality legislation and any discrimination issues surrounding pay and conditions.

Managing change: advising companies involved in a merger or acquisition of another organisation and the implications for the employers and staff in such circumstances.

Redundancy and rationalisation: advising employers and staff about any re-organisation, redundancies or closures.

Employment Law Committee

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Members: Gary Byrne
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Katherine Delahunt
Kevin Finucane
Stuart Gilhooly
Barry Lyons
Terence McCrann
Elizabeth Mullan
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Managing risks, health and safety: health and safety legislation and regulations, and dealing with claims for personal injury, stress or harassment.

Disputes and dismissals: disciplinary codes and how they should be operated; investigations prior to taking the decision to dismiss an employee, and advising an employer or employee following dismissal.

The challenge for the profession is to offer advice in this area of law and not to lose it to others. The Employment Law Committee would be happy to deal with any queries and suggestions in relation to the employment law area and can be contacted by referring matters to Geraldine Hynes, secretary to the committee, or by contacting any committee member.

A wall chart summarising employment legislation will be published by the committee shortly and will be distributed to all practices. G

Terence McCrann is a member of the Law Society's Employment Law Committee.

employment legislation

expected to work at least eight hours a day.

Employment Agency Act, 1991
Provides for the regulation and control of employment agencies and applies to all employers engaged in the employment agency business and those workers who make use of them.

Terms of Employment (Information) Act, 1994
Requires employers to provide employees with a written statement of certain particulars of the employment.

Maternity Protection Act, 1994
Provides for maternity leave entitlement, health and safety leave, time off for ante-natal/post-natal visits and sets out the notification requirements to avail of these entitlements, the right to return to work and maintenance of rights during leave provided under the Act.

Adoptive Leave Act, 1995
Provides for a minimum period of adoptive leave of not less than ten consecutive weeks to employees who are adopting children.

Protection of Young Persons (Employment) Act, 1996
Sets the minimum age limits for employment, rest intervals and maximum working hours and prohibits the employment of under 18s on late night work. Employers must keep records for their workers who are under 18 years of age.

Transnational Information and Consultation of Employees Act, 1996
Requires businesses with over 1,000 employees in the European Economic Area (which includes all EU states except the UK, together with Norway, Ireland and Liechtenstein) and at least 150 employees in each of two EEA states to establish procedures to inform and consult employees in relation to transnational matters affecting the business at EEA level.

Organisation of Working Time Act, 1997
Sets out statutory rights for employees in relation to the maximum hours of work per week, rest periods, restrictions on Sunday working and night work, as well as providing for controls in relation to zero-hour contracts and holidays.

Freedom of Information Act, 1997
Provides a right of access for employees in government departments and public bodies to their employment records. In general, records created after 21 April 1995 (or 21 October 1995 in the case of local authorities and health boards) can be accessed by the employees. However, if records created prior to this date are being used or are proposed to be used in a manner that may adversely affect an employee, then such records can also be accessed.

Parental Leave Act, 1998
The leave entitlement is available to parents of children born after 3 June 1996 and gives the right to 14 weeks' leave in respect of each child. The leave must be taken before the child is five years old, subject to modifications in the case of an adopted child (and may be taken as a continuous period, in portions or by working reduced hours).

Equality Act, 1998
Outlaws discrimination on nine distinct grounds: gender, marital status, family status, sexual orientation, religious belief, age, disability, race and membership of the travelling community. The Act also outlaws harassment in relation to any of the new discriminatory grounds in the workplace and in the course of employment whether by an employer, another employee or by clients, customers or business contacts.

***Data Protection Act, 1998* and EU Directive 95/46**
The 1988 Act allows employees to access their employment records where they are held on computer. This right will be extended to manual records when the *European data protection directive* (95/46) is implemented in Irish law. Although the implementing legislation should have been enacted by 24 October 1998, it would appear that the legislation will not be enacted until the end of this year. G

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Law Society of Ireland

What does 'reasonably practicable' mean?

With 11 deaths in the construction industry so far this year, it's not surprising that health and safety at work has become a hot political issue. Employers are obliged to ensure that their workplaces are as safe as 'reasonably practicable', but is this just a 'get-out-of-jail' card for careless bosses? Donal O'Sullivan explores the legal issues

The 1989 *Safety, Health and Welfare at Work Act* radically reformed the law in relation to health and safety. It introduced a number of duties on employers, many of which are limited by the phrase 'so far as is reasonably practicable'.

But a breach of many of these duties will not leave an employer open to any claims for compensation from employees because section 60 of the Act prevents such a breach being the subject of a civil action. So why is the phrase 'so far as is reasonably practicable' important, when a breach of the Act will not give rise to any consequences in civil law?

The answer lies in part VIII of the Act. Section 48(1) makes it a criminal offence for an employer to breach one of several duties laid on it by the Act, all of which are limited by the phrase. The importance of the phrase is clear. It is a defence open to an employer in a prosecution taken under section 48(1), and because of section 50 (which places the burden of proof in relation to this phrase on the employer) it is a defence that the employer must prove.

So what exactly does 'so far as is reasonably practicable' mean? No guidance is given in the *Safety, Health and Welfare at Work Act, 1989* itself, but the Oireachtas debates shed some light on the puzzle. In dealing with the phrase, the Minister for Labour quoted from the old English case of *Edwards v National Coal Board* ([1949] 1 All ER 743).

In this case, a provision allowed an employer to escape liability for an accident caused by a breach of a duty under the provision, if he could show that he took all reasonably practicable steps to obey that duty. In the Court of Appeal, Asquith LJ said:

'"Reasonably practicable" is a narrower term than "physically possible" and seems to me to imply that a computation must be made by the owner in which the quantum *of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed on the other, and that, if it be shown that there is a gross disproportion between them – the risk being insignificant in relation to the sacrifice – the defendants discharge the onus on them. Moreover, this computation falls to be made by the owner at a point of time anterior to the accident'.*

The 'economic calculus'

This balancing act that Asquith LJ describes has been referred to by academic commentators as the 'economic calculus', and it is a peculiarly apt name for it. But has this 'economic calculus' been accepted into Irish law? There have been few Irish cases directly on the point.

Perhaps the best starting point is the Supreme Court case of *Daly v Avonmore Creameries* ([1984] IR 131). In this case, the defendant had hired a contractor to do some work on its building, including some work on the roof. The contractor in turn hired a subcontractor to do part of the work, but the main contractor was to do the work that related to the roof himself. The contractor fell off the roof and suffered a fatal injury. The deceased's widow claimed, among other things, that the defendant had breached the provisions of section 37(1) of the *Factories Act, 1955*, which says: *'There shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work'*.

The case was dealt with by the majority in the Supreme Court (Henchy and Hederman JJ) on the basis that the roof did not constitute a means of access to the deceased's work and therefore section 37(1) did not apply. McCarthy J held that the section did apply. He

Health and safety at work: now a life and death issue

then went on to consider the meaning of the phrase, although little argument had occurred on that point. He said: *'There is a significant body of persuasive authority in the English and Scottish courts in cases under comparable legislation. I am not to be taken as supporting a view that, where lives are at stake, considerations of expense are any more than vaguely material'*.

The earlier Supreme Court case of *Kirwan v Bray UDC* (unreported, 30 July 1969) also lends some support to the existence of an 'economic calculus' in Irish law. In this case, the Supreme Court held that a slight risk may be run if the cost of removing that risk is very high.

There has only been one recent case before the Irish courts that dealt with the point: *Boyle v Marathon Petroleum* (High Court, unreported, McCracken J, 1 November 1995). This case concerned a duty contained in the *Safety, Health and Welfare (Offshore Installations) Act, 1987*. The plaintiff was an operative in an offshore platform that was drilling for gas. In the course of his duties, he was cleaning the bottom floor of the platform and hit his head off a girder on the ceiling. Section 10(5) of the Act states: *'It shall be the duty of an installation manager to ensure that every workplace on, in or in the neighbourhood of the offshore installation with which he is concerned is, so far as is reasonably practicable, made and kept safe'*.

McCracken J said: *'I have to consider whether the conditions under which the plaintiff was required to work were as safe as was reasonably practicable, and this must be a test based on the actual circumstances of each individual offshore installation'*. He went on to consider in great detail the individual circumstances of this workplace. He held that the dangers complained of by the plaintiff, namely low ceilings and obstructions, were dangers that it was not reasonably practicable to avoid in this type of work. He did not, however, specifically define the phrase.

It appears clear to me that the 'economic calculus' test of the English cases finds favour in the Irish courts, but it seems that in this jurisdiction the concept of 'risk' assumes a specialised meaning. Both the risk of an accident occurring as well as the consequences of that risk – that is, the seriousness of the injuries that will probably occur if the risk comes to fruition – must be taken into account in judging if all reasonably practicable steps have been taken.

In the case of *Marshall v Gotham Co Ltd* ([1954] 1 All ER 937, 943), a potentially far-reaching point was raised by this comment of Lord Tucker: *'If 100% security is not reasonably practicable but a lower percentage is, the mine-owner is required to take those reasonably practicable steps which will afford a degree of security which may be something less than 100%'*.

Both Lords Keith and Cohen agreed with this point. This is a commonsense idea and I do not believe that any Irish court would have difficulty in accepting the concept, even though the quote has never been referred to in a reported Irish judgment.

Recent developments

The case of *Mains v Uniroyal* ([1995] IRLR 544) may have wide-ranging implications on the subject. This was a Scottish case heard in the Court of Session before Lords Wylie, Sutherland and Johnston. It concerned section 29(1) of the *British Factories Act 1961*, which placed a duty on an employer to make and keep safe every place of work for every person working there, so far as is reasonably practicable.

This case arose out of an accident that occurred due to an unforeseeable risk. The employer argued that an onus rested on the plaintiff to first show that the risk was a reasonably foreseeable one before the employer would go into evidence on the reasonably practicable point. As the plaintiff had failed to adduce any evidence to establish this, the employer argued that it should not be held liable for the accident as it could not be expected to take reasonably practicable steps to protect against dangers it could not reasonably foresee (it did not tender any evidence that it had taken all reasonably practicable steps to avoid the risk).

Lord Sutherland gave the leading judgment (Lord Wylie agreed with him). He said: *'The duty is to make the working place safe. In my opinion, reasonable foreseeability has no part to play in the initial consideration of whether or not the employers have complied with their obligation to make and keep a working place safe'*.

He also stated in the same page of his judgment: *'As considerations of reasonable practicality involve weighing the degree and extent of the risk, on the one hand, against the time, trouble and expense of preventing it, on the other, quite clearly foreseeability comes into the matter as it is impossible to assess the degree of risk in any other way'*.

The court held that there was no onus on the employee to prove anything. And as the employer in this case had failed to lead any evidence on the reasonably practicable point, then it had failed to discharge the onus of proof and so the plaintiff succeeded in recovering damages. In my opinion, this judgment is correct.

I believe that an Irish court would have no difficulty in following it in a similar context of civil litigation.

But in this jurisdiction, the term 'so far as is reasonably practicable' only has relevance to an employer in the criminal arena. So would this case be followed in Ireland in the context of a criminal case? The consequences of such a decision by a court would be that the Health and Safety Authority could prosecute an employer for a breach of the Act that came about due to a completely unforeseeable hazard.

It would then be up to the employer to disprove this if he chose to raise the defence of 'so far as is reasonably practicable'.

Onus of proof on the employer

Mains does indicate that reasonable foreseeability is a part of the concept of reasonable practicality. This might mean that section 50, when it passed the onus of proof regarding reasonable practicality to the employer, also passed the onus in relation to reasonable foreseeability. An Irish court may well follow this case as a result.

However, even if the case were followed, its practical importance is very small. If the sole ground of complaint is the occurrence of an unforeseeable accident, it should be a relatively straightforward matter for an employer to adduce evidence as part of a 'reasonably practicable' defence showing that the risk was unforeseeable and thereby raising a strong inference that all reasonably practicable steps had been taken. It would be hard to imagine criminal liability being placed on an employer for failing to prevent the occurrence of an unforeseeable hazard.

This is the scenario that faces Irish lawyers and judges. In Irish law there is no definitive statement of the meaning of 'so far as reasonably practicable'. While the English cases are very helpful and would probably be followed, the fact that the phrase only has relevance in the criminal context in this jurisdiction makes it by no means certain. It is regrettable that McCracken J did not seize the opportunity in *Boyle v Marathon Petroleum* to fully examine and explain the phrase.

So until another case reaches the High Court and is the subject of a written judgment, we will have to make do with the hints and suggestions in *Kirwan v Bray UDC*, *Daly v Avonmore Creameries* and *Boyle v Marathon Petroleum*. **G**

Donal O'Sullivan BL is a Dublin-based barrister.

Why supporting the SMDF makes sense

'If you can't join them, beat them!' – that was the feeling that inspired the profession to set up the Solicitors' Mutual Defence Fund 12 years ago, amid soaring professional indemnity premiums. Here, Geraldine Clarke explains why solicitors have every reason to be proud of the SMDF's success

The decision to set up the Solicitors' Mutual Defence Fund on 1 May 1987 was made against a background of spiralling premiums being charged by the insurers in the market at the time.

In the year 1984/1985, solicitors were shocked to find that with very little notice professional indemnity premiums were doubled.

In the following year, Law Society President Laurence Cullen reported to the Society's AGM as follows: 'The rapidly-worsening situation as to professional indemnity cover was the subject which most worried the Council over the year. In the early part of the year, efforts were made to get the existing carriers to give details of their charges for the year commencing 1 May 1986 by not later than 1 March. Two of the carriers gave a satisfactory response. In the light of the emerging difficult premium situation, very serious consideration was given to establishing a mutual fund on 1 May 1986. The difficulties of undertaking such a daunting task in the exceedingly limited time available were recognised, and reluctantly the establishment date was deferred for 12 months'.

Many of us will, of course, recall the extreme difficulties which we faced in dealing with our insurers at that time and their absolute unwillingness to negotiate any reduction in the premiums being sought, or to give any commitment in relation to subsequent years. The average range of premium being quoted for cover of £200,000 was £4,000 per solicitor.

PIC: ROSLYN BYRNE

The SMDF's record speaks for itself

On its establishment on 1 May 1987, the Solicitors' Mutual Defence Fund offered £200,000 cover in respect of each and every claim for a subscription of £1,000 per solicitor.

The fund set itself a target of 2,000 participants in the first year. At the end of that year, it had 2,139 participating members representing its 1,039 firms.

The following year the subscription increased by £1,000 to £1,100, with a loyalty bonus of £100 per solicitor where the firm participated in the fund in its initial year. Other insurers, not unexpectedly, followed suit, and indeed within a short time of the fund being set up other insurers dropped their premiums dramatically. There can be little doubt but that, had the SMDF not been set up, solicitors would still be facing the same uncertainty and worry every year in dealing with a volatile and rapidly-fluctuating insurance market as we did in the mid-1980s.

We are now 12 years on. In the meantime, professional indemnity insurance has, of course, become compulsory for all solicitors and the level of compulsory cover was raised to £1,000,000 on 1 January 1999. But amazingly, although the level of cover has increased by £750,000, the contribution charged by the fund to each member has been maintained almost unchanged.

The aim of the SMDF's board has always been to keep administrative costs to a minimum. Claims are handled through a panel of experienced solicitors, and members against whom a claim is made are offered a choice of solicitor from the panel.

There has been a significant increase in the cost of claims in recent years, which means that increases in the contribution for next year are inevitable to avoid deterioration of the fund's reserves. However, the SMDF's record in terms of competitiveness and consistency speaks for itself. It deserves the support of all members of the profession. G

Geraldine Clarke is a partner in Dublin solicitors Gleeson McGrath Baldwin and a member of the SMDF Board.

Will power!

In the first of a series of articles on the professional course syllabus for apprentices, the Law Society's new Curriculum Development Unit spells out what's involved in the wills, probate and administration of estates module and invites members to air their views on how it could be improved

The Curriculum Development Unit (CDU) was established by the Law Society to review the provision of education to apprentices and to examine the curriculum for each course. As a first step in this examination, a review of the professional practice course *Wills, probate and administration of estates* module was held at the CDU's meeting in August.

The following is an outline of the key elements of the *Wills, probate and administration of estates* module, broken into its three constituent parts. Also included after each constituent part of the module is an outline of the tasks that a student should be able to complete after passing the module.

The CDU is seeking the views, comments, critiques and suggestions of the profession on:

- The content of the professional practice course *Wills, probate and administration of estates* curriculum, and
- The ability of apprentices to complete these functions in the office after their return from the professional course.

It would also take this opportunity to ask any member of the profession who has an interest in tutoring on this particular module to submit details outlining both their probate practice and any lecturing or presentation experience.

The module is divided into three inter-related constituent parts. These are: wills, will trusts and estate planning; probate practice and procedure; and the administration of estates.

Wills, will trusts and estate planning

- Basic elements of a will
- Necessary powers of an executor/executrix
- Legislative provisions for spouses and children, including recent family law provisions
- Taking instructions, drafting and executing wills
- Will trusts, their common law and legislative background, and the taxation and other implications
- Estate planning and taxation, including domicile, the major taxes involved, and the major reliefs and exemptions available to the practitioner.

The students should be able to:

- Attend on the testator, establish his wishes, advise him of the legal consequences of his instructions and draft a will in accordance with those instructions, doing so in the most tax-efficient manner, and have the will validly executed in accordance with all legal formalities.

Probate practice and procedure

- Attending on the client, establishing title to lead to the extraction of grants of probate, grants of administration intestate, grants of administration with will annexed and *de bonis non* grants
- Contentious and non-contentious court applications
- Distribution of shares on intestacy
- Dealing with legal rights of spouses
- Limited, special and foreign grants
- Amendment and revocation of grants.

The students should be able to:

- Take instructions after the death of the testator/intestate and complete all the necessary papers to extract the appropriate grant, including Inland Revenue affidavit and probate tax papers
- Establish title to administer an intestate estate and distribute that estate, taking into account the rules for distribution on intestacy including the *per stirpes* rule
- Advise the personal representative on the spouse's legal rights and the obligations on him to advise the spouse of same
- To deal with both contentious and non-contentious court applications to the probate officer or judge, to include rival applications, caveats, citations and petitions, knowing what they are, when they arise and the procedure involved in each case
- To apply for second or subsequent grants (*de bonis non* grants), limited, special and foreign grants.

Administration of estates

Pre-grant:

- Steps prior to the initial interview with the personal representative
- Using the interview sheet during and after the initial interview
- Role and duties of personal representative
- Protection and valuation of assets.

Post-grant:

- Collection, sale and distribution of assets
- Payment of liabilities,
- Legal right share and rights of children
- All relevant taxes, valuation dates, payment and certificates of discharge
- Joint property, beneficiaries, charitable bequests, nominations advancement (section 63), appropriation, undertakings
- Social welfare obligations
- Family arrangements and taxation implications
- Administration accounts.

The students should be able to:

- Meet the personal representative and gather from him the information they need to extract the appropriate grant and advise him of his duties and obligations
- Value and collect all the assets of the estate and distribute them according to the wishes of the testator or the rules of intestacy
- Deal with spouses' and children's rights
- Deal with insolvent and/or insufficient estates
- Discharge all appropriate taxes, taking advantage of all exemptions and reliefs available, and obtaining the necessary clearances
- Provide the personal representative with a full account of the administration of the estate and close off the file having done so.

Please send any comments or suggestions on the curriculum and teaching of the module and (indeed, applications to tutor) to Padraic Courtney, Co-ordinating Solicitor, Law Society of Ireland, Blackhall Place, Dublin 7 (DX: 79 Dublin, fax: 01 6724803, e-mail: p.courtney @lawsociety.ie). G

SOCIETY OF YOUNG SOLICITORS IRELAND

Autumn Conference 1999

19-21 November 1999 at Rochestown Park Hotel, Douglas, Cork

Friday 19 November

5pm onwards	Registration of delegates

Saturday 20 November

Syndicate Rooms 2 and 3

10.30-11am	*Recent developments in electronic commerce law,* Robert Corbett, Solicitor, Mason Hayes & Curran
11-11.30am	*Advising detained persons,* Gerard McCarthy, Solicitor, Gerard McCarthy & Co, Cork
11.30-12pm	Coffee break
12-12.30pm	*The demise of business as usual,* Elaine O'Donovan, Open Management Training
1pm-2pm	Lunch
2pm-6pm	Activities including golf, leisure and health centre with thalasso therapy steam room, jacuzzi, sauna and gymnasium, go-karting
7pm-8pm	Drinks reception
8pm-late	Banquet in Kiltegan Suite, followed by band and disco (*Black Tie*)

Sunday 21 November

Up-10.30am	Breakfast
12 noon	Checkout of hotel

NOTES:

1. Accommodation at Rochestown Park Hotel will be limited. Early booking is essential and accommodation will be allotted strictly on a first-come, first-served basis.

2. No single rooms are available in Rochestown Park Hotel. If you do not indicate with whom you wish to share, the SYS will endeavour to accommodate you in a twin room.

3. The conference fee is £130pps, and includes Friday and Saturday night accommodation, two breakfasts, subsidised activities, Saturday evening banquet and conference materials.

4. A conference rate *without* accommodation is available at £50, which entitles the delegate to attend the lectures, subsidised activities, Saturday evening banquet and to a copy of the conference materials.

5. ***Please note that the application process has changed***. One application form should be submitted per room per envelope, together with cheque(s) for the appropriate conference fee and a self-addressed envelope – eg: two delegates sharing a twin or double room should send one application form, cheque(s) totalling £260 and one self-addressed envelope. All applications must be made by ordinary prepaid post and only postal applications exhibiting a postal mark dated 10 October 1999 or after will be processed.

6 No booking will be accepted without payment of the appropriate conference fee. Cheques to be made payable to the Society of Young Solicitors. Please write delegate names on the reverse side of all cheques.

7. All cancellations must be notified to Paul Murray by 5 November 1999. Cancellations after that date will not qualify for a refund.

REGISTRATION FORM

Please use block letters **(One form per room per envelope)**

Name 1: ______________________ Name 2: ______________________

Firm: ______________________

Business address: ______________________

Phone no: ____________ (Home) ____________ (Office)

ACCOMMODATION IN ROCHESTOWN PARK HOTEL: £130 per person sharing

Please tick box ☐ Double ☐ Twin

NON-ACCOMMODATION RATE: £50 ☐

I enclose cheque/postal order payable to the Society of Young Solicitors for £130/£260/£50/£10 extra and I enclose a self-addressed envelope

I wish to avail of the vegetarian option at the banquet ☐ I wish to participate in go-karting ☐

Please post this registration form with the conference fee to the Treasurer, SYS-Spring Conference, PO Box 7255, Dublin 4.

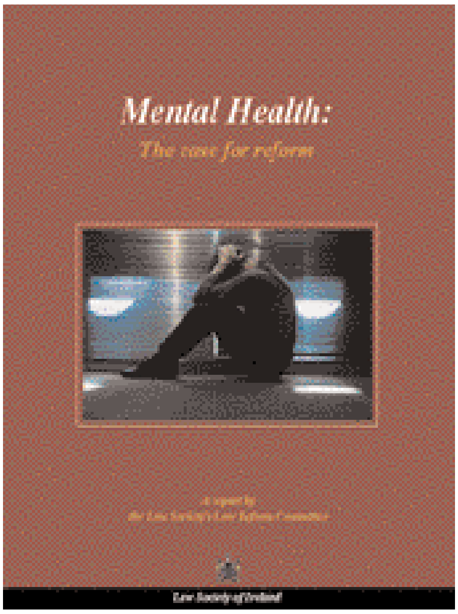
Postal applications exhibiting a postal mark of on or after 10 October 1999 only will be accepted. All enquiries regarding the conference should be directed to Paul Murray at (01) 639 5000 after 6pm Monday to Thursday.

Mental health: the case for reform

A recent report from the Law Society's Law Reform Committee has identified a number of areas where our mental health legislation needs to be reformed. The committee examined current Irish legislation, the proposals in the Government's White Paper *A new Mental Health Act* and undertook a detailed comparative study of the mental health legislation in similar jurisdictions, particularly the UK and New South Wales. This edited version of the report concentrates on the committee's recommendations

The primary objective of mental health legislation must be to provide a framework within which decisions can lawfully be taken on behalf of those who are unable to take decisions for themselves or are unable to communicate their decisions. Such legislation will also be concerned with the physical protection of mentally-incapacitated people, their carers, and the public at large. To this end, legislation inevitably provides for the compulsory detention of mentally-incapacitated persons in certain circumstances, under the *parens patriae* power vested in the State. It should be self-evident that any restriction on the liberty of such people and any interference with their rights must be kept to a minimum, and their dignity and self-respect fostered. This area of law is one which will require on-going periodic update and reform to appropriately reflect society's evolving understanding of mental illness and of the needs and rights of the mentally ill.

Current Irish mental health legislation is contained in the *Mental Treatment Act, 1945*, as amended. It has been argued convincingly that many of the provisions of the 1945 Act are now outdated in relation to developments in the practice of psychiatry and, further, that those provisions relating to civil commitment are incompatible with requirements arising under the *European convention on human rights* and with the *United Nations principles for the protection of persons with mental illness*. It has also been pointed out that current Irish legislation is out of step with the mental health regimes of other comparable jurisdictions, including Northern Ireland, Scotland, and England and Wales. This report is concerned solely with the issue of civil commitment and with legal issues following from the civil detention or lack of capacity of people suffering from mental illness, such as the management of their affairs.



Proposals in the White Paper

For the purposes of involuntary admission, the Government's White Paper proposes to define 'mental disorder' as meaning *'mental illness, significant mental handicap and severe dementia'*. 'Mental illness' would in turn be defined as *'a state of mind which affects a person's thinking, perceiving, emotion or judgement to the extent that he or she requires care or medical treatment in his or her own interests or the interests of other persons'*. 'Significant mental handicap' would be defined as *'a state of arrested or incomplete development of mind which includes significant impairment of intelligence and social functioning where this is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned'*. It is proposed to define 'severe dementia' as *'a deterioration of the brain which significantly impairs intellectual function affecting thought, comprehension and memory and which is associated with severe psychiatric or behavioural symptoms such as severe physical aggression'*. The White Paper proposes to exclude explicitly personality disorder, addiction, and, in view of domestic and international concern on the issue, social deviance from the definition of mental disorder in new legislation.

In comparison with the definitions contained in the legislation of comparable jurisdictions – particularly New South Wales – those provided in the Irish White Paper setting out the criteria for commitment can be described as vague and undefined. For example, the definition of mental illness is a circular and subjective one in that it refers to a person being so affected that he requires care or medical treatment. Also, the criteria for mental disorder proposed in the White Paper do not require that a person must be incompetent before being committed nor that appropriate treatment must be available in the centre where the person is to be detained. It has been pointed out elsewhere that this 'lack of specificity and clarity will vest excessive discretion in doctors over fundamental rights, including personal liberty, autonomy, bodily and psychological integrity'.

The Law Reform Committee believes that

the criteria for involuntary commitment to a mental institution as defined in the White Paper are unacceptably vague and open to subjective interpretation. It suggests, therefore, that more detailed statutory definitions or, at the very least, detailed guidance on each of the criteria are needed. Also, it views the suggested additional general requirements of 'dangerousness', 'incompetency' and 'treatability' with interest and believes these concepts to be worthy of further consideration. Finally, it would strongly support the inclusion in legislation of a general 'least restrictive alternative' principle which would function as a test of the proportionality of any decision to commit.

Categories of admission

Under existing legislation, there are three categories of (and procedures for) admission to psychiatric hospitals: voluntary admission, temporary admission and the admission of a person of unsound mind (PUM). The latter two categories involve compulsory detention. Each of these categories can be further divided into public ('chargeable') and private admissions, with somewhat different procedures applying in each case.

Voluntary admission. The current admission procedure for a voluntary patient is relatively straightforward and requires completion of the 'blue form'. An application must be made to the person in charge of the psychiatric institution, or to any other medical officer properly authorised in that capacity, to have the patient received in that hospital. The application may only be made by the patient himself or by the patient's parents or guardian. In order to have himself discharged, a voluntary patient must give written notice of his wish to leave and will then be entitled to leave the institution after 72 hours. The White Paper proposes to remove the formality of signing a voluntary admission form so that admission would be in the same way as admission to any ward of a general hospital. Also, it proposes to remove the requirement that voluntary patients give 72 hours' notice of intention to leave the institution. It is further proposed to give authorised nurses legal authority to hold a voluntary patient for up to six hours, within which time he must be examined by a doctor and to provide that a consultant psychiatrist may hold a voluntary patient for a period of 48 hours, within which time procedures for detention must be completed.

Temporary admission. Currently, in order to have a person admitted as a temporary patient, an application must be made to the person in charge of the psychiatric institution and the prescribed 'pink form' must be completed. The application may be made by the patient's spouse or relative or, in the case of a public patient, the appropriate community welfare officer (CWO) at the request of the spouse or relative. Where the applicant is someone other than a spouse, relative or CWO, the application must explain why it was not made by one of those parties, the connection between the applicant and the patient, and the circumstances relating to the application. The application must be accompanied by a certificate from a medical practitioner certifying that he has examined the patient within seven days of the application and is of the opinion either that the patient:

- Is suffering from mental illness, requires not more than six months' treatment and is unfit for treatment as a voluntary patient, or
- Is an addict requiring at least six months' treatment.

In the case of a private patient, the certificate must be signed by two medical practitioners, certifying that each of them is of the above opinion having separately examined the patient. Once the relevant person within the psychiatric institution has made an order to have the patient received and detained, the applicant or any person so authorised by him may, within seven days, convey the patient to the institution. However, the patient may be conveyed directly to the proposed institution, in the absence of an order, within seven days of the grant of a medical certificate sought in the course of an application. He may be detained at the institution for a period of 12 hours, during which time the order must be made or refused.

Before conveying the patient to the institution in this manner, the applicant must inform him of the nature of the medical certificate and of his right to request a second medical opinion. Where he requests a second opinion, he may not be conveyed to the psychiatric institution unless a second concurring opinion, in writing, is obtained.

A temporary patient may initially be detained for a period of up to six months, and this period may be extended where the chief medical officer of the psychiatric institution is of the opinion that the patient will not have recovered within that period. The original detention may be extended by a series of periods, none of which must exceed six months and the aggregate of which must not exceed 18 months. Where the patient is an addict, each extension must be for less than six months and the aggregate period is limited to six months. When extending an order for detention, the chief medical officer must give notice to the patient and the original applicant, setting out the circumstances relating to the extension and stating that the patient or applicant may object to the Inspector of Mental Hospitals.

Person of unsound mind (PUM). In order to have a public patient admitted as a person of unsound mind, an application, made on the prescribed 'white form' and accompanied by a statement of particulars, must be made to a medical practitioner for a recommendation that the patient be detained in a psychiatric institution. In the case of a private patient, a one-step process is set down whereby an application is made for a reception order. As in the case of a temporary patient, the applicant may be the patient's spouse or relative of at least 21 years of age or a CWO at the request of the spouse or relative. Again, any other applicant must explain why it is they who are making the application and the relevant circumstances. The applicant must have seen the patient within 14 days of making the application.

Before recommending detention, the medical practitioner to whom the application is made must have examined the patient within the previous 24 hours. A different examination procedure applies in respect of a private patient, requiring two separate medical examinations by two medical practitioners. Special applications may be made by a member of the Garda Síochána or by a CWO in emergency situations. Upon arrival at the institution, the patient must be examined by the resident medical superintendent or another medical officer acting on his behalf who will make an order for his reception and detention if satisfied that he is a PUM and is a proper person to be taken charge of and detained.

The sweeping powers contained in the *Mental Treatment Act, 1945* (as amended) to

Brian Gallagher speaking at the press conference to launch the Law Reform Committee's report

deprive a person indefinitely of his liberty by making a chargeable patient reception order, and the lack of any automatic review of the decision to detain, have been the subject of widespread criticism, not least in the courts. Indeed, the High Court decisions of Budd J[1] and Costello J[2] would appear accurately to reflect current Government thinking and the position in both international law and in comparable common-law jurisdictions in relation to reviewing decisions to detain PUMs and of continuing detention.

The 1992 Green Paper acknowledges that the main deficiency in current Irish legislation, in relation to its conformity with international law and with the 1950 *European convention for the protection of human rights and fundamental freedoms*, in particular, is the absence of a system of independent review of the decision to detain an involuntary patient. A substantial body of caselaw concerning detained psychiatric patients has developed from decisions of the European Commission and Court of Human Rights from which a number of general principles can be deduced.

The White Paper proposes to streamline and harmonise the criteria and procedures for both categories of involuntary admission. Most significantly, the Government takes the view that the existing criteria for involuntary admission are too wide in scope and require amendment in order to comply with the *Council of Europe recommendation* and the *UN principles*. Under current legislation, a person with a mental handicap or who is mentally infirm may be classified as a person of unsound mind and involuntarily admitted on broad grounds without any qualification as to his behaviour or danger to himself or others. Therefore, it is proposed to only permit involuntary admission of mentally disordered persons where 'there is a serious likelihood of that person causing immediate or imminent harm to himself or to other persons' or 'failure to admit or detain that person is likely to lead to serious deterioration in his or her condition or will prevent the giving of appropriate treatment that can only be given by admission'. It would no longer be possible to detain people whose primary problem is addiction or to detain a person of unsound mind because he or she is neglected or cruelly treated. It would be possible to treat or protect such people by less restrictive means than committal.

The White Paper proposes that the range of persons that may make an application would continue to include spouses and relatives but would be extended to include authorised officers of a health board, which would include public health nurses, clinical psychologists and social workers who have received special training for this purpose. It is also proposed that the Garda Síochána may make an application for involuntary admission of a person who appears to meet the criteria for detention where no spouse, relative or authorised officer is available or willing to make such an application. The Government proposes to harmonise admission procedures for private and public patients and to require only one medical recommendation to detain in either case. This is due to possible practical difficulties in securing two recommendations and in light of safeguards to be provided by means of the proposed Mental Health Review Board. As a further safeguard, it is proposed to limit the decision to involuntarily detain a patient to an authorised consultant psychiatrist of the approved institution.

Empirical research has shown that the initial detention period of six months is unduly long and so it is proposed to introduce a treatment order of 28 days' duration, which may be extended by a consultant psychiatrist by a period of three months, by a further period of six months and by periods of one year thereafter. The proposed Mental Health Review Board would review any initial detention after a year and subsequent extensions of detention every two years. Also, it is proposed to include in new legislation provisions for leave of absence of detained patients for specific occasions or as a trial period for suitability for discharge. Any conditions attached to leave would be subject to review by the board. New legislation would require that involuntary patients be informed of the nature of their detention, the review procedure and their right to an appeal.

Significantly, the White Paper proposes an independent review, by the proposed Mental Health Review Board, of each decision to detain and to extend a detention order. It concedes that current review and appeal procedures do not satisfy Ireland's obligations under the *European convention* which requires provision of a review by a 'judicial' body of the lawfulness of a detention order. An administrative body independent of the original decision-makers would suffice. Similarly, the *UN principles* recommend a review of every decision to detain by a judicial body or other independent and impartial body established by domestic law. It is proposed that the Mental Health Review Board would:

- Review every initial decision to detain
- Review each decision to extend detention
- Review all detention orders extending detention by one year, and subsequent extensions at two-yearly intervals
- Hear appeals against a detention order or the extension of a detention order
- Review any conditions attached to the temporary release of a detained patient
- Arrange for the provision of second opinions in relation to consent to treatment
- Review decisions to transfer patients to the Central Mental Hospital or other special psychiatric centres

- Review the appropriateness of the continuation of a child treatment order if the child had been the subject of an order for longer than one year
- Approve the participation in clinical trials of patients without the capacity to consent provided that the board is satisfied that there is a reasonable expectation of benefit to the patient's health.

Recommendations

There is considerable disappointment that the White Paper does not propose to provide for a statutory minimum level of service provision in all health boards as of right. Access to services would continue to be at the arbitrary discretion of each health board. Also, while the exclusion of certain categories of persons, such as addicts not having an accompanying mental disorder, from liability to detention is to be welcomed, it would appear necessary that alternative facilities are provided. The number of homeless mentally-disordered people is growing, as is the number of such people among the prison population, and the White Paper proposals may exacerbate this situation. Similarly, the practice of 'lodging'[3] is not alluded to in the White Paper, and if no discretion to lodge is included in new legislation, alternative facilities may again have to be provided.

Though the White Paper proposes to make voluntary admission less formal, the need for some safeguards remains. The Law Commission of England and Wales has recommended the extension of certain safeguards to voluntary patients, for example, the right to a second opinion for treatment for those unable to give valid consent.

There appears to be no reason why the proposals for information rights for detained patients contained in the White Paper should not be extended to voluntary patients.

Also, it is suggested that the Mental Health Review Board should not be limited to deciding whether to discharge but should have the option of directing the discharge at a future specified date. This would allow for 'planned discharge', whereby social support, supervised aftercare and placement of patients could be required and arranged. Also, legal representation is to be encouraged before the Mental Health Review Board, possibly by means of a relaxation of the civil legal aid means test, as research in England and Wales demonstrated that significantly more patients who had legal representation were discharged.

Therefore, the Law Reform Committee recommends:

- Introduction of a statutory minimum level of service provision as of right
- Provision of alternative facilities for categories of persons excluded from liability to detention, such as addicts or the homeless

Law Reform Committee member Brian Gallagher

- Extension of formal safeguards to voluntary patients
- Use of adult care orders to transfer unwilling patients to hospital
- Measures to allow the proposed Mental Health Review Board to order 'planned discharge'
- Measures to encourage legal representation before the proposed Mental Health Review Board.

Consent to medical treatment

Treatment of mental disorders. The *Mental Treatment Act, 1945* did not deal with the issue of informed consent to treatment of detained patients and it was widely assumed that consent to treatment was not required of an involuntarily-detained patient even though, under common law, physical treatment is unlawful without a person's consent unless the treatment is urgently necessary. The Supreme Court has accepted that the right to choose whether or not to undergo medical treatment is a personal right protected under the Constitution but also that it is one which may validly be restricted. Both the *Council of Europe recommendation* and the *UN principles* recommend that the approval of an independent authority prescribed by law should be required where the patient is incapable of understanding the nature of the treatment. The *UN principles* go even further in relation to psycho-surgery and other intrusive and irreversible treatments, recommending that such treatments should only be carried out where the patient has given informed consent and an independent body is satisfied that there is genuine informed consent and that the treatment best serves the health needs of the patient.

The Government proposes that, in relation to the requirement of consent, new mental health legislation would distinguish between two categories of treatment:

- Treatment requiring the patient's consent and a second opinion (including psycho-surgery and any other form of irreversible surgical treatment to be prescribed by regulations), and
- Treatment requiring consent or a second medical opinion (including the administration of medicine for mental disorder after three months of medication and electro-convulsive treatment.

It is proposed that consent should be in writing and that new legislation would provide for a right of patients or persons acting on their behalf to appeal to the High Court against decisions to treat on grounds that proper procedures to seek consent were not followed or that treatment without consent was not justified.

Clinical trials. Section 8(7) of the *Control of Clinical Trials Act, 1987* provides that a patient without capacity to consent to participate in a clinical trial can only participate if a written and signed consent is given for such participation by a person or persons independent of the person conducting the trial who, in the opinion of the ethics committee, is competent to give a decision on such participation. However, the *Council of Europe recommendation* states that clinical trials of products or therapies not having a psychiatric therapeutic purpose on detained mental patients should be forbidden. Also, a new protocol to the *European convention* contains a strong provision that the participation of detained mental patients in medical research should be forbidden, even with the patient's consent, unless it is reasonably expected to benefit his health. Therefore, the Government proposes to augment and strengthen the safeguards contained in the 1987 Act by including, in new mental health legislation, a condition that the participation of patients without capacity to consent in clinical trials be approved by the proposed Mental Health Review Board and that the board must satisfy itself that there is a reasonable expectation of direct or indirect benefit to the patients' health.

Since the decision of the House of Lords in *Re F* ([1990] 1 AC 1), the English courts have provided some guidance to healthcare professionals on the provision of medical treatment to mentally-incompetent adults but much uncertainty remained. Therefore, in 1995, the Law Commission published its report on *Mental incapacity.* In December 1997, the British government issued a Green Paper which broadly accepted the Law Commission's proposals but has invited further consultation on specific issues.

The UK Law Commission's proposals are complex, combining requirements for judicial approval, second opinion, and application of a best interests test in some situations and not in others. However, many of these practical difficulties could be overcome by means of a clear and comprehensive code of practice. Also, it is proposed that judicial approval would be sought in a 'judicial forum', a specialist jurisdiction in the form of an enhanced court of protection. This would require restructuring the court system. Further, it would appear inevitable that the complex procedures proposed would involve additional costs. The proposed procedures in the Irish White Paper appear to mirror the English proposals. Also, the introduction of a general authority to act reasonably would appear to be a very convenient legal device which would permit carers to carry out their everyday tasks and obviate the need for excessive legislative detail. Having regard to the requirements of confidentiality, it would be highly desirable in many situations to encourage wider consultation.

The Law Reform Committee concedes that a code of practice, though commendable in theory, may take some time to put in place. It is also concerned that procedures may be unnecessarily complex and would urge that every effort be made to ensure that they should be simplified. Also, it suggests that the right of appeal should be to the MHRB in the first instance and only then to the High Court. The committee proposes extending the scope of the enduring power of attorney contained in part II of the *Powers of Attorney Act, 1996* so as to include healthcare decisions. This would contribute to the consolidation and simplification of care procedures.

Therefore, the Law Reform Committee recommends:

- Introduction of a general authority to act reasonably in relation to everyday care decisions regarding incapacitated adults
- Measures to encourage wider consultation regarding care decisions
- Development of 'best interests test' criteria
- Development of an accessible and simplified code of practice in relation to care decisions
- Creation of a right of appeal in relation to healthcare decisions to the Mental Health Review Board in the first instance and only then to the High Court
- Extension of the *Powers of Attorney Act, 1996* to include healthcare decisions among personal care decisions.

Civil liability/access to civil justice

Under section 260 of the 1945 Act, it is necessary for a person who wishes to take civil proceedings, in respect of any act purporting to have been done in pursuance of the Act, to satisfy the High Court before the proceedings are instituted that 'there are substantial grounds for contending that the person against whom the proceedings are to be brought acted in bad faith or without reasonable care'. Such a provision was originally introduced under English law with the aim of protecting doctors from unfounded litigation. It currently operates to protect applicants, medical and nursing personnel and members of the Garda Síochána. However, it has operated in a very restrictive manner. The same standard is applied to the substantive proceedings if leave is granted. Recently, however, the Supreme Court has unanimously endorsed a strict construction of section 260 on the grounds that, as a *prima facie* curtailment of a citizen's constitutional right of access to the courts, it must be strictly construed so as to ensure that this right is not unnecessarily curtailed. The Government is of the opinion that such an explicit provision remains necessary to protect those involved in involuntary detentions, though it proposes to reduce the burden of proof from that of 'substantial grounds' to 'reasonable grounds' for contending that the defendant acted in bad faith or without reasonable care.

In comparison with other jurisdictions, the proposed new restriction on civil actions appears excessive. In both the law of Northern Ireland and of England and Wales, reform significantly reduced the burden of proof and leave will now be granted if the case deserves further investigation, even if it is unlikely to succeed. Also, these jurisdictions have specifically excluded local or public authorities from the protection of the section, thereby making it less likely that individual staff would be exposed to claims. Also, the section fails to refer to any particular category of patient, thereby creating uncertainty as to whether it applies to voluntary patients.

Finally, as patients must go to the High Court to seek leave to proceed, commensurate costs are incurred even if the claim is within the jurisdiction of the Circuit Court.

The Law Reform Committee is strongly opposed to any restrictions on civil action. It is suggested that such civil action should be facilitated by procedures in the *Civil Legal Aid Act*. It should be possible for civil actions to be taken on behalf of mentally ill people by an official body, such as the General Solicitor for Minors and Wards of Court, at the request of the Mental Health Review Board.

Adult care orders

At present, there is no legal means of protecting a mentally-disordered adult who is being abused, exploited or neglected, other than by detention under the 1945 Act or by making the person a ward of court. The Government has decided not to adopt the proposals contained in the Green Paper to include provisions for a supervision order as it was considered that a supervision order would have placed a heavy responsibility on the professional staff responsible for the patient without giving them the authority to enforce it. It was proposed during consultation that such supervision orders would include conditions requiring the patient to live at a specified place and attend specified places at specified hours for treatment, occupation, education or training. It is now proposed to introduce an adult care order to protect such people and to provide for their care according to the best standards of practice.

The adult care order would be modelled on the child care order established under the *Child Care Act, 1991*. An application would be made to the court, by a person so authorised by a health board, for the court's approval to the placement of the subject in the care of a relative, a health board or a voluntary agency. The applicant would need to produce evidence that the subject suffered from a mental disorder, that there were reasonable grounds to believe that the subject had suffered or was at risk of abuse, neglect or exploitation, and that the subject required care or protection which he would be unlikely to receive except under a care order. The court would determine the duration of the order though procedures are also proposed for an emergency order of up to eight days' duration.

The proposal to introduce adult care orders is generally to be welcomed. However, it appears unnecessarily restrictive to only permit evidence to be given by a consultant psychiatrist in application proceedings. It might be appropriate to permit evidence to be given by a consultant geriatrician or even a general practitioner who should be given some role in relation to a community-oriented protective option. Also, there may be some confusion between the role of the court, which would initially decide on the duration of the order, and the Mental Health Review Board, which would decide for or against continuation of the order. It is suggested that the legislation should permit evidence to be given by 'any interested person' at the discretion of the court, and that applications for care orders might also be brought by any interested person. Therefore, the Law Reform Committee supports the introduction of adult care orders but suggests that the procedures relating to the grant of such orders be designed so as to ensure the process is as inclusive, responsive and efficient as possible.

Property management

Wards of court. The current Irish law on wardship is contained in the *Lunacy Regulation (Ireland) Act 1871*, under which jurisdiction to appoint a 'committee' to manage the ward's affairs is vested in the President of the High Court. Section 283 of the *Mental Treatment Act, 1945* states that 'no power, restriction or prohibition contained in the Act shall apply in relation to a person of unsound mind under the care of a judge of the High Court or of a judge of the Circuit Court'. This provision was included to avoid interference with the court's powers. Therefore, a ward of court cannot be detained in a psychiatric institution, discharged or transferred except under an order made by the President of the High Court. During consultation, it was generally felt that the admission procedure governing wards of court was slow and cumbersome, and so the Government proposes that wards be subject to the same admission procedures as other patients. In such cases, the clinical director would be required to notify the Registrar of Wards immediately.

Enduring power of attorney. An enduring power of attorney comes into force when the person who granted it loses the mental capacity to manage their affairs. This device is particularly suitable for people with recurring mental illness or progressive brain diseases, such as Alzheimer's disease. Statutory provisions relating to enduring powers of attorney can now be found in part II of the *Powers of Attorney Act, 1996*.

The complex procedures involved in applications to have a person made a ward of court should be streamlined and simplified to provide more accessible protection for patients' property. Also, the Law Reform Committee suggests that the ward of court procedure should be integrated with the detention procedures, so that the property of a person who is detained against their will is automatically protected. In other words, when a detention order is made, the Wards of Court Office should be immediately notified and the wardship procedure commenced by the General Solicitor, unless there is an enduring power of attorney in existence.

The full text of this report can be obtained from the Law Society's web site at www.lawsociety.ie.

'At present, there is no legal means of protecting a mentally-disordered adult who is being abused, exploited or neglected, other than by detention under the 1945 Act or by making the person a ward of court'

Footnotes

1 *See, for example,* SC v Smith & Others *(unreported judgment, High Court, 27 and 31 July 1995), where Budd J stated that: 'The effect of a chargeable patient reception order under sections 163, 171 and particularly section 172, which allows for detention … without any automatic independent review, falls below the norms required by the constitutional guarantee of personal liberty' and that 'the provisions of section 172 of the* Mental Treatment Act, 1945, *as amended, are repugnant to the Constitution'. The Supreme Court, however, declined to take an equally critical stance: unreported judgment, 31 July 1996 (272/95),* per *Hamilton CJ. See also,* RT v Director of the Central Mental Hospital & Others *([1995] 2 ILRM 354), where the provisions contained in section 207 of the 1945 Act, permitting transfer to the Central Mental Hospital, were found to be unconstitutional.*

2 *See* RT v Director of the Central Mental Hospital & Others, *where, in relation to section 207, Costello J stated that: 'The defects in the section are such that there are no adequate safeguards against abuse or error' and that 'These defects not only mean that the section falls far short of internationally-accepted standards but, in my opinion, render the section unconstitutional'.*

3 *Under section 261 of the 1945 Act, 'A person not of unsound mind may be lodged as a boarder in a mental institution'.*

Practice notes

Criminal legal aid: 'proper representation'

The Criminal Law Committee sought clarification from the Department of Justice, Equality and Law Reform as to the categories of persons deemed to provide 'proper representation' for an assigned solicitor for the purposes of criminal legal aid. The department has advised that the list of categories is now as follows:

- A solicitor's apprentice
- An associate solicitor or partner or employee solicitor, or
- A full-time legal executive in the full-time employment of the assigned solicitor's firm (proving legal qualification either by formal certification or with ten years' practical legal experience certified by the solicitor employer, or previous employers).

Criminal Law Committee

Criminal Justice (Legal Aid) (Tax Clearance Certificate) Regulations 1999

The above regulations provide that any solicitor who wishes to have his or her name added to the legal aid panel from 1 August 1999 is required to furnish a tax clearance certificate to the appropriate county registrar and that a solicitor whose name was on a solicitors' panel as of 31 July 1999 must furnish a tax clearance certificate to the appropriate county registrar by **30 November 1999**.

The Department of Justice has issued a letter to every solicitor whose name is on the panels maintained by the county registrars, enclosing an application form for a tax clearance certificate, pursuant to the above regulations.

A practitioner's name will be retained on the panels beyond 30 November 1999 where a tax clearance certificate is submitted to the county registrar on or before that date. Practitioners should note that, **provided application for a tax clearance certificate has been made to the Collector-General by 15 October 1999**, they may have their name retained on the panel beyond 30 November 1999, where a statutory declaration is submitted to the county registrar on or before **10 December 1999**, in the form set out in the schedule to the regulations, to the effect that:

- A tax clearance certificate has not been issued or refused by the Collector-General on or before 30 November 1999, or
- An appeal pursuant to regulation 7 of the regulations has been made against a refusal by the Collector-General to issue a tax clearance certificate, which has not been determined or withdrawn on or before 30 November 1999.

Where a practitioner is on the panels of several counties, it is sufficient for **one** application form to be submitted to the Collector-General with a request that the appropriate number of official copies of the certificate be issued to the practitioner to allow same to be submitted to the relevant county registrars.

All solicitors on the legal aid panel will henceforth be required to furnish a tax clearance certificate on an annual basis.

Criminal Law Committee

How to avoid clients complaining to the Law Society

At the risk of over-simplification, here are some simple steps which will certainly lessen your chances of having a complaint made against you.

1. At the outset of a transaction, set out clearly in writing what you are going to do for your client and who is going to do it. It may seem perfectly obvious to you, but your client may have a totally different perception of what service you are going to provide
2. In compliance with section 68 of the *Solicitors (Amendment) Act, 1994*, send out a letter setting out the basis of your charge. If you are charging an hourly rate, let your client know when the clock is running by sending out timely interim bills
3. Send your client copies of all relevant correspondence – both the letters that you are writing and the letters that you receive
4. Don't be afraid to give your client something to do. Often your client will get a better response directly from a Government department or agency when there is a delay in obtaining a particular document
5. Let your client know as soon as there is a problem, and tell him how you are dealing with it.

Lack of communication with the client remains the single most common cause of complaints to the Law Society – and potentially the easiest to cure.

Registrar's Committee

Warning about faxes/laser-printed documents and e-mails

Faxes/laser-printed documents

Practitioners should be aware that some faxes/laser-printed documents may fade and the text may be completely obliterated when they are in prolonged contact with plastic cover sheets. Older continuous (thermal) paper may degrade if in contact with a heat source. Accordingly, the Practice Management/Technology Committee recommends that important faxes should always be photocopied for the relevant client file.

Practitioners should also be aware that the sending dates and originating address of the sender of a fax are capable of being falsified. Accordingly, in certain circumstances, it may be prudent to seek confirmation of the validity of the sender. It is recommended that all incoming faxes are date-stamped before they are attached to a client file.

E-mails

Practitioners should be aware that the identity of the sender of an e-mail is capable of being falsified and the date and time of sending are similarly capable of being falsified. Again, in certain circumstances, it may be prudent to confirm the identity of the sender of an e-mail. Again, it is recommended that, where appropriate, e-mails are printed and attached to the relevant client file.

Practice Management/ Technology Committee

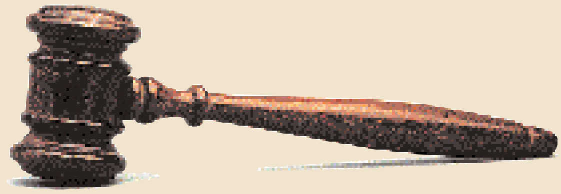
Civil bills: failure to serve

Practitioners are reminded that in order to stop the Statute of Limitations running against them, civil bills must not only be stamped and issued in the local Circuit Court office but service must also be effected.

A solicitor may accept service of the civil bill. Alternatively, service may be effected either by a designated summons-server or by registered post, as appropriate. Time will continue to run until the civil bill is served.

Failure to serve proceedings within the period of limitation may result in claims becoming statute-barred.

Litigation and Arbitration Committee



Personal injury judgments

Public liability – accident on sea ferry – negligence alleged against teachers and ferry operator – alleged breach of statutory duty – alleged contributory negligence

Case

Sinead Crowe (minor) v Sean O'Mhainnen and Island Ferries Limited, High Court, Galway, before Mr Justice Frederick Morris, President of the High Court, on 30 October 1998.

The facts

Sinead Crowe was a ten-year-old schoolgirl in June 1994. She was a member of a school outing organised by Gael Scoil Dara, Renmore, Co Galway, under the overall supervision of Martina O'Sullivan, a teacher in the school. Sean O'Mhainnen was the principal of Gael Scoil Dara.

The group comprised 28 children and Mrs O'Sullivan had the assistance of four other people, teachers, parents and two fifth-year pupils. The school outing involved a trip to the Arran Islands on the Arran Sea Bird Ferry, owned and operated by Island Ferries Limited. The schoolgirl and the other children boarded the ferry on the mainland and on the way across she and the other pupils moved from their seats on the port side of the ferry to the corresponding seats on the starboard side because the weather was cold. As they came into the harbour at Kilronan, the schoolgirl stated that she moved forward to the bow of the ferry and stood near the rail on the starboard side just after the point where the forehead mooring line is made up to the cleat. She was standing there in the company of other children. The ferry was coming alongside the quay and a crew member came forward to the bow and threw the mooring line ashore. A man on the quay placed it over a bollard and a crew member on the ferry then ran aft. Just at that time, the vessel jerked and the schoolgirl put her left hand out onto the rail. The mooring line then tightened over her hand, crushing it between the rope and the rail, causing serious injuries to her hand. She denied getting any warning about being on the fore deck at the time.

The schoolgirl was taken in pain and in shock to the dispensary at Kilronan. From there she was taken by helicopter to University College, Hospital in Galway. On examination, it was found that her left hand had been extensively injured. The middle and ring finger were almost completely evulsed at the distal interphalangeal joint, with further fractures of the fingers. The left little finger was fractured through the distal fillings with the crushed laceration of the soft tissues. Surgeons used every possible means to save the fingers, including a 12-hour surgical procedure on one day followed by a second procedure on the next. The schoolgirl was subsequently allowed home but had to be readmitted for amputation of the necrotic tips of the ring, middle and little fingers. It was necessary to insert the tips of the fingers into the schoolgirl's groin to obtain flaps and this had to be kept in position for three weeks. The following month she was readmitted to free her hand from her groin and some months later she was readmitted to trim the flaps on the ring finger. She lost the last segment of the middle ring and little fingers of her left hand. The ring finger is spread on the top in drumstick format.

Damages were sought against the school for the alleged negligence of the teachers in failing to take proper care of the schoolgirl while she was on the ferry and against the ferry owner for alleged negligence and breach of statutory duty in relation to the management of the ferry.

Specifically, in the context of the action against the school, it was argued that there was a failure on the part of the school to take reasonable care of the schoolgirl while she was under their control or custody of a teacher and that it was wrong to direct the schoolgirl to move to the bow of the ferry when it was approaching Kilronan Quay because that was the area of the ship in which there would be movement associated with the mooring. It was argued that a prudent parent would have realised that children should have been kept away from this area in the interests of safety.

The case against the ferry owners came under several headings:

- Failure to warn the passengers, in particular, the children, to stay away from the fore deck during the docking of the ferry
- Failure to move the vessel correctly by passing the mooring line not through the fairlead but instead passing it over the rail of the vessel, thereby allowing it to surge and create a hazard for people in the vicinity, and
- Breach of statutory duty on the part of the ferry owners in relation to the provisions of statutory instruments 107 and 109 of 1988.

These statutory provisions oblige ferry owners, insofar as is practicable, to ensure the health and safety of people on board the ship who may be affected by any acts or omissions. The owners are required to provide to employees information, instruction and training and supervision as is necessary to ensure, as far as is reasonably practical, the health and safety of persons on board the ship. It was also submitted on behalf of the schoolgirl that the provisions of the *Code of safe working practice for merchant seamen*, published by the Department of Transport in England and made applicable in Ireland by Statutory Instrument 107 of 1988, had been infringed.

The judgment

Morris P delivered judgment in the High Court in Galway on 30 October 1998. Having outlined the facts as above, he stated that having heard the evidence of Mrs O'Sullivan, a teacher in the school, and a Mrs Walsh, who stated that as the ferry was approaching Kilronan, there had been a general movement among the passengers making preparations for disembarking, Mrs O'Sullivan considered it proper to group the children so that they could disembark together in an orderly way. Mrs O'Sullivan, said the judge, had no knowledge or skill in the management of boats. She identified the area in the bow as a convenient place in which to group the children. He accepted that there were other tourists in this area at the time and that the ferry company had not indicated either by way of announcement or written warning or barrier that it was improper for them to go into this area.

Morris P accepted that a person with the skill and knowledge of boats would be expected to know that the bow of a vessel is an improper place to have children during the berthing of a vessel. In this case, there was nothing to show that Mrs O'Sullivan had this knowledge. On the contrary, he stated the area was in general use by other passengers without any objection by the ferry owners and he was of the opinion that it was perfectly reasonable to gather children in this area. He stated that he did not find any case of negligence made out against the school. The standard of care required by the school is that of a prudent parent towards a child. He said that in his view everything which Mrs O'Sullivan did in looking after the children on the school outing measured up to that standard.

In the context of the case against the owners of the ferry, the judge referred to the evidence of Mr Coneelly, one of the ferry's crew. The crewman said that as the ferry was approaching the pier at Kilronan, he went forward to carry out his duties. He found a large group of people in the bow, including a number of children, and that he told the people to move back, which they did. There was a conflict of evidence as to whether Mr Coneelly did in fact order the passengers to stand back. The judge considered that it was not necessary to decide on this conflict because he was satisfied that the injury to the schoolgirl occurred not while Mr Coneelly was in the bow but after he left to attend to his other duties, so that any order which he might have made or given at that time to enable him to carry out his duties in the bow had long since ceased to be effective or relevant. The evidence of Mr Coneelly that he did not pass the mooring line through the fairlead at the bow but simply passed it over the ship's rail was noted.

Evidence was given by Mr Connolly, a marine supervisor, who told the court that the ferry was fitted with a fairlead on the starboard bow and the purpose of the fairlead was to hold the mooring rope. The correct procedure was to pass the rope through the fairlead, and that by bypassing it, and passing the rope over the rail, there was a risk that the vessel would surge while at a quay, and in this surge the rope could move along the rail and injure a person nearby.

Morris P was satisfied that there was a failure on the part of the owners of the ferry to use the fairlead; they left the mooring line in a position of danger and that the jerk, as stated in evidence by the schoolgirl, caused it to tighten it over the rail and to injure the schoolgirl's hand. He was satisfied from the evidence that these were the only reasonable and proper conclusions to draw.

Accordingly, he was satisfied to hold that the accident was caused by the negligence of the owners of the ferry in failing to use the fairlead. He was also satisfied that the owners were in breach of statutory duty and in particular Statutory Instrument 109 of 1998 (regulation 4) in that they failed, so far as is reasonably practical, to ensure the safety of the schoolgirl, being a person on board the vessel, by failing to instruct and supervise Mr Coneelly in the use of the fairlead.

It had been argued in the context of contributory negligence that the schoolgirl failed to comply with her teacher's orders to keep her hands away from the ship's side. The schoolgirl stated, and this was accepted by the court, that she put her left hand on the rail only to steady herself because the vessel jerked. The judge considered that there was no question of her disregarding or ignoring the teacher's directions and he was satisfied that she was not guilty of any negligence.

Before the accident, the schoolgirl played the piano. According to a consultant psychiatrist, the schoolgirl, who had recently entered secondary school, had become increasingly conscious of her injured fingers. She avoids any classes, such as computer classes, where her hand will be seen by other people.

Morris P considered that the injuries had a profound impact on the schoolgirl's quality of life and accepted it was a serious injury. While he accepted the surgeon's assessment of a 15% loss of function, he considered that this had to be balanced against his finding of a significant cosmetic disability.

In the context of a claim for loss of earnings, he accepted evidence that while in the future the schoolgirl, as an adult, will be employable in keyboard-based work or in assembly-line work, she will always miss out on the best paid or higher-skilled jobs because of her injury. Evidence was given at the trial that keyboard workers command a wage of between £120 and £180 a week. Expert opinion was given to the effect that the adult schoolgirl would only command a salary of £120 a week, the higher-paid jobs going to people who do not suffer from a disability. Morris P considered that there was an element of loss of earnings into the future which could not be accurately calculated but which must be reflected in the damages under the heading of general damages.

Damages were awarded as follows: general damages to date of trial – £40,000; general damages into the future – £60,000; future loss of earnings – £50,000; special damages agreed at £7,432.

Awarding judgment for £157,432 against the owners of the ferry, Morris P ordered that the first-named defendant, the principal of the school, obtain his costs against the schoolgirl, with an order over against the owners of the ferry, the second-named defendant.

Solicitors for Sinead Crowe: MA Harvey & Co.
Solicitors for Sean O'Mhainnen: Horan & Sons.
Solicitors for Island Ferries Limited: McCann FitzGerald.

Employer liability – accident in factory – alleged negligence and breach of statutory duty – contributory negligence

Case

Cornelius Meade v ITW Hi-Cone Limited, High Court, Cork, before Mr Justice Smith, on 30 April 1998.

The facts

Cornelius Meade was involved in an accident on 24 October 1994 in the factory of ITW Hi-Cone Ltd, while he was making a piece out of a shaft of metal. Mr Meade was a fitter with his employers for approximately 20 years, and after five years he had become a group leader, a working foreman.

When Mr Meade had completed the piece, he tried to remove the remaining stock from the chuck. This involved opening the jaws of the chuck, pulling out the remaining stock with his right hand, and at the same time he had his left hand underneath the left side of the stock. He stated he was stretching over the lathe to complete this operation when his feet slipped, he lost his balance and his left hand, which was under the stock, collapsed and went down on steel chippings, referred to as swarfe.

Mr Meade suffered a severe injury to his left middle finger, a tendon in the finger was severed and it failed to unite. The finger is now in a permanent position pointing towards the palm of his hand.

Mr Meade alleged that the reason why he slipped was that the floor beside the machine where he was standing was wet and slippery by virtue of the fact that the splash guard underneath the coolant was not sufficient to control the coolant from escaping on to the floor surface. He stated that in removing the shaft he had to stretch, or reach close to two feet, and this put added pressure on his legs which caused him to slip.

Coolant is a mixture of oil and water which was being powered on to the piece which was being manufactured. During the duration of his particular work on the piece where the accident happened, the coolant had been falling on to the piece and on the place underneath. Some of the coolant escaped on to the floor surface.

Mr Meade sued his employer, ITW Hi-Cone Limited. He alleged that his employer was negligent in that the company: a) permitted the coolant to escape on to the floor at a time when he was working beside it; b) caused or permitted him to have to stretch or reach approximately two feet to catch and remove the remaining stock from the chuck; and c) was in breach of section 16 of the *Factory Act, 1955* in that it failed to ensure that effective means were provided and maintained for protecting employees from slipping.

The employer argued that there was never any suggestion from Mr Meade that he had slipped until two engineers met on the premises in March 1996. Mr Meade explained that he did not attach too much significance to the slip in question. The employer argued that the employee was the person responsible for the machine in question and also for the condition of the floor close to the machine where he was working.

The judgment

Mr Justice Smith gave judgment on 30 April 1998 in the High Court in Cork. Having outlined the facts as above, he referred to the evidence of the general manager of the employer company, who stated that it was reported to him that when Mr Meade was removing the shaft from the lathe, he underestimated its weight and dropped the shaft, pinning the injured finger between the shaft and the metal cuttings and that this is the account contained in the accident form sent to the department dated 27 October 1994, three days after the accident.

The judge referred to the admission by Mr Meade in cross-examination that he was aware that there was liquid on the floor near the chuck and that he was the person responsible for the cleanliness of the floor. He gave evidence that when he finished work each evening, he swept and cleaned up the floor. However, Mr Meade's case was that it was the combination of the liquid on the floor and the weight of the three-inch-long solid steel shaft which put extra pressure on his left leg which caused him to slip.

The judge considered that, insofar as the probabilities were concerned, he found as a probability that on the morning of the accident the coolant had escaped on to the floor because the splash guard underneath was inadequate to prevent the spillage. He considered the employer liable in breach of s15 of the *Factory Act, 1955* and that it failed to protect Mr Meade from slipping.

Smith J considered that Mr Meade himself was a very experienced and capable fitter. He was also satisfied that he was guilty of some negligence in that: a) Mr Meade permitted the coolant to escape on to the floor where he was working; and b) he should have anticipated that as a result of the spillage on the floor he might have slipped and he should have taken some measures to ensure the floor was safe to work on.

Accordingly, the judge apportioned blame at two-thirds on the employer and one-third on the employee.

Damages were awarded as follows: general damages at £35,000 and special damage at £1,250. The total sum awarded was £36,250, less one-third which is £12,083, leaving a net sum of £24,167. Smith J awarded costs on the Circuit Court scale, with a certificate for senior counsel. G

Solicitors for Mr Meade: James Lucey & Sons.
Solicitors for ITW Hi-Cone Limited: David J O'Meara & Son.

These summaries were compiled by Dr Eamonn G Hall, Solicitor, from Reports of personal injuries *from Doyle Court Reporters, 2 Arran Quay, Dublin 7.*

LEGISLATION UPDATE: 10 AUGUST – 13 SEPTEMBER

SELECTED STATUTORY INSTRUMENTS

Civil Legal Aid (Refugee Legal Service) (No 2) Order 1999
Number: SI 262/1999
Contents note: Prescribes the appeals officer as set out in the *Dublin Convention (Implementation Order) 1997* (SI 360/1997) as a tribunal for the purposes of s27(2)(b) of the *Civil Legal Aid Act, 1995*
Commencement date: 4/8/1999

Housing (Sale of Houses) (Amendment) Regulations 1999
Number: SI 248/1999
Contents note: Amends the regulations governing the sale by housing authorities of dwellings to tenants (SI 188/1995) in relation to the reckonable period of tenancy
Commencement date: 31/3/1998

Local Government Act, 1998 *(Commencement) Order 1999*
Number: SI 221/1998
Contents note: Appoints 19/7/1999 as the commencement date for s11 of the Act – appointment of local authority officers and employees

Road Transport Act, 1999 *(Commencement) Order 1999*
Number: SI 264/1999
Contents note: Appoints 30/8/1999 as the commencement date for the Act, other than ss4 to 8, 11, 16 and 23

Prepared by the Law Society Library

Gazette law report

Bigamy – recognition of English divorce – Director of Public Prosecutions – dependent domicile rule – common-law rules – public policy – 'limping marriages'

Case

G McG (Petitioner) v DW (Respondent) and AR (Notice Party), High Court, before Mrs Justice McGuinness, on 14 January 1999.

The parties before the court found themselves not only unsure of their marital status but also the subjects of actual criminal investigation. The basic question at issue was whether the 1985 English divorce between the petitioner and the notice party was entitled to recognition in this State. From this, the validity or otherwise of their subsequent marriages would flow. The wording of the *Domicile and Recognition of Foreign Divorces Act, 1986* did not prevent the court from developing the rules of recognition of foreign divorces in relying on the decision of the Supreme Court in *W v W* in 1993 that common-law rules are judge-made law and may be modified depending on the current policy of the court.

The High Court so held in deciding that the English divorce between the petitioner and the notice party was entitled to recognition in this State, that their subsequent respective marriages were valid and in ordering that any criminal proceedings or investigations should cease forthwith.

The facts

The petitioner, Mr G, had married the notice party, Ms R, in a Catholic Church in Dublin on 27 October 1967. Both were resident and domiciled in Ireland. The marriage irretrievably broke down and they entered into a deed of separation on 11 April 1979. Both parties embarked on new relationships. Mr G issued divorce proceedings in England on 20 August 1984.

Jurisdiction there was based either on Ms R having domicile in England or being resident there for more than one year. The former was not being seriously argued. Subsequent to the granting of the divorce in England, both parties entered into second marriages.

These proceedings came before the court in the form of a petition for a decree of nullity in which Mr G claimed a declaration that his marriage to the respondent was null and void by reason of his prior and subsisting marriage to Ms R. But it was submitted by counsel for the petitioner that his real concern was to ascertain his true marital status according to the law of this country.

The proceedings had taken a somewhat unusual course. The Master of the High Court had taken the view that the English divorce between Mr G and Ms R was of no effect and that the parties had committed bigamy. He refused the petition of nullity and directed that the papers be sent to the Director of Public Prosecutions. The Master's decision was appealed to the High Court. Mr Justice Budd had overturned the Master's order, while Miss Justice Laffoy had joined the notice party who by now had a vital interest in the proceedings.

Mrs Justice McGuinness noted that the question of the recognition in Irish law of divorces granted by the courts of a foreign jurisdiction was one which has been considered from time to time by both the High Court and the Supreme Court. The line of cases from *Mayo-Perrott v Mayo-Perrott* ([1958] IR 336) to *Gaffney v Gaffney* ([1975] IR 133) had established that such a divorce would be recognised in Ireland if it was granted by the court of the common domiciles of the parties.

The Supreme Court in *W v W* ([1993] 2 IR 476) upheld an earlier High Court decision that the common-law rule making the domicile of a woman dependent on that of her husband was swept away by principles of equality before the law and equal rights in marriage as enshrined in the Constitution. Meanwhile, in the *Domicile and Recognition of Foreign Divorces Act, 1986*, the Oireachtas had abolished the dependent domicile rule and amended the foreign divorce recognition rule to 'where either spouse is domiciled'. But the Act only applied from 2 October 1986, so the question of recognition of the English divorce in this case fell to be dealt with under common law.

The judgment

Mrs Justice McGuinness noted that, when considering the development of the common-law rules of recognition of foreign divorces, both in this country and in England, it was clear from *Le Mesurier v Le Mesurier* ([1895] AC 517) onwards that great emphasis had been laid on the need to avoid 'limping marriages', where an individual is held to be married on one jurisdiction but unmarried in another. The public policy to ensure that the marital status of a person should be the same in every country visited by that person was stressed by Kingsmill-Moore J in *Mayo-Perrott v Mayo-Perrott* and quoted with approval by Blayney J in *W v W*.

The law in regard to divorce in Ireland has been dramatically altered since 1993 – first, by the passing by referendum of the 15th amendment to the Constitution and, second, by the enactment of the *Family Law (Divorce) Act, 1996*. Both this Act and the *Family Law Act, 1995* demonstrated a clear policy by the Oireachtas not to limit the basis of jurisdiction in matrimonial matters to domicile but also to extend it to ordinary residence in a country for one year.

Mrs Justice McGuinness considered whether the court would be usurping the role of the Oireachtas by extending the common-law rule of recognition of foreign divorces to reflect the legislation of 1995 and 1996. The legislation did not prevent the court from developing the rules of recognition of foreign divorces and judge-made law may be modified depending on the current policy of the court.

Note: Subsequent to the judgment, the Attorney General sought leave in the High Court to be joined as a notice party to the proceedings. The application was refused and is the subject of an appeal to the Supreme Court.

Gerard Durcan SC and Nuala Butler BL, instructed by solicitors Bourke, Carrigg & Loftus, Ballina, Co Mayo, for the petitioner.
Inge Clissmann SC and Catherine White BL, instructed by solicitors Reidy Stafford, Newbridge, Co Kildare, for the respondent.
Donal O'Donnell and Nuala Jackson BL, instructed by solicitors Hayes and Sons, Dublin 2, for the notice party.

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

ILT digest

of legislation and superior court decisions

Compiled by David P Boyle

ADMINISTRATIVE

Minor change to *Údarás na Gaeltachta Act*
A Bill has been presented which seeks to amend s28 of the *Údarás na Gaeltachta Act, 1979* by adding the words 'and six months' after the words 'five years'.
Údarás na Gaeltachta (Amendment) Bill, 1999

BROADCASTING

Protection for televising of major events
A Bill has been presented which permits Ministers to designate certain events as being of major importance to society. In respect of such events, broadcasters providing near-universal coverage on free television shall have a right to provide coverage.
Major Events Television Coverage Bill, 1999

COMMERCIAL

***Mareva* injunction refused**

- In seeking a *Mareva* injunction, it was not enough to show that the assets were likely to be dissipated in the ordinary course of business or in the payment of lawful debts.

The plaintiffs acquired a majority shareholding in a company from two Russian companies. They believed some of the profits were taken offshore through the defendant and claimed that the acquisition by the plaintiffs of rights to the profits being accrued through the defendant was an integral part of the transaction under which they acquired the majority shareholding from the two companies. The plaintiffs believed there was a risk that the defendant would dissipate its assets to the detriment of the plaintiffs and sought an interlocutory injunction restraining the defendant from dealing with its assets so as to reduce their value below a certain amount. They sought a declaration that the assets were the property of the plaintiffs or were held on trust for their benefit. The defendant claimed it was a separate and independent legal entity from the company in question which had no right or control over the defendant's assets or business. In refusing the relief sought, it was held that:

- Before a *Mareva* injunction could be granted, there must be an intention on the defendant's part to dispose of his assets with a view to evading his obligation to the plaintiffs and to frustrate the anticipated order of the court. It was not enough to show that the assets were likely to be dissipated in the ordinary course of business or in the payment of lawful debts
- The plaintiffs had not adduced evidence in this regard. The evidence adduced by the defendant to counter the specific matters put forward by the plaintiffs as indicating a risk of dissipation sufficiently dispelled the concerns expressed by the plaintiffs
- As it was limited to a certain figure, the plaintiffs' claim was not formulated as a claim to a proprietary interest in specific assets.

Oba Enterprises Ltd v TMC Trading International Ltd (Laffoy J), 27 November 1998

COMMUNICATIONS

Postal and Telecommunications Services (Amendment) Act, 1999
This Act was signed by the President on 7 April 7 1999.

COMPANY

Further changes proposed to company code
A Bill has been presented which seeks to amend and extend parts IV and V of the *Companies Act, 1990* to permit stabilising activity in relation to the issue or sale of securities.
Companies (Amendment) (No 3) Bill, 1999

CONSTITUTIONAL

Proposed amendment regarding local government
A Bill has been passed by both Houses of the Oireachtas proposing an amendment to article 28 of the Constitution giving constitutional recognition to the role of local government and stipulating that local elections be held at least every five years.
Twentieth Amendment of the Constitution Bill (No 2) Bill, 1999

Teaching of Irish not a constitutional requirement in non-Gaeltacht areas

- A 'certain minimum education' within the meaning of article 42.3.2° of the Constitution should comprise the basic skills in reading, writing and arithmetic and such other basic knowledge as might universally be taught. Children living in an area outside the Gaeltacht area are not required to study the Irish language.

The respondent was prosecuted in the District Court pursuant to s17 of the *School Attendance Act, 1926*. The respondent gave evidence that she was educating her children at home. She provided them with daily lessons in English and mathematics, as well as lessons in geography, nature and arts and crafts once or twice a week. A national schoolteacher provided them with a weekly lesson in French and she hoped to provide lessons in Irish in the future. The District Court sought a report on the children's education from a school inspector. The inspector found that the respondent was attempting to follow the primary school curriculum, but that there was insufficient structure and planning governing the work and that there was a marked lack of progress in the areas of study. The District Court found as a fact that the children were not in receipt of a suitable elementary education of general application having regard to the primary school curriculum of the State. The District Court stated a case for the opinion of the High Court as to whether it was precluded from convicting the respondent in view of the relevant provisions of the Constitution. In answering the questions posed, it was held that:

- The respondent had offered an excuse for failing to send her children to school, which purported to be a reasonable excuse. The District Court would not have been entitled to hold that the education provided by the respondent at home was not a 'suitable elementary education' within the meaning of the 1926 Act without the evidence of the school inspector
- An education which constitutes a 'certain minimum education, moral, intellectual and social' within the meaning of article 42 of the Constitution must necessarily be regarded as a 'suitable elementary education' within the meaning of the 1926 Act
- The concept of a 'certain minimum education, moral, intellectual and social' set out in article 42.3.2° is not static and can vary according to public expectations, as is made clear by the inclusion of the phrase 'in view of actual conditions' in article 42.3.2° of the Constitution
- The Constitution contemplates that a 'certain minimum education' should comprise the basic skills in reading, writing and arithmetic and such other basic knowledge as might universally be taught and, at least in the case of children not living in the Gaeltacht, does not require the study of Irish
- In the absence of a statutory or other definition of a 'certain minimum education, moral, intellectual and social', the District Court ought not to scrutinise the fine details of the teaching methods employed by parents attempting to educate children at home in the basic essential subjects. To do so might lead to different requirements throughout the State with the result that parents could never be sure that they were complying with the 1926 Act. There could be no vindication of the *prima facie* constitutional right of parents to educate their children at home if there was gross uncertainty as to the standard or method of education required
- Having regard to the provisions of article 42 of the Constitution, the District Court was not entitled to form a view beyond a reasonable doubt that the respondent was not providing a suitable elementary education for her children.

Director of Public Prosecutions v Best (Geoghegan J), 31 July 1998

CRIMINAL

Error regarding time of arrest not fatal to prosecution

- To dismiss the charge against the applicant on the basis of the incorrect entry of the time of arrest in the custody record was to put the entry totally out of context and to give it an importance it did not have.

The applicant was charged with offences contrary to s49(2) of the *Road Traffic Acts*. At the hearing in the District Court, it emerged that, while the arresting Garda stated that he arrested the applicant at 4.35am, the custody record from Crumlin garda station showed that the applicant had been arrested at 4.25am. On the applicant's application, the judge dismissed the charge. The respondent requested the judge to state a case to the High Court as to whether the judge had been correct in law in dismissing the charge against the applicant. The High Court held that the District Court judge had been incorrect in dismissing the charge, as the custody record was not evidence as to the arrest of the applicant. The applicant appealed against that finding to the Supreme Court which, in dismissing the appeal, held that:

- To dismiss the charge against the applicant on the basis of the incorrect entry of the time of arrest in the custody record was to put the entry totally out of context and to give it an importance it did not have
- As it was conceded by the applicant that everything done after the arrest was proper, then as the arrest itself was proper in every respect, it had to be concluded that everything pertaining to the prosecution of the applicant was in order.

Denton v Director of Public Prosecutions (Supreme Court), 29 October 1998

Criminal Justice (No 2) Bill, 1997

This Bill has been passed by Dáil Éireann.

Location of bodies proposal made

A Bill has been presented and passed by Dáil Éireann which aims to:

- Establish an independent international commission to facilitate the location of the remains of the victims of paramilitary violence killed prior to 10 April 1998 (the date of the *Good Friday agreement*)
- Set out the functions and membership of that commission, and
- Provide a prohibition on the use of evidence resulting from the process.

Criminal Justice (Location of Victims' Remains) Bill, 1999

Right to silence considered

The applicant was convicted of rape. It was submitted in his defence that the act was consensual. At the trial, evidence was given of his silence during interview, save his statement that he did not rape the complainant. The applicant was convicted and appealed the decision on the grounds that the trial judge erred in law in permitting the prosecutor to adduce such evidence and that it was a breach of the applicant's right to silence. In dismissing the appeal, it was held that:

- The course of events does not trench in any way on the right to silence which was emphasised very strongly by the trial judge. But the form of evidence of the applicant's silence in the garda station and of cross-examination by the prosecution was highly relevant to the credibility of the applicant's lately preferred account of events
- The jury were manifestly entitled to act on the evidence which they had and to arrive at that decision and there is no justification for suggesting that they were perverse or inconsistent in following the specific directions of the judge as to the law in the way they were to record their verdicts.

People (Director of Public Prosecutions) v Finnerty (Court of Criminal Appeal), 22 June 1998

DAMAGES

Revenue returns followed in claim for loss of husband's earnings

The husband of the plaintiff was killed in a car accident. The car was being driven by the defendant. The plaintiff claimed, on her own behalf and on behalf of her children, for the loss suffered as a result of her husband's death. She claimed that the deceased had given her about £300 each week. In assessing damages on the basis of £120 a week, it was held that:

- The deceased kept no realistic records of his business. Accounts furnished to the Revenue Commissioners indicated that the deceased could not have paid the plaintiff £300 a week, as alleged. The deceased's accountants indulged in creative accounting and thus the accounts were unreliable. The plaintiff's evidence was equally unreliable. The court was not satisfied on the balance of probabilities as to the truth of any of the plaintiff's evidence
- Damages should be based on £120 a week, amounting to £216,000 in total loss of maintenance, and sums of £7,500 for mental distress, £500 for damages to the car, £10,000 for loss of work on the house and special damages agreed at over £3,000
- The papers in the case would be referred to the Revenue Commissioners.

McKenna v McElvaney (Johnson J), 24 July 1998

EDUCATION

Substantial changes to non-third level system

A Bill has been presented which aims to:

- Raise the minimum school-leaving age from 15 to 16 years or the completion of three years' post-primary education, whichever is the later
- Permit the Minister for Education to set minimum standards applicable where children are educated outside the recognised school system
- Permit the registration of children who are educated outside the recognised school system, and
- Establish a National Educational Welfare Board to have overall responsibility for the implementation and operation of the Bill when enacted.

Education (Welfare) Bill, 1999

Qualifications (Education and Training) Bill, 1999

This Bill has been amended in committee and passed by Seanad Éireann.

ELECTIONS

Local Elections (Disclosure of Donations and Expenditure) Bill, 1999

This Bill has been passed by both Houses of the Oireachtas.

EMPLOYMENT

Oral hearing unnecessary in circumstances of dismissal case

- There was no necessity to have an oral hearing, preliminary or otherwise in this case as the applicant had never at any stage queried the accuracy of his sick leave record.

The applicant had been employed in the prison service and was dismissed by the respondents due to his chronic absenteeism. He was granted leave to seek judicial review of his dismissal. He contended that the respondents failed to comply with the requirements of natural and constitutional justice. He further contended that he was not afforded an adequate opportunity to make a reply to the reasons for his dismissal, and that the respondents took into consideration documents which had not been disclosed to him, namely a memorandum submitted to the second-named respondent. He further contended that he had been denied the right to cross-examine those persons who were giving adverse evidence against him. In dismissing the application, it was held that:

- The procedures adopted by the respondent were in the context of a long series of warning letters to the respondent. The accuracy of these letters were never challenged by the applicant prior to his dismissal
- As the applicant had never queried the accuracy of his sick leave record, there was no necessity to have any oral hearing, preliminary or otherwise
- The memorandum submitted to the second-named respondent was a fair summary of the facts and, as such, the decision reached by the second-named respondent was factually sustainable and the criteria which were applied were reasonable
- The inclusion of rest days in a period of sick leave was entirely in accordance with normal Civil Service practice
- S9 of the 1956 Act had no bearing on this case, as the applicant had not become incapable of discharging his duties.

Gaughan v Haughey (Carroll J), 5 October 1998

EQUALITY

New equal status legislation proposed

On 19 June 1998, the *Equal Status Bill, 1997* was declared unconstitutional by the Supreme Court. A private member's Bill was introduced at the end of last year as a proposed substitute for the impugned legislation. Now the Government has brought forward a new Bill which aims to:

- Provide for equality in goods and services, accommodation, disposal of premises and education
- Deal with all services generally available to the public, including facilities for refreshment and entertainment, credit facilities and transport services
- Define the grounds of prohibited discrimination as gender, marital status, family status, sexual orientation, religion, membership of the travelling community, age, disability and race
- Provide that discrimination by a registered club against members or applicants will result in forfeiture of that club's certificate of registration, thereby depriving the club of its entitlement to serve alcohol to its members, and
- Permit the making of regulations about accessibility of transport facilities for disabled persons.

Equal Status Bill, 1999

FAMILY

Custody and *Hague convention* considered

- The question as to whether an individual has a right of custody in relation to a child for the purposes of the *Hague convention* has to depend on the circumstances of each case. An individual may have inchoate rights which will entitle that individual to rely on the provisions of the convention, even though such rights are not formally recognised or granted by law.

The plaintiff issued proceedings against the defendant seeking, pursuant to the *Hague convention*, the return of their son to the jurisdiction of the courts of the State of New York. The marriage of the plaintiff and the defendant was not recognised under New York State law. It was agreed that the determination of the plaintiff's custody rights should be tried as a preliminary issue. Conflicting expert evidence as to the rights of an unmarried father under New York law was adduced by both parties. In adjudicating on the preliminary issue, it was held that:

- Having considered the expert evidence on the applicable law of the State of New York, the court could not be satisfied that the plaintiff had established that, as the natural father of a non-marital child who had not obtained any order in his favour from the court of habitual residence of the child, he had established custody rights on the date of removal

- It would appear that the correct position under New York law was that the mother of a non-marital child had sole right of custody of the child until such time as an order of filiation was made or a paternity agreement or compromise was approved by the court
- In applying the *Hague convention*, considerations beyond established legal rights arose. Both the plaintiff and the defendant had acknowledged the plaintiff's paternity of the child. It was inconceivable that, had the proceedings in the family court of New York not been interrupted by the defendant leaving the jurisdiction of the court with the child, approval would not have been given to the acknowledgement of paternity, whereupon both parents would have had a right to custody
- In the particular circumstances of the case, the plaintiff was not merely relying on *de facto* joint custody of the child with the defendant for the first five-and-a-half years of the child's life. The plaintiff's inchoate right to custody, which would almost inevitably have crystallised into established rights by the court's approval of the acknowledgements of paternity, were rights of custody within the meaning of article 3 of the *Hague convention*
- The plaintiff was entitled to invoke the *Hague convention* and pursue his claim under article 12 thereof.

HI v MG (Laffoy J), 5 November 1998

Delay considered in application to return child

- Delay cannot be solely determinative. However, if delay is established, it is a factor which the court must have regard to in exercising its discretion whether to return the child to the state of its habitual residence.

The child, C, was born in Spain in 1991. C was the subject of proceedings in 1994 when the Supreme Court ordered that C be returned to Spain, subject to certain undertakings proffered by the father, the plaintiff, for the Spanish courts to decide on custody and access. In 1996 the mother, the defendant, made allegations of sexual assault of C against the plaintiff. The Spanish courts ordered that C should not be removed from Spain. In October 1996, the defendant brought C to live with her parents in Ireland. In 1998, the plaintiff sought the return of C to Spain and that the defendant be committed to prison. In making an order pursuant to article 12 of the *Hague convention*, returning C to Spain, it was held that:

- In so far as the court is entitled to have regard to the welfare of the child in applying the provisions of the *Hague convention*, it must give priority to this over the imperative to condemn the behaviour of the defendant
- Delay cannot be solely determinative. However, if delay is established, it is a factor to which the court must have regard in exercising its discretion whether to return the child to the state of its habitual residence, where such discretion is reposed in the court under the *Hague convention*
- The defendant, on whom the onus of proof (on the issue of acquiescence) lay, had not established conduct on the part of the plaintiff which clearly and unequivocally led the defendant to believe that the plaintiff was not asserting, or going to assert, his right to invoke the *Hague convention*
- The onus was on the defendant to demonstrate that the child was now settled in her new environment and the defendant had not discharged that onus
- It was not for the court to make any finding as to the likelihood, possibility, or the probability of the child having been abused by the plaintiff between January 1995 and March 1996. To do so would trespass on the jurisdiction of the civil and criminal courts of Spain
- The defendant had not established that returning the child to Spain would expose her to the type of physical or psychological harm envisaged in article 13(b).

MDP v SMB (Laffoy J), 6 November 1998

HEALTH SERVICES

National Disability Authority Bill, 1998

This Bill has been amended in the Select Committee on Justice, Equality and Women's Rights.

Proposed regulation of infertility treatment

A private member's Bill has been introduced which seeks to set out statutory guidelines and procedures for persons involved in the provision of services assisting human reproduction.

Regulation of Assisted Human Reproduction Bill, 1999

INSURANCE

Terms not imposed by court which were not expressly agreed

- The contract of insurance is a commercial contract and the courts should be slow to impose terms on either party which have not been expressly agreed by them.

The applicant claimed that a sum of money was due on foot of a policy of insurance entered into by the applicant with the respondent, an insurance company. The respondent repudiated the policy on the grounds of fraud and breach of duty of good faith. In the High Court, the trial judge found that the respondent was entitled to repudiate liability under the policy. On appeal, the applicant submitted that the respondent was in breach of constitutional justice and fair procedures. The applicant submitted that he was not given a fair opportunity of dealing with the respondent's objections and further that the trial judge had made no express finding of fraudulent intention on the part of the applicant. In dismissing the appeal, it was held that:

- An insurer had to treat the insured fairly and with respect in accordance with the mutual obligations of good faith. However, the insurer could hardly be expected to spoon-feed an insured if the insurer had doubts as to the insured's honesty and reliability. It was for the parties to make their own contract and the courts had to be careful not to impose on parties terms which they would never have accepted if such terms were suggested in the pre-contract bargaining
- Having regard to the circumstances, including the ignoring of requests for some documentary corroboration, there was no obligation on the respondent to conduct a kind of trial or hearing before repudiating liability under the policy
- The contract of insurance was a commercial contract and the courts had to be slow to impose terms on either party which had not been expressly agreed by them
- The contract of insurance undoubtedly involved mutual obligations of good faith, but that did not mean that the insurer could not, provided it was acting *bona fide,* disclaim liability without first conducting some form of trial. The trial comes afterwards in the courts if the insured contended that the disclaimer of liability by the insurer was unwarranted and in breach of contract.

Fagan v General Accident Fire and Life Assurance Corporation plc (Supreme Court), 14 October 1998

INTERNATIONAL AID

Bretton Woods Agreements *(Amendment) Act, 1999*

This Act was signed by the President on 7 April 1999.

LEGAL PROFESSION

Lawyers from other states to practice here

New legislation permits lawyers from the new EU states of Austria, Finland and Sweden to pursue professional activities in the State by way of provision of services (*European Communities (Freedom to Provide Services) (Lawyers) (Amendment Regulations 1999* – SI 132 of 1999). Additionally, solicitors qualified in New Zealand may now be admitted as solicitors in Ireland subject to the corresponding conditions under which solicitors whose names are on the roll may be admitted to practise in that country.

Solicitors Act, 1954 (Section 44) Order 1999 (SI No 133 of 1999)

PLANNING AND DEVELOPMENT

Procedural changes to planning code

New regulations have been made which:

- Provide for matters of procedure in relation to a request to a planning authority for an opinion on information which should be contained in an environmental impact statement
- Apply the same procedures to appeals to An Bord Pleanála and to applications to the Minister for the Environment and Local Government for the certification of proposed local authority development
- Extend the procedures to be followed in the case of a proposed development which would be located on an environmentally-sensitive site or be likely to have significant effects on the environment in another EU Member State
- Provide that fish farming development which is licensed under the *Fisheries (Amendment) Act, 1997* is exempted development, and
- Come into effect on 1 May 1999.

Local Government (Planning and Development) Regulations 1999 (SI No 92 of 1999)

Changes to EIA system

New regulations have been made which:

- Enable a person obliged to submit an environmental impact statement in respect of a proposed development to request the competent authority concerned to provide an opinion on the information to be contained in the statement
- Re-state and extend certain existing provisions, including those relating to classes of development which require an environmental impact statement, and the procedures to be followed in the case of a proposed development which would be located on an environmentally-sensitive site or be likely to have significant effects on the environment in another EU Member State, and
- Come into effect on 1 May 1999.

European Communities (Environmental Impact Assessment) (Amendment) Regulations 1999 (SI No 93 of 1999)

PRACTICE AND PROCEDURE

Whether amendment to pleadings will be allowed

- The court will allow the amendment of pleadings where it would have been appropriate to include the proposed amendment in the original pleadings and where the proposed amendment would have survived an attack under o19, r28, provided that this does not cause an injury or injustice to the other party. Injury means that the other party is placed in a worse position than that which he would have been in had the proposed amendment been pleaded at the proper time.

A large quantity of intervention beef was destroyed by fire at the premises of United Meat Packers (UMP). The plaintiff refused to indemnify the defendant in respect of the loss. In these proceedings, the plaintiff claimed declarations that they were entitled to repudiate liability on the grounds, among others, that the defendant had not disclosed that the beef was stored in premises owned by UMP and not by the defendant. The plaintiff sought leave to amend its statements of claim to include, among other things, allegations that the defendant was aware of irregularities and abuses at the UMP premises in connection with the Aid to Private Storage Scheme and Export Refund Scheme. The defendant objected, on the grounds that the plaintiff had not adduced any evidence from an insurance professional that an insurer would take these matters into account in deciding whether to accept a risk. In granting the relief sought, it was held that:

- The court was not concerned to punish parties for mistakes in the conduct of their cases and would allow the amendment of pleadings where it would have been appropriate to include the proposed amendment in the original pleadings and where the proposed amendment would have survived an attack under o19, r28, provided that this did not cause an injury or injustice to the other party. Injury meant that the other party was placed in a worse position that that which he would have been in had the proposed amendment been pleaded at the proper time
- A party seeking leave to amend pleadings does not necessarily have to adduce primary evidence in support of the proposed amendment. Evidence from a solicitor based on instructions from his clients was admissible on an interlocutory application
- The defendant had not established that the proposed amendment would result in any injustice or prejudice to him.

Cornhill v Minister for Agriculture and Food (O'Sullivan J), 13 March 1998

Limits on third-party discovery

- Third-party discovery should only be ordered when there was no realistic alternative available.

The defendants were sued by the plaintiff for defamation. In their defence, the defendants pleaded justification. They submitted that if they were to fully defend the plaintiff's claim, it was essential that they procure the books of evidence from the plaintiff's trial and appeal. They sought voluntary discovery of the documents from the Office of the Chief State Solicitor, who informed them that it did not retain copies of books of evidence. They then sought to obtain the documents from the Registrar of the Special Criminal Court and the Court of Criminal Appeal. The application was refused. The defendants then issued motions pursuant to o31, r9 of *Rules of the superior courts*. It was submitted that as the plaintiff, *prima facie*, had in his possession the documents in question, it was not desirable to involve third parties by making orders of discovery against them in respect of the same documents. In refusing to make an order for third-party discovery, it was held that:

- There was nothing in o31, r9 which deprived its applicability to a book of evidence or a transcript of a hearing of a criminal matter
- In an appropriate case, the court should make an order for third-party discovery, even though the documents might be discovered by a party to the action
- An order should only be made against a third party in circumstances where the documents in question are not readily available to be discovered by a party to the action
- While the plaintiff had been convicted in the Special Criminal Court, it did not necessarily follow that he or his solicitors would not make full and proper discovery
- Simply because the parties to an action were hostile to each other was not a reason for presuming that proper discovery would not be made
- Third-party discovery should only be ordered when there was no realistic alternative available
- If the documents were not pro-

duced on discovery by the plaintiff, then the court would be prepared to make the order sought.

Chambers v Times Newspapers Limited (Morris P), 17 November 1998

REAL PROPERTY

Transfer set aside and arrears of rent ordered

The plaintiff, who suffered from learning difficulties, inherited a farm. He entered into an agreement for a lease of the property to the defendant which included an option to purchase. The plaintiff had received no independent advice, there was no rent review clause and the defendant's option to buy could be exercised at any time over 25 years without any regard to an increase in the value of the land. There followed an undated transfer of the lands and, the defendant claimed, payment of £65,000 by the defendant to the plaintiff. The plaintiff sought to have the agreement set aside and was successful in the Circuit Court. In dismissing the defendant's appeal, the High Court held that:

- Concerning the question of payments by the defendant, the court preferred the plaintiff's version of events and concluded that the defendant took advantage of the plaintiff. While the defendant may have paid the plaintiff small sums from time to time and had given the plaintiff a car, he could not be entitled to the repayment of these sums in the light of his conduct
- The defendant made several alterations to the property, some to the plaintiff's advantage and others to his disadvantage. The plaintiff was entitled to a sum representing the cost of reinstating the lands to their original condition, together with a sum for the cost of restoring the farm buildings to their original condition
- The plaintiff was entitled to the letting value of the land for the period when the defendant was in possession
- The defendant should be compensated for work done in the form of improvements which would permanently benefit the property, even though the work was not requested by the plaintiff, and this sum should be set off against the sums due by the defendant to the plaintiff
- The defendant's counter-claim was dismissed. The Circuit Court orders setting aside the lease and undated transfer were affirmed but variation was made to compensate the plaintiff for the waste committed by the defendant and the rents to which the plaintiff was entitled.

Tobin v Cassidy (Keane J), 3 November 1998

TAXATION

CGT multipliers for 1999/00 released

In relation to disposals in the current tax year, the multipliers for the purposes of s556(2) of the *Taxes Consolidation Act, 1997* have been made available.

Capital Gains Tax (Multipliers) (1999-2000) Regulations 1998 (SI No 111 of 1999)

TORT

Injunction against potentially defamatory article granted

- The grant of injunctive relief was a 'jurisdiction of a delicate nature' and the court had to be circumspect to ensure that it did not unnecessarily interfere with the right of freedom of expression.

The plaintiff was a company director who was involved in the running of two nightclubs. He sought an interlocutory injunction restraining the defendant from, among other things, publishing in a certain magazine an article which he alleged was defamatory of him. The first-named defendant was the editor of the magazine. The second-named defendant and the third-named defendant were the purported authors of the article in question. The plaintiff contended that the words of the article in question 'in the natural and ordinary meaning' or by innuendo alleged that, first, he permitted the sale of drugs on his premises and was benefiting therefrom and that, second, he was a homosexual. The defendant contended in respect of the first complaint that the words did not have the meaning ascribed to them and, if they did, he would plead justification at the trial of the action. In respect of the second complaint, the defendant contended that the words did not bear the meaning alleged. In allowing the injunctive relief sought, it was held that:

- A plaintiff in an action such as this in order to obtain an interlocutory injunction had to show not merely that he had raised a serious issue concerning the words complained of but that there was no doubt but that they were defamatory
- The reason for the reluctance on the part of the courts to grant interlocutory injunctions in cases of this sort was grounded in the importance attached to the right of free speech
- The decision in *Bonnard v Perryman* was authority for the rule that where a defendant in a libel action intended to plead justification, a court would not grant an interlocutory injunction to restrain publication of the statement complained of
- Accordingly, the question then arose as to whether a bald statement of intent to plead justification was sufficient to debar a plaintiff who might otherwise be entitled to an injunction from such relief
- A rule which permitted a defendant to, in effect, oust the ability of the court to intervene by way of injunction in an appropriate case by the simple expedient of expressing an intention to plead justification at the trial of the action was not consistent with the obligations imposed on the court under the Constitution
- In respect of the first complaint, the words complained of did not, in their natural and ordinary meaning, make such allegations as contended by the plaintiff with the degree of clarity required to say that the words were without doubt defamatory of the plaintiff. However, looking at the parts of the article which were complained of as a whole, there was present an innuendo to the effect alleged by the plaintiff
- In respect of the allegation of homosexuality, the word in question 'in its natural and ordinary meaning' was taken as meaning homosexual
- It is not sound to suggest that merely because an activity was no longer prohibited by the criminal law an allegation of engaging in such activity could not be defamatory
- The grant of injunctive relief was a 'jurisdiction of a delicate nature' and the court had to be circumspect to ensure that it did not unnecessarily interfere with the right of freedom of expression
- Damages were the normal remedy for defamation and injunctions were not. However, in the present case, the question arose as to what damages the plaintiff would be likely to recover against the defendant at the trial
- In all the circumstances, injunctive relief was granted because to refuse it was to consign the plaintiff to a trial where damages would be inadequate remedy because of the virtual impossibility of ever recovering any sum awarded.

Reynolds v Malocco trading as 'Patrick' (Kelly J), 11 December 1998 G

News from the EU and International Affairs Committee

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

The *Brussels II convention*, part 2

The second part of this article examines the substantive provisions of the *Brussels II convention* and assesses its ability to deal with matrimonial matters

On 28 May 1998, the council approved the *Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters* (the *Brussels II convention*), which was signed on the same day by the representatives of all the Member States.

Title 1: scope of the convention

Title 1 provides the scope of the convention to be, among other things, proceedings on divorce, legal separation or marriage annulment and proceedings concerning custody of the children of both spouses on the occasion of the application for a divorce, legal separation or marriage annulment.

The non-recognition of divorces and legal separations was the principal reason for the *Brussels II convention*. In addressing this issue, the parties attempted to strike a balance between those Member States who sought tight jurisdictional rules designed at preventing forum shopping, in particular for their own nationals (for example, Ireland), and those Member States with more liberal divorce laws who sought to preserve their existing generous jurisdiction rules (such as the UK).

Few matters are more troublesome and sensitive than the custody of children on the break-up of a marriage. Accordingly, the inclusion of 'parental responsibility' matters in the scope of the convention caused considerable difficulty. The scope of 'parental responsibility' is broadly confined to custody matters linked to the matrimonial proceedings. The difficulties with this section were not helped by the fact that the *Hague conference* was preparing the 1996 convention on child protection, though the provisions of the *Hague convention* were taken into account in drafting the convention under review. The *Brussels II convention* covers both biological and adopted children of the couple, but not the children of one or other of the spouses from a previous union. Consequently, an Irish order concerning children, some of whom are and some of whom not the children of both spouses, will qualify only for partial recognition under the *Brussels II convention*. Significantly, however, the part of the order referable to children from a previous union will fall to be recognised under the *Luxembourg convention on the recognition and enforcement of custody orders 1980*. Non-marital children are excluded from the scope of the convention.[1] Custody decisions, which are interlocutory in nature, are unsuitable for automatic recognition and enforcement. The Brussels model is therefore highly inappropriate to deal with such matters. The notion that custody cases should be stayed while the matter is referred to the Court of Justice for a preliminary ruling is absurd.

Title II: jurisdiction

Title II sets down the rules of direct jurisdiction that determine which Member State's court is competent to rule both on status matters and on related custody matters. It provides that the convention is potentially applicable where one of the parties is habitually resident in a Member State or is a national of or domiciled (in the Irish sense) in such a state.[2] The establishment of direct jurisdiction in matrimonial matters is the major departure in the *Brussels II convention*.

Habitual residence of one or other of the parties is the central governing criterion for jurisdiction under the convention. This will be interpreted in a manner similar to that adopted by the European Court in relation to other conventions. One interesting feature to be noted about article 2, point (a) of paragraph (i), is that a joint application is facilitated where the application may be made to the authorities of the place in which either spouse is habitually resident. This minor role for the spouses' free choice is absent from the remainder of the *Brussels II convention*. Such an approach stands in stark contrast to the approach adopted in the original convention.

Jurisdiction can also be determined by reference to nationality or domicile and will be conferred on the courts of the state of which both spouses are nationals or where they are both domiciled. States will apply one or other of nationality or domicile. Therefore, while it is likely that common nationality will be acceptable in Spain, domicile will be the criterion for Ireland.

As the convention is silent on the consequences of dual nationality, each state will be free to apply their domestic rules.

Custody. Article 3 ascertains where and under what conditions the judicial bodies with jurisdiction in matrimonial proceedings in the terms delineated in article 2 have jurisdiction in a custody matter over a child of both spouses. The forum exercising jurisdiction in respect of matrimonial proceeding has jurisdiction for custody issues where the child is habitually resident in the same state. Where the child is habitually resident in a Member State other than the Member State exercising jurisdiction in respect of matrimonial proceedings, the courts of the state exercising jurisdiction in the matrimonial proceedings will also have jurisdiction subject to one of the spouses having parental responsibility in relation to the child. The jurisdiction of the courts must also have been accepted by the spouses and must be in the best interests of the child.

Article 4 provides that the jurisdiction conferred by article 3 (that is, custody issues) must be exercised within the limits established in the 1980 *Hague convention* (particularly articles 3 and 16).

Conversion of legal separation into divorce. Article 6 provides that the forum with jurisdiction for the initial separation shall maintain jurisdiction for conversion of the separation into divorce, subject to the caveat that such conversion is possible under the domestic law of the state in question.

Residual jurisdiction. Article 8 organises a system of residual jurisdiction and is parallel to a provision in article 4 of the 1968 *Brussels convention*, if no other court of a contracting state has jurisdiction under articles 2 to 6 of the convention and one of the spouses resides in a non-member state. In such circumstances, jurisdiction is to be determined by reference to the law applicable in the Member State in question.

Examination as to jurisdiction. Article 9 provides an automatic examination by the court of origin as to its jurisdiction in accordance with the grounds laid down in the convention. This was a particularly important provision for Ireland, where there was a very real concern that the convention might be used to circumvent our limited divorce legislation.

***Lis pendens* and dependent actions.** *Brussels II* establishes the same system of *lis pendens* (pending action) as *Brussels I*. Paragraph 1 of article 11 provides that if the same action is brought in two different courts, the court second seised shall stay its proceedings until such time as the first one has passed a final decision. The convention does not adopt the usual requirement that both actions be identical. Rather, it adopts a much wider interpretation of *lis pendens* so that if a party files for divorce in one forum, and the other spouse files for annulment in another contracting state, the second forum must decline jurisdiction.

Provisional and protective measures. Section 4 of the *Brussels II convention* deals with provisional and protective measures. Article 12 is imported from article 24 of the 1968 *Brussels convention* and provides that a court in a contracting state may, even if it does not have jurisdiction under the convention, take emergency steps to protect either assets or persons.

Title III: recognition and enforcement

Title III deals with the recognition and enforcement of judgments. It is very clear from the provisions in Title III (article 14) that recognition is restricted to the dissolution of the marriage bond (annulment, legal separation or divorce) and does not apply to other matters. The procedure for enforcement is analogous to that in the *Brussels I convention*.

Article 13 provides a general definition for the term 'judgment' in paragraph 1, though paragraph 2 states that the term shall also apply to orders for costs and expenses. The term 'judgment' applies only to positive decisions. Consequently, the rejection of the petition is not covered.

Article 15, paragraph 1, details the grounds for non-recognition of judgments for divorce, legal separation or marriage annulment, and paragraph 2 contains the grounds of non-recognition of custody judgments in the event of matrimonial proceedings. The first ground for non-recognition is the fact that it is in serious conflict with public policy in the state in which recognition is sought. While the analogous provision in article 27(1) of the 1968 *Brussels convention* has had little impact, the sensitivities inherent in family law cases may ensure that this provision is subjected to greater use. The significance of this provision is diluted by article 17 of the *Brussels II convention* which prohibits non-recognition of a foreign judgment on the grounds that divorce, legal separation or marriage annulment would not be permitted on identical facts by the law of the Member State in which such recognition is sought. This approach is similar to the arrangement adopted under the 1970 *Hague convention on the recognition of divorces and legal separations*, of which Ireland is not a member.

Refusal of recognition also remains possible on the public policy ground, under article 15, paragraph 2, in custody disputes connected with the matrimonial proceedings. This ground for non-recognition, however, differs from that pertaining to the non-recognition of judgments for a divorce, legal separation and annulment in that it is not possible to refuse recognition purely because the judgment is manifestly contrary to public policy. In a provision that virtually mirrors article 23(2)(d) of the 1996 *Hague convention*, paragraph 2(a) also provides that consideration be given to taking the best interests of the child into account.

Non-review as to substance. Article 18 of the convention prevents a judgment being reviewed as to its substance by the Member State in which recognition is sought.

Title IV: transitional provisions

Title IV deals with transitional provisions. While the convention is generally prospective, it may, in certain circumstances, apply to judgments given after it has entered into force which stem from proceedings initiated before that date.

Title V: general provisions

Title V reviews the relationship of the *Brussels II convention* with the other conventions. Generally, the *Brussels II convention* will take precedence over such conventions to the extent that they address matters governed by both conventions. For example, in so far as its scope includes matters concerning custody of a child of both spouses, the *Brussels II convention* supersedes the 1996 *Hague convention* in circumstances in which protection of the child is connected to the separation or divorce. As previously noted, by virtue of article 4 of the *Brussels II convention*, the *Hague convention on the civil aspects of international parental child abduction 1980* continues to operate.

Special provision has been made for the relationship between the *Brussels II convention* and relevant *Inter-Nordic conventions*. The central idea is that the relevant uniform laws in force within the Nordic states concerning marriage, adoption, guardianship and custody should amount to a derogation from the *Brussels II convention*, in so far as existing agreements are concerned.

This exception to the general application of the convention shall apply only when both spouses are nationals of a Nordic Member State and their normal place of residence is within one of those states.

Article 42 addresses the special situation that arises for those states where annulment procedures are the subject of concordats[3] with the Vatican.

Title VI: Court of Justice

Title VI provides that the European Court of Justice will have jurisdiction in the interpretation of the convention. This particular title prompted much discussion and debate. Some states argued that a great deal of the success of the *Brussels I convention* was attributable to the Court of Justice, pointing to how the court had facilitated the resolution of interpretative difficulties. Those states therefore sought a similar interpretative jurisdiction for the *Brussels II convention*.

Other states argued either against ECJ jurisdiction or suggested that it should be confined. A compromise approach was adopted in article 45 of the *Brussels II convention*, which permitted the principle of ECJ jurisdiction to be included in the convention while leaving the modalities of such jurisdiction to a separate protocol.

Title VII: final provisions

Among other things, title VII deals with matters such as declarations and reservations, entry into force, accession by new Member States and amendments.

Article 46(1) provides that, with the exception of relevant *Inter-Nordic conventions*[4] and concordats[5], the *Brussels II convention* may not be subject to any reservation. Ireland and Italy encountered particular difficulty with article 46(1). This prompted agreement by the Member States to accept the declarations made by both Italy and Ireland.

The difficulties encountered by Ireland did not stem from recognising divorce judgments handed down in another Member State on the basis of more flexible rules than those pertaining in Ireland; it arose from the fact that the test of public policy could not be applied to the jurisdictional rules because of article 16(3). Ireland therefore actively sought the inclusion in the convention of a provision to ensure that parties petitioning for divorce had in fact habitually resided in a Member State to avoid recognition of a divorce obtained on the basis of a false claim to habitual residence. The concern was that the convention could be used as a means to circumvent Ireland's limited domestic divorce regime, which could be in contravention of the Irish Constitution. This might occur if the divorce had been granted at a time when both spouses were habitually resident in Ireland and the foreign court had assumed jurisdiction in the mistaken belief that one or other of the parties was actually habitually resident in the foreign country in question.

In particular, Ireland sought that the convention be amended to permit refusal of recognition or enforcement of a divorce judgment granted in another Member State in circumstances where the jurisdiction to grant the judgment was not founded on a genuine link between one or both spouses and the Member State in question. Ireland wanted the courts of the state of origin to authenticate the genuine existence of the connections provided for in article 2. This proposal sought a departure from the classic prohibition on a review as to substance at the time of recognition enshrined in article 18 of the *Brussels II convention* and article 29 of the 1968 convention. Ireland's difficulties centred on one of the fundamental principles of both *Brussels conventions*. Not surprisingly, this proposal was unacceptable. In order to meet Ireland's difficulties, a compromise solution of the following declaration (which is annexed to the convention) was accepted for a renewable transitional period of five years:

'Notwithstanding the provisions of this convention, Ireland may maintain the jurisdiction which it has to refuse to recognise a divorce obtained in another Member State where that divorce has been obtained as a result of the party, or parties, deliberately misleading a court of the state in question in relation to its jurisdictional requirements such that recognition of the divorce would not be compatible with the Constitution of Ireland'.

Proposal for council regulation

It has now been decided to transpose the substance of the convention into a regulation[6] that will have the effect, among others, of ensuring that it enters into operation for all EU states on the same date in all countries. That date will be earlier than would otherwise be the case if national ratification procedures had been permitted. The regulation will replace the *Brussels II convention* and, when agreed by the council, will have direct effect in Irish law. It will not require any implementing provisions save for some amendments to the rules of court.

There is a close correspondence between the provisions of the convention and of the proposed regulation. The obvious differences between the two types of instrument, however, have necessitated departures from the convention in some respects. For example, article 45 is to be deleted in the proposed regulation as this Community instrument does not need to confer jurisdiction on the Court of Justice, given that such automatically exists in the provisions of article 220 of the *EC treaty*. Similarly, title VII is to be deleted in the proposed regulation, as its provisions would be incompatible with the nature of a regulation. Ireland may therefore request in the course of the discussions on the regulation[7] that the terms of the declaration concerning Ireland be recorded in the council minutes.

The *Brussels II convention* is unlikely to achieve the uniformity realised by the original *Brussels convention*. This is, in part, due to the fact that the conditions that heralded the success of the original *Brussels convention* are not present. Instead of facilitating the European harmonisation of family law and the EU-wide recognition of divorce in all its forms, the complex infrastructure established under the convention is likely to ensure that divorce planning and 'forum shopping' will occur with greater ease. For example, status and children will be covered by *Brussels II* while the distribution of assets will continue to be dealt with under *Brussels I*.

The fact that child law issues will only be addressed if connected to proceedings relating to divorce, legal separation or marriage annulment is to be criticised. It seems superfluous, given the fact that a considerably more far-reaching convention is available in the *Hague convention on the protection of children 1996*.

In conclusion, the *Brussels II convention* is unlikely to achieve its central objective of reducing the incidence of 'limping marriages' due to a failure on the part of the drafters of the convention to acknowledge and address the real practical problems in achieving uniformity in family law. G

Geoffrey Shannon is a solicitor and lecturer in law at the Dublin Institute of Technology.

Footnotes

1 *Pre-nuptial agreements are also excluded from the scope of the convention.*
2 *Articles 7 and 8.*
3 *Concordat is the term used to define international treaties with the Holy See.*
4 *Article 38(2).*
5 *Article 42.*
6 *In May of this year, the commission sent a draft regulation to council.*
7 *Ireland has exercised the option contained in the fourth protocol to the* Amsterdam treaty *permitting this jurisdiction to opt into discussions on the council regulation.*

Conferences and seminars

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

Topic: *Legal aspects of tourism and travel in the European single market*
Date: 21-22 October
Venue: Trier, Germany

Topic: *International private law in the single market: The Europeanisation of liability law*
Date: 25-26 October
Venue: Trier, Germany

Topic: *Current developments in European distribution law: panorama after the Green Paper*
Date: 4-5 November
Venue: Trier, Germany

Topic: *Licensing contracts under European cartel law*
Date: 8-9 November
Venue: Trier, Germany

Topic: *Telebanking and cyber-money in the European single market*
Date: 15-16 November
Venue: Trier, Germany

Topic: *Current developments in European fiscal law*
Date: 18-19 November
Venue: Amsterdam, The Netherlands

Topic: *The Community trade mark: caselaw of the Boards of Appeal of the Office for Harmonisation in the Internal Market*
Date: 18-19 November
Venue: Alicante, Spain

Topic: *The eco-label as a voluntary measure and consumer interests*
Date: 29-30 November
Venue: Trier, Germany

Topic: *Human rights and combating racism in the European Union*
Date: 4-5 December
Venue: Trier, Germany

AIJA (International Association of Young Lawyers)
Contact: Gerard Coll (tel: 01 667 5111)

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

Topic: *Private-public partnership*
Date: 20-21 November
Venue: Warsaw, Poland

IIR
Contact: (Tel: 0044 171 9155055)
Topic: *Data protection Ireland '99*
Date: 3 November
Venue: Stakis Hotel, Dublin

Law Society of Ireland
Contact: TP Kennedy (tel: 01 672 4802)

Topic: *European law healthcheck*
Date: 16 October
Venue: Blackhall Place, Dublin

RECENT DEVELOPMENTS IN EUROPEAN LAW

COMPETITION

Article 81

Limburgse Vinyl Maatschappij NV and Ors v Commission (Joined Cases T-305-7/94, T-313-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94), judgment of the Court of First Instance, 20 April 1999. In 1988, the commission held that 14 European PVC producers had formed a price and quota fixing cartel and imposed fines totalling 23,500,000 ecus. The decision was annulled by the ECJ in 1994, primarily on the ground of lack of proper authentication. In 1994, the commission adopted a new decision. This was then appealed by 12 of the undertakings concerned. They raised a total of almost 80 arguments against the forum, procedure and substance of the contested decision.

The CFI rejected all the arguments alleging defects of form and procedure. The court also rejected almost all the substantive arguments. The undertakings had argued that the principle of inviolability of the home had been violated. The court pointed out that the undertakings had voluntarily co-operated in the investigation. The undertakings had also argued a breach of their right to silence. The court held that this right was not absolute. It did not preclude the commission from compelling an undertaking to disclose documents that established the existence of anti-competitive behaviour. The court also upheld the factual findings of the commission in relation to the cartel. It pointed to meetings between the producers over three years, quota and compensation mechanisms, monitoring of sales in national markets, target prices and a quota system. This disclosed the existence of a concerted practice, the object or effect of which was to restrict competition (through the joint fixing of prices and sales volumes). The concerted practice had an appreciable effect on intra-Community trade.

FREE MOVEMENT OF CAPITAL

Manfred Trummer and Peter Mayer (Case C-222/97), judgment of 16 March 1999. Trummer, an Austrian resident, bought a property in Austria from a German vendor, Peter Mayer. Trummer took out a German mortgage in German marks. Austrian law permitted foreign currency mortgages but required conversion into Austrian schillings on registration. The ECJ was asked to consider whether this requirement operated as a restriction on capital movements, contrary to article 56. The court held that this restriction did contravene article 56. As the debt was in marks but the mortgage was required to be in schillings, this created an exchange control risk. If currencies moved in the wrong direction, this would weaken the security taken by the mortgagee. This would operate as a disincentive to mortgages expressed in a foreign currency. The court further held that the rule could not be defended on grounds of public policy. It could be argued that having all debts assessed in a single currency provided transparency to all creditors so that the sums owing by the debtor could easily be assessed. The court held that even if Austrian law was intended to have that effect, the benefits to unsecured creditors was not outweighed by the detriment to the mortgagee.

FREE MOVEMENT OF GOODS

CRT France International v Directeur Régional des Impôts de Bourgogne (Case C-109/98), judgment of 22 April 1999. CRT imports two-way radios (CBs). In October 1996, the French tax authorities served a tax demand on CRT in respect of the flat-rate tax payable on CBs. CRT argued that the tax was contrary to articles 9, 12 and 95 of the treaty. The ECJ held that a tax is equivalent to a customs duty where it is borne solely by imported products, as in this case. If there is no identical or similar domestic product, the charge can be considered as an internal tax if it relates to a general system of internal dues applied indiscriminately to a category of products by reference to objective criteria irrespective of the origin of the products. Unlike other radio products, the tax on CBs is borne by the supplier. The tax does not fund a specific service rendered to importers. Thus, the ECJ held that the tax was a charge having equivalent effect to customs duty prohibited under articles 9 and 12.

FREE MOVEMENT OF PERSONS

EU citizenship

Florus Ariël Wijsenbeek (Case C-378/97), Advocate General's Opinion, 16 March 1999. Advocate General Cosmas opined on articles 7 and 8a of the treaty, which related to citizenship of the union. He ruled that they cannot be interpreted as requiring the automatic, complete and general lifting of systematic frontier controls where a citizen crosses internal union frontiers. However, article 8a precludes an obligation to show a passport or identity card when crossing national frontiers except if such a requirement is applied without discrimination, is justified by overriding reasons of public policy, is appropriate to achieve the end it pursues and is no more coercive than necessary in order to achieve it.

LITIGATION

Brussels convention

Hans-Hermann Mietz v Intership Yachting Sneek BV, Case C-99/96, judgment of 2 April 1999. The case concerned a contract for the purchase of a yacht between a German purchaser and a Dutch shipbuilder. The agreement was negotiated and concluded at a boat show in Düsseldorf, Germany, but the contract was signed in the Netherlands. The yacht was to be based on a model exhibited at the boat show but substantially re-modelled. The purchaser had agreed to pay the price in instalments before delivery. He failed to meet the payments and the shipbuilders obtained an order against him in the Dutch courts. A German court declared this order to be enforceable in Germany. The purchaser appealed to a higher regional court and then to the *Bundesgerichtshof*. He argued that the German courts had exclusive jurisdiction over disputes arising from the contract. The ECJ held that the contract was a consumer contract within the meaning of article 13(1)(3) of the *Brussels convention* and thus conferred exclusive jurisdiction on the German courts. The contract did not fall within article 13(1)(1), which relates to contracts on instalment credit terms, as the full price had been paid before transfer of possession. G

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Law Society Annual Conference


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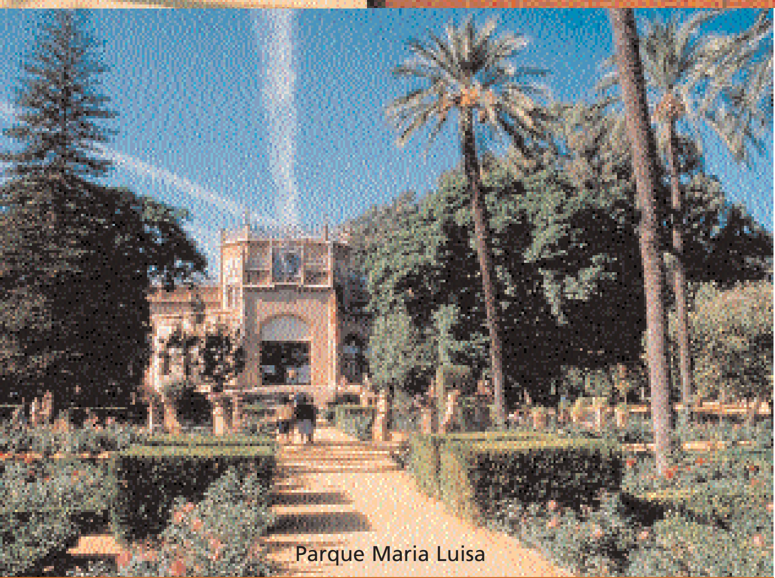
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(weekend after Easter)

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Advance booking form

SEVILLE 2000

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Guidelines for a graceful exit
Keenan Johnson, Chairman of the Law Society's Guidance and Ethics Committee, with members of the committee who recently launched a new publication, the snappily-titled *Solicitors ceasing practice: guidelines for solicitors retiring or ceasing to practice as sole practitioners or sole principals and for solicitors purchasing practices from them*. Copies of the booklet are available from the Law Society

Gardaí in lawyer-bashing shocker!
The Gardaí denied using any undue influence in extracting a victory from the Law Society Golf Team at the annual Law Society/Garda Síochána golf match recently. The Garda team took possession of the *President's Perpetual Golf Trophy* to be used as evidence of their sporting prowess. Pictured in the line-up were (*front row, l-r*): Immediate Past-President Laurence K Shields, Garda Commissioner Pat Byrne, Law Society President Patrick O'Connor and Law Society Past-President Frank Daly; (*back row, l-r*): Criminal Assets Bureau's Legal Officer, Barry Galvin and its Head, Fachtna Murphy, Barry Donoghue, Chairman of the Criminal Law Committee, Director General Ken Murphy, Junior Vice-President Gerard Griffin and Deputy Director General Mary Keane

New Law School journal to be launched

Apprentice solicitors are pleased to announce the launch of an exciting new law journal. The primary aim of the *Hibernian law journal* is to provide a forum for apprentices and newly-qualified solicitors who wish to engage in legal scholarship of a high calibre.

The journal will be published bi-annually with each edition containing six articles of approximately 8,000-12,000 words, and four to six commentaries of approximately 2,000-4,000 words. The subject areas for both articles and commentaries will not be restricted.

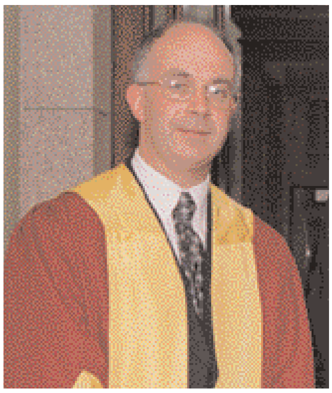
An editorial committee will be responsible for the overall management of the journal, including editorial policy, and will be advised by an honorary editorial board. Its membership is comprised of TP Kennedy, Legal Education Co-ordinator of the Law Society, as editor-in-chief, and apprentice solicitors Marsha Coghlan of A&L Goodbody, John Meade of McCann FitzGerald, Geoff Moore of Arthur Cox and Philip Nolan of Mason, Hayes & Curran.

The committee urges all apprentices and newly-qualified solicitors to consider contributing. Anyone requiring further information should contact any of the committee members. G

Albert moves on

Dr Albert Power has left his position as the Law Society's Director of Education to take up an appointment as Director of Education and Training with the Institute of Chartered Accountants. In this challenging new position, he will be responsible for all of the pre- and post-qualification education and training of chartered accountants in Ireland. The Society regrets the loss of an outstanding contributor to its education system but wishes him every success in this new phase of his career.

Albert qualified as a solicitor in 1983 and served as the Society's Education Officer for two years in the mid-1980s, following which he practised employment law with the Federated Union of Employers. He returned to the Society in 1989, and over the following ten years rose steadily from the position of Assistant Director of Education to become Head of the Law School and Director of Education in 1994. As such, he was well known to the two thousand or more solicitors who passed through the Society's training courses over the last decade.



Albert Power: 'simply the best'

At Albert's final parchment ceremony on 10 September, the President, Patrick O'Connor, paid generous tribute to his contribution to the Society. At a subsequent event to mark his departure, the Director General, Ken Murphy, said that Albert was 'quite simply the best administrator' he had ever worked with. Albert had 'guided the Society's education through some very difficult periods when the sheer volume of apprentices and the extra courses which they required, together with inadequate facilities, regular turnover of professional staff and the uncertainties caused by legal challenges and the lack of any clear policy framework for the future represented problems which would have overwhelmed anyone who was less resourceful, hardworking, efficient and able'. He noted that, as Albert himself had pointed out, it was ironic that he was departing 'at a time when most, if not all, of these problems have been successfully overcome, a new direction for education has been approved by the membership, the £5 million new education centre is well under construction, the new course is being designed and the future for legal professional training in the Law Society has never been brighter. The timing and size of his new challenge are his only reasons for departing. We thank him for his outstanding contribution over the years and wish him well in his future career.' G

CONTINUING LEGAL EDUCATION

AUTUMN/WINTER SCHEDULE

NEW PENSION OPTIONS FOR THE SELF-EMPLOYED	Blackhall Place, Dublin and Imperial Hotel Cork	12 October 1999 30 November 1999
PENSIONS & THE FAMILY LAW ACTS	Fitzpatrick's Hotel, Tivoli, Cork	14 October 1999
MEDICAL NEGLIGENCE (BOOKED OUT)	Blackhall Place, Dublin	21 October 1999
SHAREHOLDERS' AGREEMENTS	Imperial Hotel, Cork	28 October 1999
PERSONNEL MANAGEMENT	Blackhall Place, Dublin	3 November 1999
NEW HOUSES	Blackhall Place, Dublin	4 November 1999
SHARE PURCHASE AGREEMENTS AND THE ACQUISITION AND DISPOSAL OF PRIVATE COMPANIES	Blackhall Place, Dublin	8 November 1999
FAMILY LITIGATION POST BRUSSELS II CONVENTION	Blackhall Place, Dublin and Imperial Hotel, Cork	10 November 1999 23 November, 1999
BASIC CAT FOR PRACTITIONERS	Hodson Bay Hotel, Athlone	15 November 1999
SETTING UP IN PRACTICE	Blackhall Place, Dublin	17 November 1999
TRUSTS	Blackhall Place, Dublin	25 November 1999
THE PRINCIPLES OF PRACTICAL DRAFTING OF DEEDS IN CONVEYANCING TRANSACTIONS	Blackhall Place, Dublin	7 December 1999

For further information, please see CLE brochure enclosed with this month's *Gazette or* telephone the CLE department on 01 6724802 or fax 01 6724803. Suggestions for CLE seminars are always welcome.

***Aul' Lang Syne* and all that**

Law Society President, Patrick O'Connor, with guests at a recent reunion dinner in Blackhall Place for the UCD BCL graduation class of 1973. The guests also included solicitors admitted to the Roll of Solicitors in 1974/75

Quality counts for Limerick firm

Limerick solicitors FB Keating & Co became the latest firm to join the quality club when it was awarded the ISO 9002 quality award from the National Standards Authority of Ireland (NSAI). In the picture are *(l-r):* Frank Keating, Managing Partner, FB Keating & Co, NSAI's Michael Kelleher, Tony Murray, Partner, FB Keating & Co, and Willie O'Dea TD, Minister of State at the Department of Education and Science

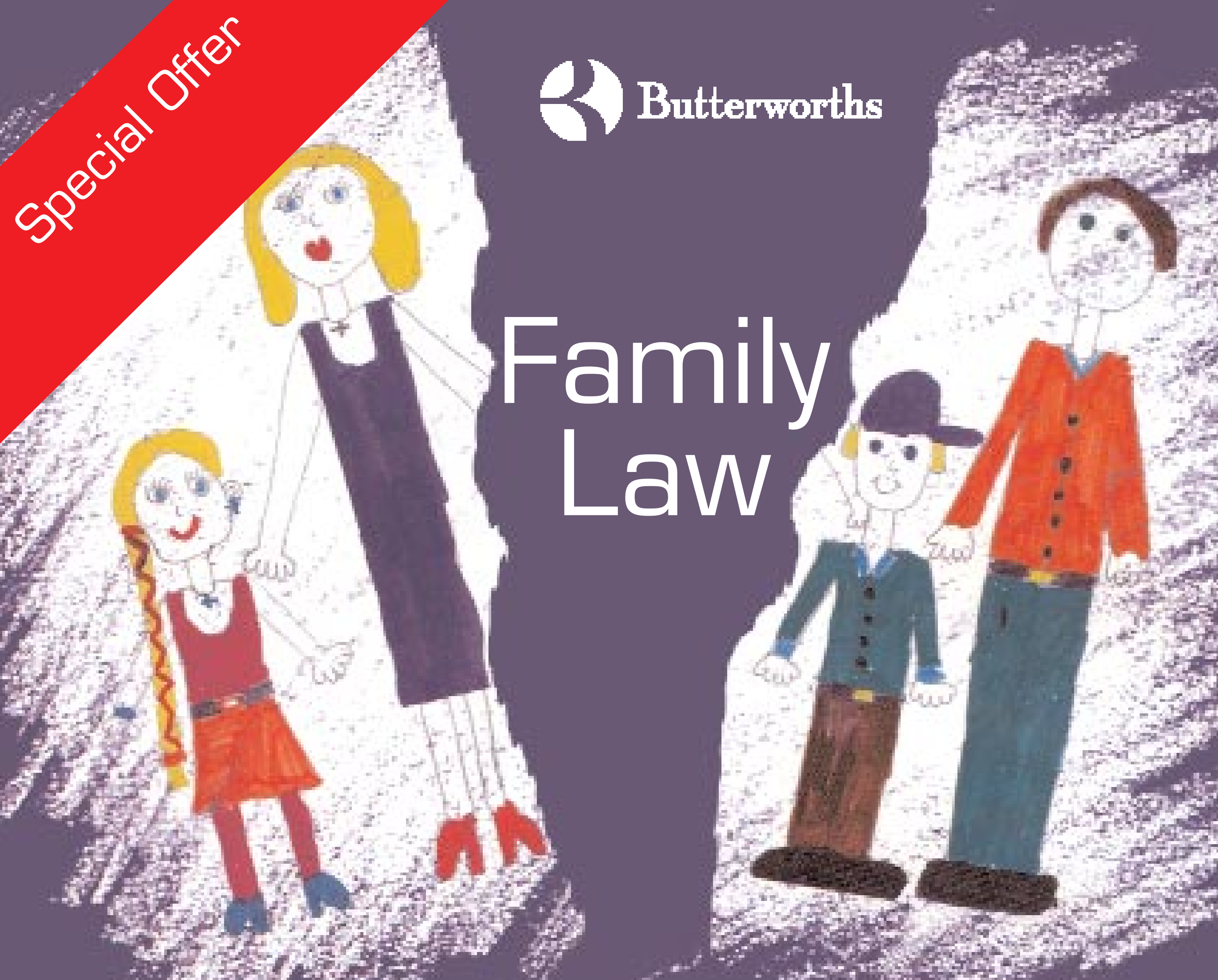
DSBA letting agreement

The Dublin Solicitors' Bar Association has published a new *Letting agreement* document. The document, together with a disk, costs £70 and can be obtained from either Hugh O'Neill at Marcus Lynch & Co (tel: 01 8732134) or from DSBA secretary Mary Rigney (tel: 01 2859758).

The DSBA sub-committee which drafted the new *Letting agreement:* Colm Price (Kearns Price & Co), Christine Scott (Arthur Cox), DSBA President Hugh O'Neill, Kevin O'Higgins (Kevin O'Higgins Solicitors), and Marjorie Murphy (Murphy McElligott Solicitors)

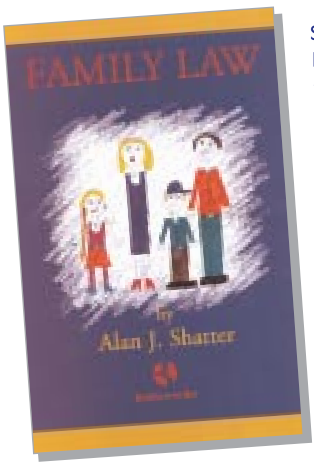
SADSI Gala Ball

The SADSI annual Gala Ball was held in July in the Imperial Hotel in Cork. SADSI would like to thank all the sponsors who contributed to the success of the event: A&L Goodbody, Arthur Cox, Bank of Ireland, Beamish & Crawford, BCM Hanby Wallace, Butterworths, Cork Dry Gin, Circle Press, Coopers Restaurants, Esat Digifone, Eugene F Collins, William Fry, Hibernian Legal, Hotel Conrad, Imperial Hotel, Jurys Doyle Hotels, LK Shields, Mason Hayes & Curran, Matheson Ormsby Prentice, McCann FitzGerald, Milano, O'Callaghan Hotels, Rochford Brady Legal Services, Schwartz, Southern Law Association, and Whitney Moore & Keller.



Order both these books together, before October 31st 1999 and pay just £110. (Normal joint price £140)

Shatter: Family Law, 4th Edition

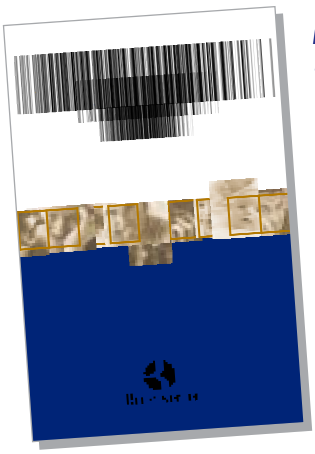


Since the first edition of **Shatter: Family Law** was published almost 20 years ago, this book has become the authoritative family law textbook for both practitioners and students.

Features:
- All the constitutional and statutory reforms enacted in recent years
- All recent case law developments
- Discussion of the law's inadequacies and anomalies and suggestions for further reforms
- Deals in detail with divorce, separation and nullity (recognition of foreign divorces)
- Ancillary relief orders, adoption, custody, child abduction and child card disputes
- Matrimonial Property, Family Home Protection and Succession Act

April 1997 £90.00 Product code SFL4 ISBN 1 85475 124 7

Irish Family Law Handbook



By Deirdrey Kennedy, BA, LLM, BL and Elizabeth Maguire, MA, LLB, MLitt, BL

The **Irish Family Law Handbook** brings together in one volume all the relevant family law legislation, fully consolidated and up to date. Each section is annotated to indicate amendments or repeals. The editors have selected all the relevant family statutes which busy practitioners need to refer to on a regular basis.

This volume should prove to be an indispensable reference work for all family law practitioners.

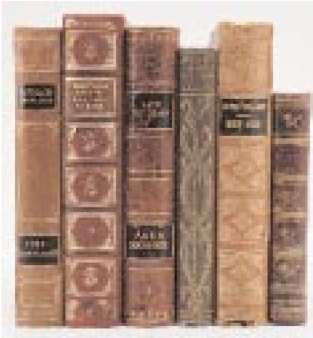
Outline Contents Part 1: General Family Statutes Part 2: The Adoption Acts

Part 3: Rules of Court

Publication date: August 1999 £50.00 ISBN: 185 475 8357

To order your copy contact Butterworths:

26 Upper Ormond Quay, Dublin 7 Tel (01) 873 1555 Fax (01) 873 1876 e-mail: ircustomer@butterworths.co.uk



Book reviews

Negotiating international joint venture agreements

Stephen Sayer

Sweet & Maxwell (1999), 100 Avenue Road, London NW3 3PF, England. ISBN: 0-421-63140-6. Price: stg£195

A book entitled *Negotiating international joint venture agreements* may not be at the top of the shopping list of many Irish solicitors whose practice is confined to local or national cases. But, in fact, this book is extremely relevant and useful for practitioners who are involved in joint ventures or similar arrangements, whether nationally or internationally.

The book is a practitioner's guide to joint ventures. It has precedents and commentary. Practitioners would find it invaluable. Indeed, the book comes with a disk containing the precedents so there is no need to re-type the precedents in the book! (The disk will operate in WordPerfect and Word, for example.)

The author, Stephen Sayer, is the head of Richards Butler's Commercial and EC Group. He has been a partner for a quarter of a century. The book contains a wealth of practical and academic experience.

The introductory part of the book begins with a 'general briefing' on joint ventures. It includes consideration of questions such as why have a joint venture, the key provisions of agreements, and what to remember in the pre-contract negotiations. It also deals with due diligence and competition law.

The second part of the book examines the corporate joint venture. Practitioners will welcome the fact that this part is not a dry, theoretical commentary but rather an analysis of a precedent agreement with a commentary on the provisions. This part obviously contains references to UK legislative provisions that an Irish reader would need to treat with some caution.

The third part deals with co-operative or contractual joint ventures. Again, this is a precedent-based analysis.

The penultimate part examines the European Economic Interest Grouping. The EEIG was created by Regulation 2137/85 and was meant to be the great hope in terms of providing a vehicle for cross-border business within the EU. It has been a relative disappointment, with few EEIGs registered. Nonetheless, should one wish to form an EEIG, this book contains a precedent and practical advice.

If the book has drawbacks, it is that it is a loose-leaf work that does not dwell on any issue for too long but races ahead to the next clause. The publishers should reconsider whether it should be loose-leaf because this book could well be published as an annual handbook. The fact that it does not linger over issues may not be a problem at all for the primary audience of this book – the practitioner in search of a precedent and practical advice.

Overall, the title of this book should not deter a national audience. It is written by a practitioner for practitioners. It would be difficult to imagine a more useful book on the subject. **G**

Vincent Power is a partner with solicitors A&L Goodbody.

Digital media: contracts, rights and licensing (second edition)

Alan Williams, Duncan Calow and Nicholas Higham

Sweet & Maxwell (1998), 100 Avenue Road, London NW3 3PF, England. ISBN: 075200 4204. Price: stg£120

Ireland is the world's second-largest software exporter. We are only behind the United States. Reuters recently reported that there is a fortune to be made in on-line commerce and that the Irish stand a good chance of getting their hands on the spoils. Trade in goods and services over the Internet is expected to be worth $1.3 trillion globally by 2003, and Ireland has been positioning itself to be an 'e-commerce' hub.

This second edition of *Digital media* reflects the further development of new media from the core digital technology. New legal and regulatory frameworks are rapidly developing in Ireland, Europe and the United States to cover the ever-expanding methods of electronic delivery: CD-Rom, Digital Versatile Disc (DVD), video-on-demand (VOD), interactive television (ITV), on-line services and the Internet.

Included in this edition are the latest technical and commercial developments, an expanded section on Internet and on-line services, guidance on distribution issues, precedent agreements and practical checklists and updates on relevant caselaw and legislation. A disk is included, covering sample clauses and precedent materials contained in the book.

All the writers are from the Digital Media Team at UK solicitors Denton Hall.

Digital media adopts a practical approach which will be welcomed by all those determined to make their legal and commercial presence significant in any digital media deals. **G**

Dr Eamonn G Hall is Company Solicitor of eircom plc.

The ethics and conduct of lawyers in England and Wales

Andrew Boon and Jennifer Levin

Hart Publishing Ltd (1999), 19 Whitehouse Rd, Oxford OX1 4PA, England. ISBN: 1-84113-018-4. Price: stg£30 (hbk); stg£16 (pbk)

When I read the publisher's claim that, for the first time in England and Wales, this book addressed fundamental issues of the ethics and conduct of lawyers, I was quite surprised, being aware of many publications on professional conduct. Like most lawyers, I would have thought of ethics and professional conduct as two sides of the one coin. However, this book addresses a very necessary distinction between the two and asks whether there is any clear ethical basis for either the solicitors' or barristers' codes of conduct in England and Wales. This question is very relevant today, as lawyers everywhere seek to identify the essential values of their professions so that these can be preserved, even in our changing times.

The principles behind lawyers' codes of conduct are universal and consequently the subject matter of the book is completely relevant to the Irish context.

The book is divided into five parts. The first part opens our minds for the examination which is to follow. The codes and principles of conduct of the two branches of the profession are examined in their historical and social context.

In the next part, the question of how both professions show a commitment to ethics in their disciplinary and regulatory procedures is raised, and this part includes an examination of how complaints against solicitors and barristers are processed. The place which ethics and professional conduct have been given in legal education is considered, and it is noted that ethics have never featured prominently in the curricula of either undergraduate or vocational legal education.

Part three examines the duties of lawyers to clients and third parties, and looks at the duty to provide a public service, the latter usually accepted as one of the hallmarks of a profession. Inevitably, there are occasions when these duties conflict. What balance is the lawyer expected to achieve?

The issues of confidentiality and conflict of interest are examined in part four. Confidentiality is at the very core of the lawyer/client relationship but is now being eroded by legislation. Conflict of interest is discussed in various situations, including the difficult area of conflict concerning the interests of children. Conflicts arising between lawyers' own interests and those of their clients are also considered. This leads nicely into the final chapter of this section which examines lawyers' fees.

Part five looks at the lawyer's role in litigation and advocacy. There is a prediction that if lawyers fail to adapt to the role of facilitator in alternative dispute resolution, they will be left behind.

The epilogue looks to the future and at the globalisation of ethics and international codes.

Part one will be difficult reading for the average solicitor because – this being an interdisciplinary examination – the language of philosophy and sociology is used. For instance, there is discussion as to whether a deontological or teleological approach is a more appropriate methodology for the evaluation of the subject matter. But the reader should not be deterred. If necessary, the excellent introduction and conclusion to all of the chapters would be a sufficient base to allow progression to the main part of the book.

This book carries out an exercise which is important at the present time. Ethical issues have come into focus not only for the legal professions themselves but also for the media and for government.

The authors are to be congratulated. This is an important book. G

Therese Clarke is senior solicitor in the Law Society's Practice Queries/Professional Guidance section.

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 1 October 1999)

Regd owner: Brendan Cullen; Folio: 12247F; Lands: Pollerton and Barony of Carlow; **Co Carlow**

Regd owner: John Abbot; Folio: 98427F; Lands: Townland of Coldcut and Barony of Uppercross; **Co Dublin**

Regd owner: Patrick James Duffy; Folio: DN10530F; Lands: 105 Killester Avenue, Parish of Artaine, District of Artaine West; **Co Dublin**

Regd owner: Brendan Noel Mulvanny; Folio: DN13734L; Lands: The property situate in the East of Ballygall Road East in the Parish of Finglas, District of Finglas North; **Co Dublin**

Regd owner: Patrick McGowan, Glibe, Stranorlar, County Donegal, and Edenmore Farm, Lifford, County Donegal; Folio: 8168F; Lands: Area: 122.00 acres; **Co Donegal**

Regd owner: William James Wilson, Ballydevitt, Donegal, County Donegal; Folio: 10003; Lands: Ballydevitt; Area: 15.738 acres; **Co Donegal**

Regd owner: John Callanan, Kingston, Taylors Hill, Galway; Folio: 53715; Lands: Townland of Culfin and Barony of Ballynahinch; Area: 0a 2r 36p; **Co Galway**

Regd owner: Eamonn and Mary O'Brien; Folio: 19169; Lands: Townland of (1) Shronebeirne, and (2) Knocknacaheragh and Barony of Iraghticonnor; Area: (1) 1.225, and (2) 1.15 acres; **Co Kerry**

Regd owner: Edmond Garvey (deceased); Folio: 3842 and 4061; Lands: Townland of Ballingoola and Barony of Smallcounty; Area: (1) 13.327 acres, (2) 54.26 acres; **Co Limerick**

Regd owner: Joseph Hanrahan; Folio: 10404F; Lands: Townland of Parish of St Nicholas and Barony of a plot of ground situated on the north side of the road leading from Farranshone to Thomond Row; **Co Limerick**

Regd owner: Richard Joyce, Kilsallagh Lower, Kilsallagh Post Office, Westport, Co Mayo; Folio: 4619F; Lands: Townland of Kilsallagh Lower and Barony of Murrisk; **Co Mayo**

Regd owner: Hubert Harton Concrete Limited, Swanlake House, Creighan, County Cavan; Folio: 17351F; Lands: Pottlereage; Area: 14.907 hectares; **Co Meath**

Regd owner: Thomas McCann, Bettystown, Drogheda, Co Meath; Folio: 6755; Lands: Betaghstown; **Co Meath**

Regd owner: John Price, Grange, Castletown, Navan, Co Meath, and St George's Cross, Castletown, Navan, Co Meath; Folio: 13162; Lands: Castletown; Area: 6.375 acres; **Co Meath**

Regd owner: Christopher Farrelly (o/w James Christopher), Bawn, Drumlish, Co Longford; Folio: 6988; Lands: Bawn; Area: 11a 3r 10p; **Co Longford**

Regd owner: Andrew Kenny (deceased), Rooskey, Bealnamullia, Athlone, Co Roscommon; Folio: 21427; Lands: Townland of Rooskagh and Barony of Athlone South; Area: 9a 1r 7p; **Co Roscommon**

Regd owner: Brian Feeney, Lisgorey, Calry, Co Sligo; Folio: 19032; Lands: Townland of Lisgorey and Barony of Carbury; Area: 33.431 acres; **Co Sligo**

Regd owner: Edward Kilbane, Mullaghroe, Gurteen, Co Sligo; Folio: 1449; Lands: Mullaghroe; Area: 79 acres and 11 perches; **Co Sligo**

Regd owner: Peter James Scanlon (deceased), Achonry, Ballymote, Co Sligo; Folio: 3306; Lands: Townland of Achonry and Barony of Leyny; Area: 26a 0r 1p; **Co Sligo**

Regd owner: Patrick Toher, Glen Upper, Glencar, Co Sligo; Folio: 6443; Lands: Townland of Glen Upper and Barony of Carbury; Area: 20a 1r 24p; **Co Sligo**

Regd owner: William and Assumpta Bergin; Folio: 18906F; Lands: Bohereenduff and Barony of Iffa and Offa West; **Co Tipperary**

Regd owner: James O'Dwyer and Eleanor McGarry; Folio: 15190F; Lands: Townland of Urban District of Dungarvan and Barony of Decies without Drum; **Co Waterford**

Regd owner: Cecil June Stewart (deceased); Folio: 3443F; Lands: Stokestown and Barony of Bantry; **Co Wexford**

Regd owner: Mary Anne Fanning; Folio: 612; Lands: Kilmurray Lower and Barony of Arklow; **Co Wicklow**

Regd owner: John and Dolores McMahon; Folio: 108649F; Lands: 23 Seskin View Road, parish of town Tallaght, Dublin 4; **Co Dublin**

WILLS

Cooper, Winifred, late of 3 O'Rourke Park, Sallynoggin, Co Dublin. Would any person having knowledge of a will executed by the above named deceased who died on 5 August 1999, please contact Philip Clarke, Ledwidge Solicitors, 1 Adelaide Street, Dun Laoghaire, Co Dublin, tel: 01 2808055 (Ref: PC/7383)

Crowley, Patrick, late of Piper's Cross, Kilmoney, Carrigaline, Co Cork, formerly of 20 River's View Road, Chiswick, London, England. Would any person having any knowledge of any will executed by the above named deceased who died on 29 August 1999, please contact Ahern Roberts Williams & Partners, The Old Rectory, Cork Road, Carrigaline, Co Cork, tel: 021 374444, fax: 021 374244

Lavin, Thomas (deceased), late of Irishtown, Foxford, County Mayo. Date of death 13 August 1995. Will any person(s) knowing of the whereabouts of the original will dated 13 February 1995 of the above named deceased, please contact MacHales, Solicitors, Ballina, Co Mayo, tel: 096 21122, fax: 096 21179

Murphy, Rita (deceased), late of 32 Rowan Hall, Millbrook Court, Milltown, Dublin 6. Would any person having knowledge of the whereabouts of the original will dated 24 September 1996 of the above named deceased who died on 22 February 1999, please contact Messrs Samuel Roche & Co, Solicitors, Barrack Street, Tullow, Co Carlow, tel: 0503 51123, fax: 0503 51217

Radley, George (deceased), late of the Brake, Cobh, Co Cork. Would any person having knowledge of a will of the above named deceased who died on or about 24 August 1999, please contact Messrs Coakley Moloney, Solicitors, 49 South Mall, Cork (Ref: PD), tel: 021 273133, fax: 021 276948

Twomey, David, late of Glenakip, Rathcormac, County Cork. Would any person having a knowledge of a will executed by the above named deceased who died on 5 May 1999, please contact Frank Buttimer & Co, Solicitors, 19 Washington Street, Cork, tel: 021 277330 (Ref: CBW)

EMPLOYMENT

Solicitor, currently full-time lecturer on law degree course, seeks position in research and/or training in Dublin firm, especially company/commercial law area, F/T or P/T. 6½ years' experience as researcher in major Dublin law firm, including setting up and maintaining internal research systems, researching legal problems for practitioners, in-house training, writing for law publications etc. Reply to Box No 76

Post-professional course apprentice with experience (returning to Law Society for advanced course May/June 2000) seeks apprenticeship in North Wicklow/South Dublin area. **Reply Box No 80**

FDC Tax Planning Dept. We are a young, rapidly-expanding tax department. We serve a large portfolio of clients through a network of 20 offices. We now wish to recruit: **Senior/Junior Tax Consultant** and **Trainee Tax Consultants**. We require personable, self-motivated individuals who desire to advance within our Tax Department. Payment will be commensurate with experience, qualification and ability. Please forward applications to: Donncha Collins, FDC Tax Planning Dept, FDC House, Wellington Road, Cork

Apprentice (post-professional course) seeks a challenging position in top five firm, preferably in a private client department. **Reply Box No 81**

Experienced legal secretary wishing to work from home, will undertake all typing, secretarial work etc; fast efficient service; confidentiality assured. Contact G Murray, tel: 4562906

Locum solicitor required for Limerick city centre general practice. December 1999–April 2000. Family law experience desirable. Salary negotiable. Applications to: Patricia O'Connor, Solicitor, 104 Henry Street, Limerick

Ernst & Young seek post-advanced course/newly or recently-qualified solicitors for their tax department. Positions available in financial services and succession planning areas. Commercial experience preferable but not essential. Applications are also invited from experienced solicitors wishing to specialise in taxation. We offer competitive salaries and excellent opportunities for advancement based on performance. Apply with CV to Philip Oxley, Human Resources, Ernst & Young, Ernst & Young Building, Harcourt Centre, Harcourt Street, Dublin 2, tel: 01 4750555, fax: 01 4750599

MISCELLANEOUS

Northern Ireland solicitors providing an efficient and comprehensive legal service in all contentious/non-contentious matters. Dublin-based consultations and elsewhere. Fee apportionment. ML White, Solicitors, 43-45 Monaghan Street, Newry, County Down, tel: 080 1693 68144, fax: 080 1693 60966

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 McAllen 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

Will anyone acting for the estate of Francis Nolan of 56 Haddington Road, Dublin 4, or William Nolan of the same address, or Louisa Eyers of 133 Parnell Terrace, South Circular Road, Dublin 8, or anyone knowing of the successors of these persons, please contact Orpen Franks, Solicitors, (Ref: EH), 28/30 Burlington Road, Dublin 4

Legal practice in Dublin/Leinster area required. Principals may send details stating approximate annual turnover and nature of business carried out to **Box No 82**. All applications will be dealt with in the strictest confidence.

Halsbury 1917, Volume 1 to 31, hardback, defective end on volumes 8 and 26. Always useful. Price is £200, tel: 8333520, 12–2pm

Legal practice. Work and progress and good will of existing solicitor's practice for sale. Would suit existing practice or set-up situation. Reply to Dermot M Dempsey & Co, Solicitors, O'Growney Street, Athboy, County Meath, tel: 046 32583/4, fax: 046 32716

TITLE DEEDS

In the matter of the *Registration of Title Act, 1964* and of the application of Martin Kavanagh in respect of property in the county of Carlow
County: Carlow
Lands: Ballinagilkey
Dealing no: D1999JS002713Y

Take notice that Martin Kavanagh of Ballinagilkey, Hacketstown, County Carlow, has lodged an application for registration on the freehold register free from encumbrances in respect of the above property. The original title documents specified in the schedule hereto are stated to have been lost or mislaid. The application may be inspected at this registry.

The application will be proceeded with unless notice is received in the registry within one calendar month from the date of publication of this notice that the original documents of title are in existence. Any such notice should state the grounds on which the documents are held and quote the dealing reference above.
Sean MacMahon, Examiner of Titles

Schedule
Deed of conveyance dated 27 April 1922 from James Hibbert Newton to Denis Brophy of lands at Ballinagilkey.

Estate of George Twibill (deceased)
Would any person or parties who knows the whereabouts of the title documents to dwelling house known as 210 Ard Easmuinn, Dundalk, Co Louth, residence of George and Maureen Twibill (both now deceased) which consist of a deed of assignment dated 31 December 1970 between Dundalk Urban District Council and Charles Fearon and a deed of assignment dated 5 August 1971 between Charles Fearon and George Twibill, please contact MacGuill & Company, Solicitors, 5 Seatown, Dundalk, tel: 042 9334026, fax: 9334897