Law Society Gazette

Regulars

Cover Story

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INTERNATIONAL CORRUPTION SYMPOSIUM

An international symposium on the OECD convention on combating bribery of foreign public officials will be held in Bruges, Belgium, on 14-15 September. The conference, organised by the American Bar Association, the International Bar Association and the CCBE, will bring together experts on the OECD convention and other anti-corruption initiatives. It will include discussions on money laundering and bank secrecy laws. For further information, contact the ABA's international law section on +202 662 1727 (web: *www.abanet.org/intlaw*).

ACCOMMODATION FOR APPRENTICES

The Education Department is currently compiling an accommodation list that will be made available to students on the forthcoming professional practice course part 1, which will run from 4 October until 4 May 2001. Students will also be attending advanced courses during the summer months. If you wish to have details of your property included on the list, please contact Geoffrey Shannon or Gráinne Butler in the Law Society's Education Department on 01 672 4802.

CONSUMER WEBSITE UPGRADED

The European Consumer Centre (ECC) has updated its website (*www.ecic.ie*) so that it is a more comprehensive and easier-to-use resource for citizens seeking information and advice on their consumer rights on-line. The new look website includes tips and guidelines on a wide range of consumer issues, including buying on-line, air passenger rights and step-by-step procedures for making a complaint to a retailer or service provider. Consumers can also download the ECC's recent publication *The small claims court: a consumer's guide.*

American lawyers harden their opposition to MDPs

The drive towards multi-disciplinary partnerships and practices (MDPs) suffered a set-back recently with the news that the American Bar Association has voted decisively to ensure that MDPs continue to be outlawed in the United States. The movement for MDPs is led by accountancy firms in a number of jurisdictions which want to see the establishment of partnerships or practices involving lawyers and other professionals.

Last year an ABA commission proposed that MDPs might be tolerated, provided lawyers retained majority control of the entities in question. But even this was too great a potential threat to the core values of the American legal profession, according to a resolution passed by a three-to-one voting majority of the ABA's ruling house of delegates at its annual meeting in New York in July.

The lengthy resolution passed at the meeting emphasised the need to preserve the core values of the legal profession, including 'the lawyer's duty of undivided

loyalty to the client' and his duty 'to exercise independent legal judgement for the benefit of the client … to hold client confidences inviolate … and to avoid conflicts of interest'. One of the proposers of the motion said that its objective was 'to nail this issue once and for all'.

This decision by the largest (numbering one million) and most powerful legal profession in the world will reinforce opposition to MDPs in Europe and elsewhere. Last year the CCBE, the umbrella body for national law societies and bar associations in Europe, came out in opposition to MDPs, with only the Law Society of England and Wales dissenting.

The Law Society of Ireland has long held the position that MDPs would be contrary to the public interest and to the interests of the legal profession in this country.

Disappointment over judicial appointments bill delay

The Law Society has said it is 'disappointed' that legislation which would allow the appointment of solicitors to the superior courts benches has not yet been published.

According to Director General Ken Murphy: 'Both I and other members of the society have raised the matter with the minister for justice, and we have been assured that it is other aspects of the bill – not the part dealing with judicial qualifications – which have been causing the delay'.

US lawyers meet in Blackhall Place

The Tánaiste Mary Harney was the main guest speaker in Blackhall Place when the American Bar Association held a meeting in Dublin recently for the first time in 15 years. Members of the international section of the ABA spent a few days in Ireland during a marathon two weeks which began in New York and continued in London.

Speaking on the topic *Ireland as a gateway to Europe*, Harney regaled the audience with statistics about Irish economic performance. She particularly emphasised the extent to which the Celtic Tiger has US origins: 27% of American investment in Europe is made in Ireland, a

Tánaiste Mary Harney and Director General Ken Murphy at the ABA's Dublin meeting

member state with only 1% of the EU's population.

Other speakers at the seminar were Sir George Quigley, chairman of Ulster Bank, General Motors chairman Robert C Weinbaum, and Law Society Director General Ken Murphy.

Discrimination in AG's office 'absurd and indefensible'

The Law Society has again hit out at the exclusion of solicitors from positions in the attorney general's office, branding the practice 'absurd and utterly indefensible'. Advertisements for the posts of third and fourth legal assistant in the AG's office had appeared in the national press, stipulating that only barristers need apply.

In a strongly-worded letter to attorney general Michael McDowell, Law Society Director General Ken Murphy said: 'To exclude all solicitors, regardless of their experience or ability, from consideration for these appointments is to exclude more than 80% of the practising lawyers in the state. It constitutes discrimination without objective justification. It is a restrictive practice which is fundamentally contrary to the public interest'.

Attorney general Michael McDowell: prejudice against solicitors?

Murphy added that the Law Society believed every position for a lawyer in the public service should be open to all lawyers and should be filled by the best candidate, regardless of whether that candidate is a solicitor or a barrister. And he pointed to the 'special irony' that the AG's office was currently involved in drafting legislation which would allow solicitors to be appointed to the High and Supreme Court benches, noting that solicitors could even become attorney general but not, apparently, third and fourth legal assistants.

'The position taken by your office on this matter is, in the view of the society, absurd and utterly indefensible', he told McDowell. 'Is it merely an outdated tradition? Or is it simply a form of prejudice – something offensive to solicitors and highly inappropriate in the office of the attorney general?'

He concluded by calling on McDowell to discontinue this discriminatory practice and to readvertise the positions as open to solicitors as well as barristers. His letter has been copied to the taoiseach and the relevant government ministers.

At the time of going to press, there had been no response from McDowell.

LAW SOCIETY RETIREMENT TRUST SCHEME
Unit prices: 1 August 2000
- **Managed fund: 355.679p**
- **All-equity fund: 112.057p**
- **Cash fund: 179.453p**
- **Pension protector fund: -**

IRISH SOLICITOR FOR INTERNATIONAL ARBITRATION COURT
Michael Carrigan, a partner in the Dublin law firm Eugene F Collins, has been named as the Irish representative on the International Court of Arbitration. The court operates under the aegis of the International Chamber of Commerce and is one of the major organisations involved in international commercial dispute resolution. Carrigan is the first Irish solicitor to have been appointed to the court.

NEW CHIEF STATE SOLICITOR
Cork Corporation law agent David O'Hagan has been appointed chief state solicitor, taking over from Michael Buckley, who retired earlier this year. O'Hagan qualified in 1978 and took up his new position in July.

New diploma in commercial law

The Law Society's new nine-module *Diploma in commercial law* will begin in November and run for approximately 12 months. The diploma is intended to appeal to both solicitors and barristers and covers: sale of goods and supply of services, e-commerce, commercial lending, insolvency, competition law, intellectual property, common commercial agreements, insurance law, private company acquisitions and taxation issues.

Anyone wishing to enrol for the diploma should send an e-mail to *lawschool@lawsociety.ie* requesting an application form. Those who are not interested in attending the diploma but would like to attend a specific module should send an e-mail to *lawschool@lawsociety.ie* requesting a 'module' application form.

Website proves to be a big hit

The Law Society's website has proved to be a big success, with figures showing some 119,000 'hits' on the site since the beginning of this year. This translates into over 7,000 'user sessions', where actual browsers investigate the contents of the site. The members' area, which was launched last October and is restricted to solicitors, registered over 1,500 user sessions last month.

All practice notes issued up to July 2000 can now be accessed by members and the library catalogue will be going on-line later this year. According to webmaster Claire O'Sullivan, plans are already underway to give the website a fresh new look.

Custody Courts in punctuality shocker!

Sleepyhead solicitors are set to get a rude awakening when the Custody Office Courts in Dublin's Chancery Street start sitting promptly at 10.30am in the mornings and 2pm in the afternoons. Although these are the official hours of business for courts 44, 45 and 46, the Courts Service admits that sittings rarely start on time. But from 1 September, all Custody Office Court sittings will be starting – and ending – on time. The Courts Service has asked all members of the profession to co-operate with the new early-bird regime.

Coming to a court near you: the *Human rights convention*

The *European convention on human rights* is due to be incorporated into Irish law by the end of this year, and solicitors need to familiarise themselves with it very soon, writes Michael Farrell

Margaret Anderson Brown is not a household name for Irish lawyers, but that could change pretty shortly. Ms Brown was charged with drink-driving at Dunfermline Sheriff's Court in Scotland last year. It seems the police had found her under the influence at an all-night shop. Her car was parked nearby. The police required her to tell them who had driven the car under section 172 of the UK *Road Traffic Act 1988*, the equivalent of section 107 of the Irish act. Section 172 makes it an offence not to give information about the driver of a vehicle.

Ms Brown said she had been driving and she was charged with driving while under the influence. A pretty routine case, you might think. But the *European convention on human rights* was made part of the domestic law of Scotland in May of last year. Margaret Brown's legal team argued that her admission that she had been driving had been obtained by coercion and the threat of prosecution if she did not answer. To admit it in evidence would be a breach of the right to a fair trial and the right against self-incrimination under article 6.1 of the convention, they said.

The Scottish Court of Appeal agreed and stopped Ms Brown's trial on the drink-driving charge.

The UK parliament had passed the *Human Rights Act* in November 1998, incorporating the convention into UK law for the first time. The act was made effective in Scotland six months later to coincide with the establishment of the new Scottish Parliament. The rest of the UK has had to wait a little longer while they re-trained the judges, lawyers and civil servants, but the convention will become law throughout the UK, including Northern Ireland, on 2 October.

I shot the sheriff

In the meantime, Scottish lawyers have not been idle. Since May 1999 about 180 cases have been taken raising convention points in one form or another, and around 13 have been successful. One of them led to the striking-down of the Scottish system of appointing temporary sheriffs or judges from among practising solicitors or barristers. The Court of Appeal held that because they had no security of tenure they were not sufficiently independent to fulfil the requirements of the convention.

Michael Farrell: the convention might help tip the scales in your client's favour

Even in England, some of the courts have already begun to anticipate 2 October and consider convention issues. Birmingham Crown Court recently gave a decision similar to the Margaret Brown one. And from 2 October, lawyers in Northern Ireland, England and Wales will be able to plead convention rights in any court as well as the more traditional causes of action or defences.

That will leave Ireland as the only one of the 41 member states of the Council of Europe where the convention is not part of domestic law, allowing it to be raised in the local courts instead of having to make the long trek to Strasbourg after exhausting domestic remedies. But that is all about to change very rapidly. Under the *Good Friday agreement*, the government committed itself to look again at the question of incorporating the convention and in June justice minister John O'Donoghue finally announced that it would be incorporated by October.

Bill withers

The October deadline now seems unlikely to be met since no bill has been published yet, but it is being given priority and the convention should be in effect here by the end of the year. The proposed method of incorporation is not yet clear except that the government has ruled out making the convention part of the constitution and has opted for legislation instead. Hopefully, however, a new *Human Rights Act* will make the convention directly part of Irish law and provide that all primary and secondary legislation must be given effect in a manner compatible with it.

Presumably too, like the UK act, the legislation will impose a duty on all public bodies to act in conformity with the convention. And it should provide a remedy in damages if they do not. If any statute

HUMAN RIGHTS CONVENTION CONFERENCE

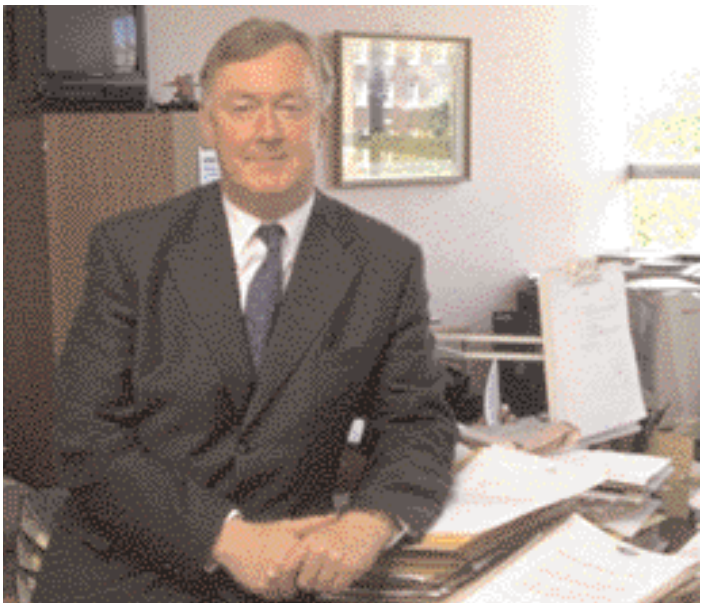
The Law Society is aiming to raise awareness of the implications of incorporation of the European convention among solicitors and the general public. It will hold a major conference on the issue in the new Education Centre on Saturday 14 October. For details, see the next issue of the *Gazette*.

The Education Department will hold a comprehensive continuing legal education course to familiarise members with how the new legislation will work in practice, including how it has been working in Scotland. And the Law Society Council has set up a sub-committee to study and make representations about the draft legislation before and during its passage through the Oireachtas.

Anyone interested in participating in the work of the sub-committee should contact Mary Clare Walsh at Blackhall Place. G

cannot be brought into line with the convention, the legislation is likely to provide that the courts can issue a certificate of incompatibility, putting it up to the government and the Oireachtas to amend it accordingly or face eventual censure by the Strasbourg court, which will retain its power to hear individual complaints against Ireland.

The effect of this change in the law will be dramatic. The two best-known decisions in Scotland so far have been in the area of criminal law, and the convention is particularly strong on issues of fair trial and unlawful detention, but it and its protocols touch on almost every area of law. And the Strasbourg court has built up a rich store of jurisprudence in fields such as family law, privacy, discrimination on grounds of race, gender, sexual orientation, health, education, defamation, and even property rights.



Sitting pretty: justice minister John O'Donoghue has pledged to incorporate the *Human rights convention* into Irish law by October

Up to now this has had a limited effect on Irish law. There have been a few key decisions such as the *Airey* case on legal aid and the *Norris* case on decriminalising gay sex. For the most part, however, Irish lawyers – and their clients – have been put off by the prospect of having to exhaust domestic remedies and then face a five-year wait and costs of £35,000 or more to get a decision from Strasbourg.

Now there will be no excuse for not pleading convention rights in every case where they are relevant and appropriate, or can be made appear so with a little ingenuity – and it would be negligent not to do so. Not all that many cases may be decided on a convention point, but it might help to tilt the scales in your client's favour. And certainly once clients begin to hear about incorporation, they will want a claim for their 'European rights' included in their cases.

Brown eyes blue

Margaret Brown's case has shown that convention points can be pleaded – with some success – even in the road traffic courts. How many times will 'Margaret Brown'-type points be pleaded in the District Court this winter?

Strasbourg and the European convention are almost upon us. It is time we woke up and started taking notice. G

Michael Farrell is a solicitor with the Dublin law firm Michael E Hanahoe and former co-chairperson of the Irish Council for Civil Liberties.

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NEW!

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Finbarr McAuley and
J Paul McCutcheon

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Contents include: The elements of criminal liability; The structure of criminal liability; The defences to a criminal charge; The nature of excuses and justifications, and Derivative, inchoate and strict liability and causation.

Publication: June 2000
Price: £58 (pb)
ISBN: 1 85800 155 2
Price: £98 (hb)
ISBN: 1 85800 058 0

Judicial Review

Conleth Bradley

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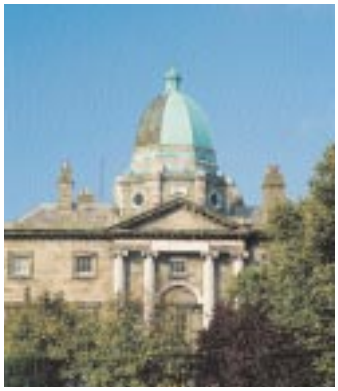
Letters

Rules on complaints about overcharging

From: Julian Deale, Julian Deale & Co, Dublin

The *Solicitors Amendment Act, 1994* became law in October of that year. Among the many powers granted to the Law Society was the right to adjudicate upon fees charged, thus barring solicitors rights of access to the courts by virtue of the taxation of costs system. It also provided that the Law Society had the power to stay proceedings if they had been instituted, and to stop the issue of proceedings if they had not been issued, in an endeavour by a solicitor to recover fees. It also envisaged that there would be rules made governing how the Law Society would determine the fees which solicitors charge and whether or not they were fair or excessive or in any way exorbitant. Six years later, no rules have been put in place, and I believe that solicitors are being extremely badly disadvantaged.

Of course the public has a right to complain, and if they think that they have been overcharged they should have redress to some forum. They already have that right through the taxation system. However, the additional powers granted to the Law Society, in my view, should not be exercised until the Law Society is satisfied that it is a *bona fide* complaint. A number of people, as is well known, will make complaints to the Law Society with a view to deferring the payment of fees. This is extremely unfair on practitioners. In the very nature of a matter or an action a solicitor would have made a number of disbursements



Overcharging complaints: is the Law Society being unfair to members?

which he will have done in good faith on the basis that he will be reimbursed by the client. He will also be obliged to pay the value-added tax on all disbursements and on his professional fees. If the Law Society decided to adjudicate upon a case, the solicitor may have to wait perhaps upwards of a year or whatever time the Law Society decides in its wisdom to take to vet a bill.

I believe this to be inherently unfair and, indeed, portions of the act may well be unconstitutional. I believe that before the Law Society embarks upon vetting a bill, it should be a *sine qua non* that the complainant discharges all of the VAT payable by the solicitor, all of the disbursements made and one-third of the professional fee. The one-third of the professional fee could be held by the Law Society, but the other sums should be remitted to the practitioner as these are not profit costs but disbursements made legitimately on behalf of and with the full authority of a client. Any other way is inherently unfair to a solicitor. The overwhelming majority of all solicitors who practise law in this country are small practitioners and for them to carry a heavy load of value-added tax (and perhaps many thousands of pounds in disbursements) is inherently unfair. To bring the scales of justice into equilibrium, I believe that my proposal is a reasonable and fair one and should be considered by the Law Society.

I say that for the simple reason that since the coming into force of the act almost six years ago, no attempt has been made to draft any rules in regard to the method by which the Law Society decides or does not decide on the veracity or otherwise of a solicitor's charge and/or disbursements made by him. In the heel of the hunt, it is the solicitor who is disadvantaged as he will have had to have paid the VAT and the disbursements in many cases. That is inherently inequitable, and I think the Law Society should ensure that it puts in place regulations governing how it will address and deal with complaints about fees and regularise the position in regard to the rights that it will confer upon itself in the way in which those fees are determined as to whether they are fair or not.

Absolute certainty in undertakings

From: Joseph Caulfield, Staunton Caulfield & Co, Co Roscommon

I wish to take issue with the Conveyancing Committee of the Law Society over its practice note *Transfer of common areas to management company* in the July issue (page 33), specifically in relation to its understanding of a solicitor's undertaking. The article states: 'it is the normal practice for the solicitor acting for the developer to give an undertaking to the purchaser's solicitor on the completion of the sale of each unit that a copy of the assurance of the common areas to the management company will be furnished after the assurance has been stamped and registered'. If I were to give or receive such an undertaking, it would be my clear understanding that compliance was within the control of the solicitor giving the undertaking.

My understanding, which is in absolute terms and leaves no room for equivocation or ambiguity, is rubbished by the Conveyancing Committee's understanding which suggests that 'the undertaking has been given on behalf of the client and if the solicitor had no knowledge of the likelihood of the company being struck off then the solicitor can hardly be liable on foot of the undertaking'.

With respect to the Conveyancing Committee, the cornerstone of the undertaking (and, indeed, of the Law Society and the society's members in this context) is that on giving an undertaking a solicitor must be absolutely certain that he

Date: Friday 29 September 2000
Time: 9.45 am to 12.30 pm
Venue: The Law Society

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- What is reputation management?
- Too busy for marketing?

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Speakers Eamonn Keenan - Sexton Keenan & Co; Justin Phelan - Keyhouse Computing; Ray Gordon - Gordon & Associates; David Rowe - out•source

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himself can comply with the undertaking he gives. The purpose of this letter is to re-establish this principle in the mind of the Conveyancing Committee, and you might see to it that the committee gets a copy of this communication, which I would like aired in the *Gazette*.

Finally, I note the Conveyancing Committee's practice note under the heading *HomeBond warning* (July, page 34), and frankly I do not feel that the society is doing enough to publicise the inadequacies of the HomeBond scheme. It seems to me that once a property has the benefit of the scheme, purchasers interpret the word 'guarantee' as covering all possible eventualities. But when one points out the obvious inadequacies of the scheme to each individual purchaser (which is time consuming and unappreciated by client who only wants to see the positive), they soon recognise the scheme for what it is. I feel it would be of assistance to the profession if purchasers had a general understanding of these inadequacies before they consider purchasing a property, and the only way to achieve this objective is for the society to consider a publicity campaign.

Disturbing new trend in property sales?

From: A Moore Horgan, Desmond PH Whindle & Co, Dublin

The Law Society's request to the profession to give a reasonable length of time to colleagues in which to get ready for the closing of sales of property is a comfort. I wonder if anything could be done to stop what now seems to be a new practice. I don't know whether or not it is widespread among agents or whether other colleagues have had similar experiences.

Recently, I have had to deal with new purchasers from vendors for whom Douglas Newman Good were the selling agents. It seems that – from what I have been told – the closing dates were imposed by the agent who stipulated a seven-day period in which the contracts were to be returned (coupled with a threat to put the property back on the market). In the first case, the colleague's letter was dated five days before posting, which left only two days in which to comply.

Property boom and bust-up

When objection was made directly to my colleague, Douglas Newman Good hounded me, asking for an explanation of the specific legal problems on title, of which there were a few (that is, in addition to the problem with the closing dates). I received a number of calls over the following days. I requested that the calls stop and refused to give an explanation to someone who is not a member of my profession. What happened then was that my client was asked to get the reasons from me, which he did, and these were then relayed to the agent who in turn rang my colleague – I presume to ask her for an explanation.

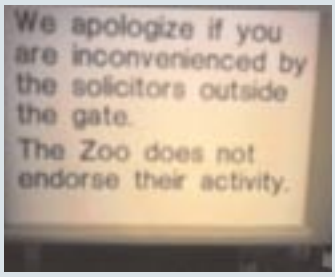
It was not until the second episode that I realised that this is becoming a trend and is causing bad feeling between client and solicitor and between colleagues. In one case, I was told by my client that the agent had asked that the solicitor be fired.

The reason that the new trend is working is that the agent is working on the fear of the purchaser that he or she will lose the property.

DUMB AND DUMBER

From: Leo Mangan, Mangan O'Beirne, Dublin

The following picture was taken at San Diego zoo:



And readers might like to ponder the following address of a decentralised state agency:
The Land Registry,
Kerry Section,
Cork Road,
Waterford.

From: Michael Gilroy, Gore & Grimes, Dublin

The following are actual cases and case names from our friends in the US (courtesy of the worldwide web):

- *Easter Seals Society for Crippled Children v Playboy* (815 F2d 323, 5th Cir [1987])
- *United States v 11 1/4 Dozen Packages of Article Labelled In Part Mrs Moffet's Shoo Fly Powders For Drunkenness* (40 FSupp 208,WDNY [1941])
- *Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics* (403 US 388 [1971])
- *Julius Goldman's Egg City v United States* (464 US 814 [1984])
- *I am the Beast Six Six Six of the Lord of Hosts in Edmond Frank Macgillivray Jr Now. I am the Beast Six Six Six of the Lord of Hosts Iefmjn. I am the Beast Six Six Six of the Lord of Hosts. I am the Beast Six Six Six Otlohiefmjn. I am the Beast Ssotlohiefmjn. I am the Beast Six Six Six. Beast Six Six Six Lord v Michigan State Police; City Police Of Lansing; State Of Michigan; Ingham County 54a District Court; and Ingham County Jail* (unreported, File No 5:89:92, US Dist Ct W Dist Mich [1990] US)
- *Silver v Gold* (211 Cal App 3d 17, 259 Cal Rptr 185 [1989])
- *Plough v Fields*, (422 F 2d 824, 9th Cir [1970])
- *Klump v Duffus* (71 F 3d 1368, 7th Cir [1995])
- *United States v Estate Of Grace* (395 US 316 [1969])
- *State of Indiana v Virtue* (658 NE 2d 605 [1995])
- *United States ex rel Gerald Mayo v Satan and His Staff* (54 FRD 282, WD Pa [1971]).

Leo Mangan wins the bottle of champagne this month.

Send your examples of the wacky, weird and wonderful to the Editor, *Law Society Gazette*, Blackhall Place, Dublin 7, or you can fax us on 01 672 4801 or e-mail us at c.oboyle@lawsociety.ie.

As always, the best entry will win a bottle of the finest champagne that monopoly money can buy.

A study in inno

In New York, there is a unique law clinic that works to prove the innocence of prison inmates through DNA testing. Keith Farnan spent six weeks on secondment to the Innocence Project and gained some startling insights into how the American legal system works

MAIN POINTS

- The Innocence Project is handling 200 cases, with 1,000 more pending evaluation
- Restrictions on post-conviction appeals in the USA
- DNA testing in Ireland

In June 1999, Calvin Johnson Jr walked out of the courthouse in Clayton County, Georgia, a free man. Following his trial, where his conviction was vacated on the grounds of actual innocence, the prosecuting attorney had apologised to Johnson. It was gracefully accepted – 16 years too late.

In March 1983, a woman in Clayton County was attacked while she slept, choked with a belt and sexually assaulted. The victim had stated that the assailant's voice was soft-spoken and that he seemed well educated.

Two weeks later, she identified an African-American male by the name of Calvin Johnson Jr in a photographic line-up. Johnson was a university graduate who had been convicted and imprisoned for 14 months for a burglary he had committed to pay off a fine. He had become a suspect in a prior rape but was never charged. Unfortunately, this would bring him to the attention of the investigators in the Clayton County assault. The police were sure they had their man. But shortly after the photographic identification, the victim failed to identify Johnson in a live line-up and instead picked out another suspect. She would later testify that this had occurred because she was afraid to look at her assailant.

In neighbouring Fulton County, another woman was attacked and assaulted in a similar fashion, stating that her assailant was black and had strangled her with a belt before he assaulted her. She claimed to have seen her assailant and identified Johnson from a line-up after failing to identify him from police mugshots.

The testimony of these victims at trial would prove to be both powerful and damning. Despite having a sound alibi and forensic evidence in his favour, an all-white jury took only 45 minutes to find Calvin Johnson guilty on all charges, and he was sentenced to life imprisonment.

What would make this case of particular interest to analysts for years to come is the fact that 12 months later Johnson would be tried for the second assault in Fulton County. The result was not what the prosecuting attorney expected. A jury composed of seven blacks and five whites contemplated a case that appeared to be stronger in substance, only to find the already-convicted defendant not guilty of the second offence.

As he would not admit to his guilt, Calvin Johnson Jr was ineligible for parole. He would still be in prison today were it not for the fact that he contacted a law clinic known as the Innocence Project. Students from this clinic would discover the evidence that eventually exonerated Johnson.

The Innocence Project

The facts of this case are similar to many which have been brought to the attention of the Innocence Project. Founded in 1992, the Innocence Project has operated out of the Benjamin N Cardozo School of Law as a program for law students supervised by internationally-renowned attorney Barry Scheck, Professor of Law Peter Neufeld and several administrators.

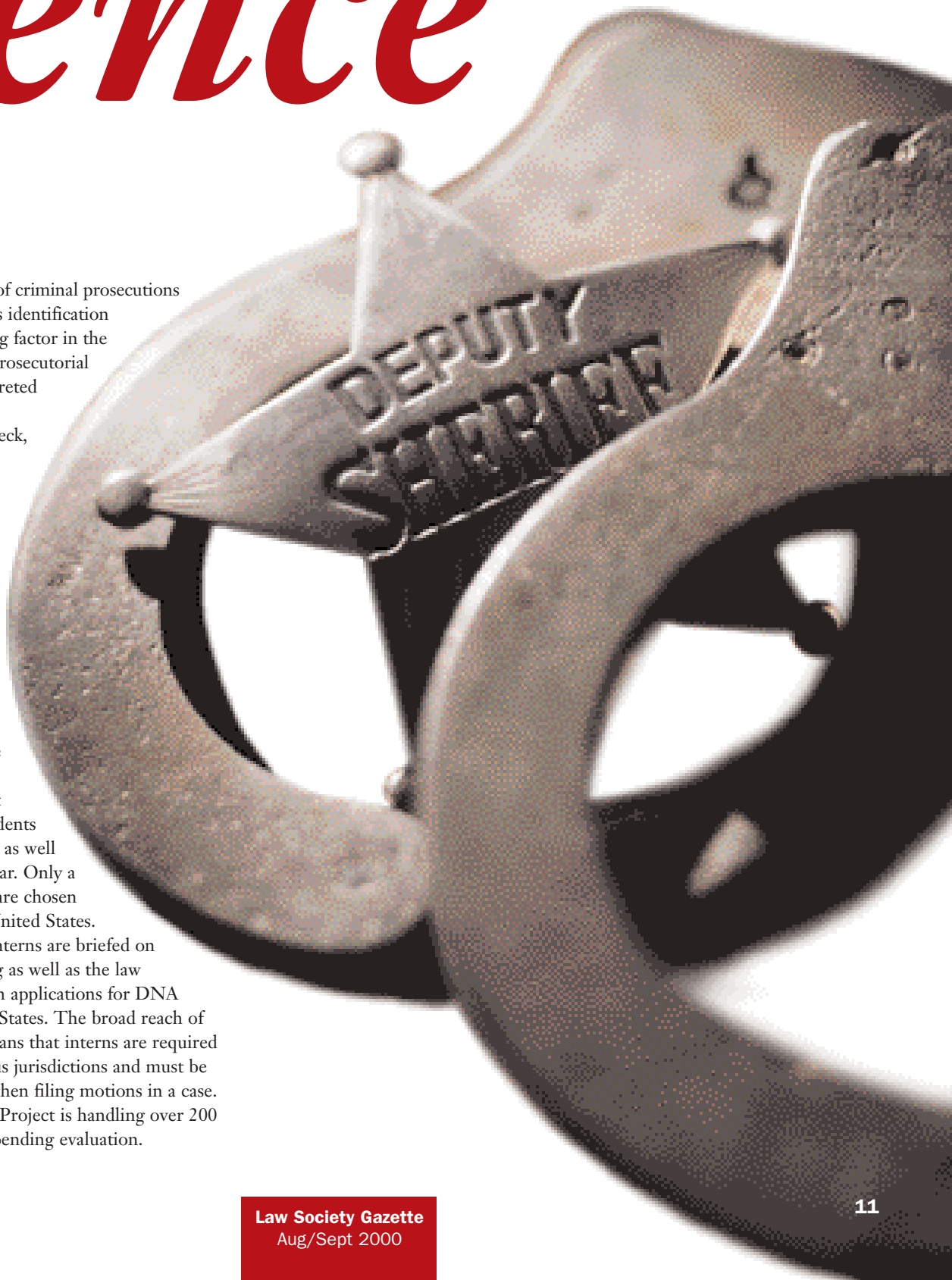
The project has acted as counsel or assisted counsel in over 40 cases, two of which were capital punishment cases, where convictions have been reversed or overturned in the United States as a result of exculpatory DNA tests on biological evidence from the original crime. Much of its work was documented in the National Institute of Justice report entitled *Convicted by juries; exonerated by science*. The report discussed these cases and how they

ocence

highlighted the fallibility of criminal prosecutions in areas such as eyewitness identification (which was such a damning factor in the case of Calvin Johnson), prosecutorial misconduct and misinterpreted scientific data.

According to Barry Scheck, the goal of the Innocence Project is entirely unique: to prove actual innocence. There is no middle ground here. It is not the function of the project to show procedural errors in the trial, nor does it try to advise clients as to legal errors in their case. There is only one aim – to prove innocence through the use of DNA testing.

To this end, the project enrols the help of law students during the summer recess as well as during the academic year. Only a dozen or so law students are chosen from schools across the United States. During their first week, interns are briefed on DNA and serology testing as well as the law relating to post-conviction applications for DNA testing across the United States. The broad reach of the Innocence Project means that interns are required to work on cases in various jurisdictions and must be constantly aware of this when filing motions in a case. Currently, the Innocence Project is handling over 200 cases and over 1,000 are pending evaluation.



Samples in a haystack

The location of evidence, biological or otherwise, is one of the fundamental tasks for the students at the project. This is the first of many obstacles to be overcome in the establishment of innocence. Pleas from inmates around the country are received every day and cases which are taken on can be anything up to 20 years old. The greatest risk is that the evidence has been destroyed or has been misplaced. More often than not, it is being stored in a vast warehouse of evidence without any proper register of its presence.

Diplomatic inquiries are made every day to courthouse clerks, evidence clerks, hospitals, testing laboratories, police departments and prosecuting attorneys' offices, any of which may have custody of the relevant evidence. It can sometimes be simply a matter of luck that a student will chance upon the exact location of evidence from an old case. Once it has been discovered, a preservation letter is immediately sent to the custodian, ensuring the continued existence of the evidence. It was such a preservation letter that prevented the evidence in Calvin Johnson's case from being destroyed.

Post-conviction applications

Having located the evidence, the next objective is to convince the office of the prosecuting attorney to release it for testing in an effort to obtain a new trial on the basis of newly-discovered evidence.

The reaction of various district attorney's offices to such requests can range from co-operative to belligerent. Although attitudes vary, a 1999 report from the National Institute of Justice on post-conviction relief does recommend co-operation between prosecutors and defence attorneys and encourages the 'pursuit of truth over the invocation of appellate time bars'. However, this recommendation has not permeated the entire system and the reality can often be quite different.

The issue of post-conviction appeals in relation to the granting of a new trial on the basis of newly-discovered evidence is complex and has yet to reach a satisfactory conclusion. Appellate time bars are statutes which procedurally bar those who are convicted from gaining a new trial due to the discovery of new evidence outside of a certain time period following the conviction. Each state has its own particular

FROM SEROLOGY TO DNA: THE EVOLUTION OF FORENSICS

The majority of cases being assessed by the Innocence Project are sexual assault and homicide, and occurred at a time when forensic science was still very rudimentary and serology was the prime method of investigation. The evidence used in the original trial would have been collected as part of a rape kit, which was then submitted to the police laboratory for testing.

At the time of the original trial, tests performed on these samples simply determined the international ABO blood type of the sample, thus identifying the individual antigens which are present in all cell membranes. There are three antigens in the human system, A, B and H, which result in four blood groups, A, B, AB and O (which is the blood group of a person who produces only H antigens). From these antigens, the blood type of the perpetrator of the crime may be determined. Whether the perpetrator actually secreted these antigens was also a factor in determining the likelihood of the accused being guilty of the offence. Approximately 15% of the population do not secrete enough antigens to be detected during testing so if an assailant was a secretor and the accused was not, the accused could be excluded as a suspect.

Although it is obvious now that blood-typing and secretor status could not be presented as conclusive proof of guilt, ten or 15 years ago this evidence, coupled with eyewitness testimony, was often devastating to the accused's case.

Forensic identification has evolved considerably into its current incarnation of DNA (deoxyribonucleic acid) profiling. The genetic make-up of each individual provides a personal fingerprint in every cell in our bodies. Biological evidence left at a crime scene can now be run through a DNA database in many countries in Europe as well as the United States. These databanks represent a considerable advance from the DNA profiles of the late 1980s when the technique was first introduced in English courts.

Originally, to acquire a DNA profile, a large quantity of non-degraded biological sample was necessary to gain a conclusive result during testing. RFLP (restrictive fragmentive length polymorphism) testing was the first method of testing used by laboratories in criminal cases. However, this test often presented an inconclusive result and sometimes resulted in the entire biological sample being destroyed in the process. For these reasons, there were many cases where the DNA evidence was inconclusive and it was obvious that this test needed to be improved upon.

By the early 1990s, a method of amplifying biological samples had been developed, known as PCR (polymerase chain reaction). PCR allowed scientists to take small samples, which may have been degraded and of insufficient size for an RFLP test, and replicate the DNA strands contained within them, thus achieving a result where none was possible before. This test was then followed by short tandem repeat (STR) testing which is even more sensitive and is the current method of testing favoured by laboratories around the world, including Ireland. STR represents the basis for the DNA databases in England and America and allows officers investigating various crimes to enter a biological sample of the accused into this database and obtain a match with biological evidence left at a crime scene. G

procedure, and time limits vary from three years to 21 days. Possible avenues of appeal were further curtailed by the *Antiterrorism and Death Penalty Act 1996*.

In the majority of cases taken on by the Innocence Project, clients have already exhausted the statutory avenues of appeal. Applications to federal courts offer a more promising possibility for appeal but require the demonstration of a constitutional violation.

The constitutional right to demonstrate actual innocence to allow access for testing via a *habeas corpus* review in federal or state courts has already been debated in the Supreme Court case of *Herrera v Collins* (506 US 390 [1993]). The court addressed the question of 'whether it would violate the 14th amendment's due process clause or the eighth amendment's prohibition against cruel and unusual punishment to execute an inmate who claimed he could prove, through newly-discovered evidence proffered in a federal *habeas* petition, that he was actually innocent' (US Department of Justice report, September 1999).

In a famous (at least in legal circles) plurality opinion, Chief Justice Rehnquist denied Herrera's appeal, but stated that if a 'truly persuasive' showing of actual innocence were demonstrated, then the court could regard any punishment or incarceration as unconstitutional. The result of the opinion was to set a very high standard for a showing of actual innocence and commentators believed that this would sound the death-knell for post-conviction appeals. But with the advent of DNA technology, this standard can now be met, and this case 'may provide a reasonable basis for an inmate who cannot obtain relief in state court to seek federal *habeas* relief' (US Department of Justice report, September 1999).

Forensic investigation in Ireland

For many observers, the acceptance and recognition of DNA testing in the legal system represents an exciting step forward in the processing of the guilty and the freeing of the innocent.

For practicing solicitors, DNA testing represents an area where the law does not have to involve a notional scale of reasonable doubt presided over by judge and jury. Answers can be conclusive. This, of course, can be to the detriment of defence lawyers as well as to their advantage.

The majority of criminal cases in Ireland do not involve DNA testing, due to the practical consideration that the laboratory located in the Garda Headquarters in Dublin is the only forensic lab in the state equipped to perform the necessary tests. Although this might deter practitioners from availing of the state's laboratory, the head of biology at the laboratory, Dr Louise McKenna, stresses that the lab's services are available to those acting for the defence and that the results of tests are openly available. As a result, there have been no *Freedom of Information Act* requests of the forensic laboratory.

The lab's high standard of quality control and checking systems contrasts starkly with reported cases of negligence and misconduct in state laboratories in the United States. One particularly infamous case is that of Fred Zain, a state trooper in West Virginia, who testified in court cases as a forensics expert for years when in fact he had no such qualification. For over ten years, he testified as to the conclusive nature of tests that he could never have conducted, thus contributing heavily to the case against the accused and influencing a jury's decision to find the defendant guilty of crimes he or she may not have committed. According to Dr McKenna, such a scenario could not happen here because of the various checks in place in the laboratory.

'It can sometimes be simply a matter of luck that a student will chance upon the exact location of evidence from an old case'

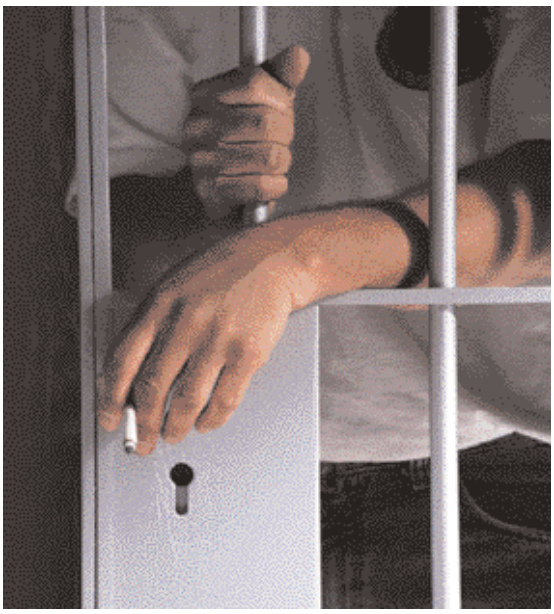
Despite the Gardai being given extensive powers to take biological samples under the *Criminal Justice (Forensic Evidence) Act, 1990*, many practitioners may not have encountered DNA testing in criminal investigations in Ireland. This may not be the case for much longer. The idea of a DNA database being set up in Ireland is gaining support; a point made at the international conference on forensic science held in Dublin recently. The foreseeable difficulty seems to be the actual content of the database and who should be required to supply a sample.

As is the case in Ireland, English police can take DNA from anyone suspected of, charged with, reported for, or convicted of a recordable offence and check it against records on the database. The DNA profile is only retained on the database if the suspect is convicted or cautioned or if action against the individual is on-going.

Whatever the final decision of the Oireachtas, there is one certainty in this matter, according to Dr McKenna: there will need to be definitive guidelines and legislation if law and science are to work in harmony.

This past summer, Calvin Johnson Jr visited the Innocence Project to speak to the interns, almost a year to the day after he had been released. He is a well-educated and charismatic individual and shows no signs of bitterness or anger about what happened to him. Instead, he speaks of his faith and the prayers that helped him during his time 'inside' and how grateful he is to the project for its work.

Listening to him, one becomes acutely aware of the fact that there could be many more prisoners just like him, waiting and praying patiently for help with their case. These people are the very reason the Innocence Project was conceived in the first place. G



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Electronic signatures, encryption, on-line contracts – the recent *Electronic Commerce Act* could hardly be of more fundamental significance to the Irish legal system. Jonathan Newman discusses the act's key features and warns that you'd better start checking your e-mails carefully

MAIN POINTS

- **The *Electronic Commerce Act* follows the Australian model**
- **There's a risk that people may be bound by an e-mail they haven't even read**
- **Land contracts are included in the act's scope**

Sign of the

The main impact of the *Electronic Commerce Act, 2000* will probably be felt in relations between government and private citizens and businesses. In this sense, then, the act's title is certainly a misnomer, but no doubt it was adopted to advertise abroad Ireland's ambition to become a centre for electronic commerce. Unfortunately, the delay in passing it has somewhat undermined this admirable goal. Several competing states, including the UK, have already passed their own electronic transactions legislation.

The Law Society, primarily through its Business Law Committee, prepared detailed submissions for the government concerning the original legislative proposals, published in August 1999. While welcoming the government's initiative, the society took the view that the proposals were profoundly flawed. It suggested many alterations and noted that the Australian federal legislation provided a good model. The society's submissions appear to have met with approval and the new Irish act for the most part shadows the Australian *Electronic Transactions Act 2000*. Irish lawyers can therefore take advantage of the emerging Australian jurisprudence.

The act concerns itself primarily with legally facilitating electronic transactions. This article looks at some, but certainly not all, of the act's key features. Legislation of a more regulatory nature will be required in order to implement the EU's *Electronic commerce directive*. That legislation will also deal with issues such as the liability of Internet service providers in respect of the transmission of defamatory material.

Needless to say, Irish law is littered with express or implied paper-based requirements – declarations are to be signed, original certificates to be presented, notices to be served by post and so on. These references either prevent or create uncertainty around the legal effectiveness of electronic signatures and electronic documents.

Rather than review existing legislation piecemeal – the approach adopted in the UK – the Irish act takes a 'big bang' approach. On the act's commencement, the use of an electronic signature, electronic writing, electronic records or electronic versions of original documents, and the

THE CONSENT PRINCIPLE

It would obviously be oppressive to allow the use of electronic communications in fulfilling a legal obligation (such as serving a notice under immigration legislation) when the recipient does not expect to receive an important document by these means. So the principle of consent is central to the *Electronic Commerce Act, 2000*: no person, including the state, can fulfil his or her legal obligations by communicating with another person electronically when the intended recipient has not previously consented to the use of electronic means. What constitutes consent will vary with the circumstances. The gravity of the communication may call for express consent, while a previous exchange of e-mails may in other cases constitute implied consent.

The irritant of unsolicited e-mails will not be tackled by the consent principle. Communications which are not sent in fulfilment of a legal obligation (such as invitations to avail of a business's services) are not subject to the consent principle. G

times

delivery of documents by electronic means, will henceforth satisfy all existing paper-based requirements, subject to certain safeguards. For instance, statutory notices which are required by the applicable legislation to be served by post, or otherwise, may now be served by e-mail, for example.

The vast majority of paper-based requirements lie not in the commercial field, but in the field of relations between government and private citizens and businesses. The greatest impact of the legislation is therefore to allow these relations to be conducted electronically.

Protection from the public

It seems that the government feels that state agencies need some protection from the public. The act provides that an electronic communication to a state agency is ineffective in fulfilling a legal obligation unless the agency gives its prior consent – in other words, state bodies are not required to be able to conduct their dealings electronically. A more credible approach would have been to provide in the act for a deadline after which state agencies could not avail of the consent principle: the Australian act sets a deadline of 1 July 2001.

The Irish act indicates that a person may be bound

by an e-mail that has not actually come to his or her attention. In other words, in certain cases the risk that an addressee may not in fact regularly check his or her e-mail is borne by the addressee. This is the result of the act's rather impenetrable rules. The only explanation of the rules is to be found in the explanatory memorandum to the Australian *Electronic Transactions Act 2000*, from which our rules are taken.

The time of receipt rules are in practice the most important as they will determine whether an electronic communication has been received before the expiry of a contractual or statutory deadline. In paraphrase, the basic 'time of receipt' rule is this: where a person, business or state agency has previously made an e-mail address available to another, then an e-mail to that address is deemed to have been received by the addressee at the moment when it becomes possible for the addressee to access the e-mail by logging on to the server. It does not matter whether the addressee has in fact logged on and seen it. Where a person has not previously made an e-mail address available, the time of receipt of incoming e-mails is the time he actually becomes aware of them.

A defect in these rules is that, unlike the existing judicial approach, they contain no element of flexibility allowing for the justice of individual cases. However, the consent principle should usually prevent these rules working oppressively.

The act also stipulates that when a sender of an electronic communication requires an acknowledgment, the acknowledgment must be sent if the original communication is to have legal effect. In effect, there is an obligation to comply with requests for acknowledgments. This rule will, however, shortly have to be altered to comply with the EU's *Electronic commerce directive*.

'Electronic communications must be handled with exactly the same care as paper communications'

Electronic signatures

The act enables the use of electronic writing (such as the text of an e-mail) and electronic signatures in fulfilling legal requirements of paper writing and manual signatures. Its provisions in relation to electronic signatures implement the EU's *Electronic signatures directive*.

'Electronic signature' is a term which requires more explanation. The act states that an electronic signature is electronic data which serves to authenticate other electronic data with which it is associated. A very wide range of data can therefore potentially constitute an electronic signature, including the sender's name commonly automatically included at the foot of e-mails, initials typed at the end of a document stored electronically, a scanned image of a letterhead and, of course, a scanned image of a manual signature contained in a document.

Documents which are to be witnessed or which are under seal may be signed electronically, but a special type of electronic signature is required: an 'advanced electronic signature based on a qualified certificate'. This lumbering concept is defined in the act. In practical terms, using an advanced electronic signature currently involves the encryption of an electronic document using an electronic code (or 'key') which is unique (like a PIN number) to the signatory and held only by him or her. The fact that the document can only be encrypted, and then decrypted by the recipient, using this unique key guarantees both the identity of the originator of the document and the unaltered nature of the electronic document. A qualified certificate is issued by the commercial entity supplying the key software (called the 'certification service provider') which confirms to the recipient of an encrypted communication that the key used for encryption is uniquely linked to a named person.

So this type of signature provides a level of protection far beyond that of manual signatures. But to my knowledge such a certification service is currently not available generally to individuals (as opposed to organisations) and so this aspect of the act anticipates developments. It is therefore unfortunate that deeds under seal must be executed using a certified signature, given the frequency with which deeds are used in commercial transactions.

It is anticipated that a general certification service provision industry will develop and the act envisages that the minister shall establish industry supervisory and voluntary accreditation schemes by statutory instrument. The act also provides that certification service providers are, as a general rule, liable for all damage flowing from certification errors (such as granting certification to an impostor), unless the service provider can prove that it did not act negligently.

GOVERNING .IE DOMAINS

The act gives the minister for public enterprise the power to regulate by statutory instrument the system (currently operated by UCD Computing Services) for allocating '.ie' domain names (or website addresses) to Irish people and businesses. The explanatory memorandum indicates that there is no immediate intention to do so.

There are two main problems for Irish people and businesses in relation to domain names. The first is the global problem of abusive registrations, most famously illustrated by the 'bertieahern.com' incident. The existing law and national courts, in tandem with the World Intellectual Property Organisation dispute resolution system, can generally offer an effective remedy.

The Irish .ie domain registry system is not prone to abusive registrations because of its tightly-drawn rules on granting registrations. But these rules themselves create the second problem: the difficulty in obtaining a .ie address. It can, for instance, be necessary to incorporate a company under a proposed trading name simply to register that as a domain name. This restrictive approach may be seen as rather pointless given that Network Solutions (which manages domains such as '.com') has no equivalent restrictions. G

Electronic land sales

The *Statute of Frauds*, of course, requires that agreements disposing of an interest in land be in writing and signed. The effect of the *Electronic Commerce Act* is that an electronic signature will suffice. Because of the wide definition of an electronic signature, many electronic communications have the capacity to constitute a memorandum for the purpose of the statute. For instance, the sender's name which is automatically appended to the end of an e-mail would *prima facie* now appear to constitute a signature.

In a most difficult provision, the act does exclude documents such as a conveyance from its scope – in other words, the conveyance must still be on paper – but not the contract itself.

The Law Society feared that the public, understanding that a signature is generally necessary to bind one in a land contract, may not realise that a casual e-mail could have the same binding effect. It therefore urged the Minister for Public Enterprise, Mary O'Rourke, to also exclude land contracts from the scope of the act. The minister appears to have viewed this as an attempt to ensure that solicitors were involved in the conveyancing process, stating in Dáil Éireann that the proposal was: 'very interesting because it is in the line of vested interest … However, I also have every right to stand up for consumers and their rights in this regard. We are of the opinion that the concerns, although coming from a legitimate background – the Conveyancing Committee of the Law Society of Ireland – are misplaced'.

But it is noteworthy that the EU saw some legitimate distinction in relation to land contracts, for the *Electronic commerce directive* specifically allows dealings in relation to real property to be excluded from the scope of national electronic commerce legislation. Electronic communications, then, must be handled with exactly the same care as paper communications and practitioners should try to make this same point to clients.

Consumer protection

The *Consumer Credit Act, 1995* provides that consumers who agree to accept credit must be sent a written copy of the agreement and that this copy must highlight the consumer's right to withdraw from the contract within ten days (the 'cooling-off' period). This requirement for hard copy is preserved by the act. The *Unfair Contract Terms Regulations 1995* are also not prejudiced by the operation of the act.

The act contains a range of other exclusions from its scope. Of particular significance is that the rules and practices of courts are excluded, as is the law governing the making of affidavits, statutory declarations, wills, trusts and enduring powers of attorney. So it will not be possible to file documents in court offices electronically with legal effect. The minister has the power to remove these exclusions in due course.

Criminal law enforcement

The act creates a number of offences in relation to the misuse of electronic signatures (such as knowingly using another's advanced electronic signature), and provides that search warrants may be given to facilitate their investigation. A court may also require a person to decrypt information, but non-compliance may only be tried summarily.

The *Electronic Commerce Act* provides that nothing in it requires or enables the disclosure of the keys used to encrypt electronic information. For instance, a suspect (or, more importantly, the certification service provider who supplied his key) may not be required to disclose an encryption key so as to enable the Garda Siochána to monitor communications. Attempts by the British government to require certification service providers to record and supply to the authorities the encryption keys of their customers created a severe backlash and delayed the UK legislation.

The issue is parked by the Irish legislation, but inevitability some system – no doubt involving prior judicial approval – for enabling the Garda Siochána to access encryption keys will have to be established. G

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Theatre of

How come hospitals can routinely charge more to treat road traffic accident victims than they do for other types of patients? And why do charges vary so much from health board to health board? Keenan Johnson warns that if the issues are not clarified soon, further disputes over hospital charges are likely to arise

Most solicitors involved in litigation will be familiar with the practice of hospitals and health boards issuing accounts for hospital maintenance in road traffic accident cases which are considerably higher than those normally charged to public, private or semi-private patients. They quote as authority for their right to charge such high rates the provisions of section 2, sub-section 1, of the *Health Amendment Act, 1986*, which says:

'Where –

a) Injury is caused to a person by the negligent use of a mechanically-propelled vehicle in a public place, and

b) In-patient services or out-patient services have been, are being or will be provided by or on behalf of a health board in respect of the injury, and

c) Any one of the following, that is to say, the person aforesaid, his personal representative or dependant, has received, or is entitled to receive, damages or compensation in respect of the negligent use aforesaid from the person liable to pay such damages or compensation in respect of that injury, or any loss, damage or expense (or mental distress in the case of a dependant) arising therefrom, the health board shall, notwithstanding anything in the Health Acts, 1947 to 1985, *make a charge upon the person who received or is entitled to receive such damages or compensation in respect of the said in-patient services or out-patient services'.*

When this legislation was going through the Seanad, the minister for health indicated that the charge made by the health board would normally be the average daily cost per bed day in the hospital concerned. This 'average daily cost' formula is the reason that substantially higher charges are sought from patients who are victims of injury arising out of a road traffic accident. The average daily rate can vary greatly from health board to health board and hospital to hospital, with amounts being claimed ranging from £120 to over £550 a day. The formula takes no account of the accommodation, treatment or care

the absurd

MAIN POINTS

- Hospital charges can vary from £120 to £550 a day
- Judgments in *Crilly v Farrington* and *O'Rourke v Scott*
- Precautions for solicitors settling hospital charges for accident victims

afforded to the patient and is, to say the least, arbitrary and unfair.

In the recent case of *Crilly v Farrington* (judgment delivered on 21 December 1999), Mr Justice Geoghegan considered the interpretation of section 2, sub-section 1, of the *Health (Amendment) Act, 1986*. In this case, the plaintiff was seriously injured in a road traffic accident and as a result underwent treatment in Our Lady of Lourdes Hospital, Drogheda and Beaumont Hospital, Dublin. The most expensive part of his treatment was in Beaumont Hospital. The Eastern Health Board claimed that its charges were calculated on the average daily cost per bed day in the hospital.

Originally, the matter was tried before Mrs Justice Denham (High Court, 26 August 1992). In respect of the maintenance charges at Beaumont Hospital, she awarded a figure calculated on the cost of a private patient per day, while in respect of Our Lady's Hospital, Drogheda, she awarded a figure of £99 a day, which was calculated on a semi-private basis. The judge granted the hospitals liberty to explain why they considered it fair to charge an extra rate for road traffic accident victims. In this particular case, Beaumont Hospital was seeking a payment of £525 a day.

The Eastern Health Board, as the authority in charge of Beaumont Hospital, decided to take up Judge Denham's invitation to justify its charge of £525 maintenance a day. The defendant's insurers, FBD, decided to pay the Beaumont bill in full and then pleaded that the matter could not proceed because it was now moot. Subsequently, FBD abandoned the claim that the matter was moot and agreed with the Eastern Health Board that the issue basis on which hospital charges on road traffic accident cases were calculated be tried.

Counsel for FBD argued that the charge which a health board could levy under section 2, sub-section 1, of the *Health Amendment Act, 1986* should be calculated by reference to the maintenance charges approved or directed from time to time by the minister for health under section 55 of the *Health Act, 1970*. The current maintenance charge under section 55 is £158 a day. Counsel for the Eastern Health Board argued that section 2, sub-section 1, of the *Health Amendment Act, 1986* was a free-standing section and that the charge should be calculated by the division of the annual cost of a particular hospital by the number of occupied hospital bed days in that hospital during the year when the charge is raised.

Mr Justice Geoghegan quoted with approval the decision of Kinlen J in *O'Rourke v Scott* (judgment delivered on 24 November 1993), where the judge disallowed daily rates of £184 and £172 and allowed

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£100 a day. Kinlen J observed:

'It is extremely hard to know what should be given in these circumstances and there is no guidance for the court of justice, just as there is no guidance for the health board. I am satisfied that the health board can charge and this was the purpose for this act. They cannot charge the full economic cost of running the hospital just because there is probably an insurance company who will take up the bill … I think there has been a lack of guidance from the Oireachtas and I think as a matter of urgency it should be referred back to the Oireachtas to clarify the situation'.

Mr Justice Geoghegan noted that, following the *O'Rourke v Scott* case, it had become common practice to apply in infant settlement cases for 'a Kinlen order'. The Kinlen order fixed the rate of maintenance allowable to a health board or hospital authority. Geoghegan J observed that initially the Kinlen order was fixed at a maximum rate of £100 a day and in recent times this figure had increased to £150 a day. He also went on to say:

'It seems strange that no steps have been taken in the six years which have now passed to amend the legislation, making it crystal clear how the charge is to be imposed. Instead of that, there is an unnecessary legal battle between the health boards and the insurance industry'.

In determining how the charge under section 2(1) of the 1986 act should be assessed, Geoghegan J observed:

'I can see no reason in principle why the assessment of that charge should not be governed by identical principles as those that apply where there is provision for an unspecified charge in a written contract. The charge must be a reasonable one. That begs the question as to what is a reasonable charge and to some extent that is the real issue in this case. If an unspecified charge was provided for in a written sale contract, the amount of the charge would be assessed on a *quantum meruit* basis, that is, a charge of an amount which both parties could have reasonably agreed to'.

He went on to state that: 'The charge which the health board is obliged to make upon a person, such as the plaintiff in this case, is a charge in respect of the actual in-patient services or out-patient services which the plaintiff has received. That is perfectly clear from the wording of the sub-section. This does not mean that there can be no element of averaging because some averaging may be necessary in order to assess with any practicality a reasonable price for the services given. But on any reading of section 2(1) of the 1986 act, it is difficult to see how a health board would be entitled to charge a patient in Beaumont Hospital with a broken toe the identical daily charge as a similar-type plaintiff who had to undergo expensive brain surgery'.

In summary, Mr Justice Geoghegan determined:

'Applying the ordinary rules of construction, I am satisfied that the charge under section 2(1) of the 1986 act must be a reasonable charge in the *quantum meruit* sense. Insofar as a plaintiff will have received treatment within a particular speciality, some averaging within that speciality would be acceptable in arriving at the charge, but the general averaging as contended for could not be contemplated as a reasonable basis for a charge unless there was a special provision in the section covering it'.

Accordingly, Mr Justice Geoghegan rejected the formula proposed by the Eastern Health Board.

While the logic of Mr Justice Geoghegan's judgment in *Crilly v Farrington* cannot be faulted, it is clear that the present situation is totally unsatisfactory in that there is no certainty or clarity as to what is a reasonable charge in any particular case. Clearly, the present uncertainty needs to be resolved without delay, and pressure should be brought to bear on the minister for health to introduce regulations which set out clearly a fixed 'average daily cost' to be charged in road traffic accident cases.

If the situation is not clarified, it is clear that further disputes as to hospital charges in road traffic accident cases will arise. In the meantime, a solicitor should take the precautions set out above when settling a road traffic accident case where a claim for hospital charges arises. G

Keenan Johnson is a Law Society Council member and chairman of the society's Guidance and Ethics Committee.

WHAT TO DO WHEN SETTLING HOSPITAL CHARGES

- If possible, attempt to negotiate a compromise figure for maintenance charges with the hospital
- Try to get an indemnity from the insurance company in respect of any additional charges to which the hospital may be entitled. Unfortunately, most insurance companies are loath to provide such an indemnity
- If neither of the options above are available, advise the client, in writing, prior to settlement, of the amount that is on offer for maintenance charges, the amount being claimed and the possibility that all or part of the difference may be recoverable from the client or health board after settlement
- When settlement has been reached, the solicitor should write to the hospital or health board advising that settlement has been reached and the amount that has been recovered in respect of maintenance charges.

The solicitor should further advise the hospital or health board that he is prepared to forward a cheque for the amount recovered in respect of maintenance charges, provided the hospital is prepared to accept the said payment in full and final settlement of its claim. The solicitor's letter should also provide that, if the hospital is not prepared to accept the amount recovered in full and final settlement of its claim, then the solicitor will pay the monies recovered direct to the client and it will be a matter for the hospital to seek recovery of the monies directly from the client.

Obviously, there is an attraction from the hospital's view point in receiving payment through the solicitor without the necessity of pursuing collection and recovery against the client. Solicitors should take particular care to ensure that they advise clients that, where monies are paid to and accepted by the hospital, further sums may be claimed by the hospital at a later date. G

Food for

Food safety in Ireland is governed by a maze of acts, statutory instruments – and several different government departments. Richard O'Sullivan and Niall Hunt argue that a system overhaul is needed to protect our food supply and increase consumer confidence

MAIN POINTS

- **Food safety policy is in disarray**
- **The regulatory framework for food safety explained**
- **The role of environmental health officers**

The food code in Ireland consists of several disparate sets of enactments, from the arcane to modern regulations emanating from Brussels. An unfortunate feature of the present Irish code is that the Oireachtas never saw fit to repeal outdated legislation, nor has it made the giant leap to consolidate the various acts and statutory instruments.

In many ways, it is indicative of the diverse nature of the Irish food code that no one government department or minister has responsibility for food legislation. Instead, responsibility is delegated to the department dealing with a particular area, such as food production, preparation and retail.

For example, matters which would primarily be associated with agriculture, animal farming and other primary production are, in the main, under the control of the department of agriculture and food. In contrast, matters which may be more readily associated with public health such as food hygiene, labelling and additive control is the responsibility of the department of health and children. The obvious effect of this separation is that there is very little consistency in the application of the various parts of the food code. Further, lessons learned in one part of the country may never be known in another until a different local authority makes the same mistake.

But not all food safety problems can be blamed on a lack of consolidated regulations. For example, how many butchers kept cooked and raw meats separate five years ago? It is certain that more do now, due to the barrage of media coverage on food issues, but it certainly hasn't been solely through the efforts of the government press office. The government has not bombarded the general public with television and radio advertisements on the benefits of being vigilant when it comes to food handling and spotting early signs of food poisoning. Consider how much revenue from both national and international sources the government would have retained, say in the beef sector, if it had worked out a proper clearing and certification programme for safety when the first mad cow fell down several years ago.

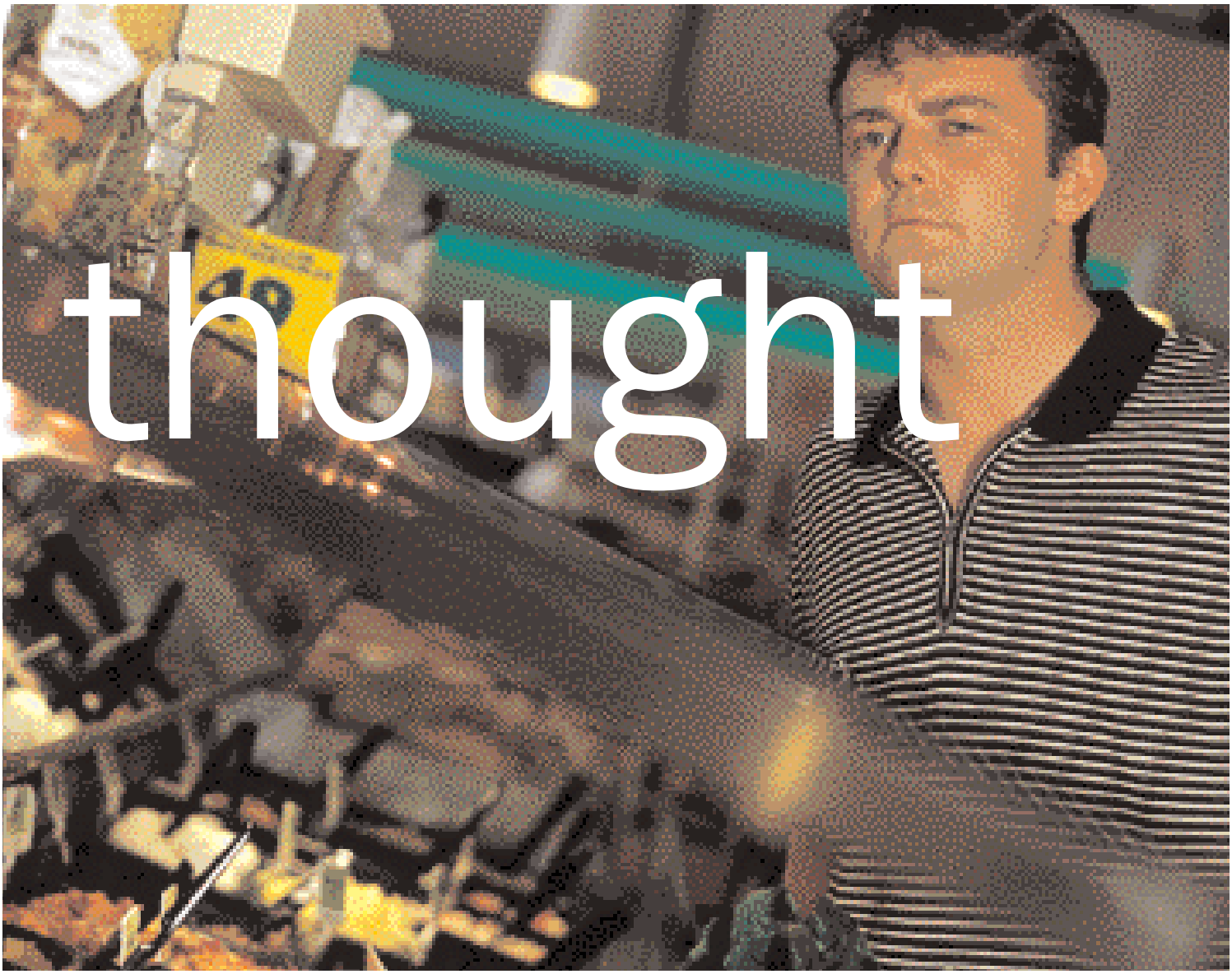
Co-operation is clearly needed between government agencies, local authorities and the health boards to minimise effort and maximise return in researching complaints and surveying all aspects of food safety.

It is the state's responsibility to ensure that the food hygiene code is clear and comprehensive. All producers of food, big or small, must be able to understand and comply with the regulations. Equally, it is in the interests of both the state and the food industry to heighten consumer confidence through education.

Regulating the food industry

For the purpose of this article, we intend to limit our examination to the section of the food hygiene code which regulates the production and sale of food to the consumer, as operated by the health boards (**see panel opposite**). Of these, the 1998 regulations are of primary importance.

The first major attempt to produce food safety guidelines was the *Food Hygiene Regulations 1950–1989*. These were operated for over 35 years until the 1998 regulations were made as a result of pan-European directives emanating from Brussels. The 1950–1989 regulations provided for a system of licensing of several key areas, including all food premises, food vans and food stalls. Allied to this system of licensing was a system of registration of



food businesses with the health board.

The imposition of the 1998 regulations on the previous code has had some considerable practical benefits, for example, the concept of a hazard analysis and critical control point (HACCP) has been introduced (**see panel overleaf**) and the practical day-to-day powers of health board officers have been increased.

Spaced-out on food safety

Pronounced 'hassip', HACCP is a food safety programme developed nearly 30 years ago for American astronauts. It has been adapted for the food supply – and is still being adapted – by the US Food and Drug Administration. Under other systems, regulators depend on spot-checks of manufacturing conditions and random sampling of final products to ensure safe food. However, this is a reactive approach rather than a preventive one, and can be less efficient.

HACCP offers a number of advantages over the current system:

- By correctly identifying hazards and all the critical control points (CCPs), one ends up with a production process where a minimum number of safety checks are performed to precise criteria. The result is cheap and efficient and can result in a safe product every time
- HACCP helps a food producer to break into and compete more effectively in the world market, in the same way that an ISO or Q-Mark certification can be used to show that the product is of a high quality
- It focuses on identifying and preventing hazards from contaminating food and is based on sound science

LEGISLATION REGULATING THE PRODUCTION AND SALE OF FOOD

- *Sale of Food and Drugs Act, 1875–1936*
- *Health Act, 1947*
- *Health Act, 1953*
- *Health Act, 1970*
- *Food Hygiene Regulations 1950–1989*
- *European Communities* (Health Act, 1947, *Amendment of Sections 54 and 61) Regulations 1991*
- *European Communities (Hygiene of Foodstuffs) Regulations 1998*
- *European Communities (Official Control of Foodstuffs) Regulations 1998*
- *Health (Official Control of Food) Official Laboratory's Order 1998* G

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for the Law Society of Ireland

- It permits a more efficient and effective overview, primarily because the record-keeping allows investigators to see how well a firm is complying with food safety laws over a period of time, rather than how well it is doing on any given day
- It appropriately places responsibility for ensuring food safety on the food manufacturer or distributor.

The costs associated with failure of a company's food safety system are higher than HACCP implementation programmes. In terms of product cost, the indirect costs of a product recall can exceed product value several fold. Litigation expenses associated with a recall and expenses directly related to personal injury claims can exceed the direct costs of a recall. The cost of HACCP programmes are significant, but substantially less than the direct costs of a single recall. So an established single-body agency could help significantly in the establishment of a HACCP programme, no matter what the firm size, thus freeing up the courts, saving money and boosting consumer confidence.

Environmental health officers

Those affected by the food code must be familiar with its contents and procedures. In practice, this means the proprietors of food businesses will wish to know what they should do when the environmental health officer (EHO) calls.

When an officer visits food premises for the purposes of an inspection, he has certain statutory powers of entry. Article 11 of the *Official Control Regulations* provides that an EHO may, at all reasonable times, enter 'any premises in which he has reasonable grounds for believing that any controlled item is being produced, manufactured, imported, processed, stored, transported, distributed or traded'.

All officers inspecting food premises will have been issued with a warrant detailing their identity as officials of the health board empowered to perform certain functions under the food hygiene code. In this regard, article 3(2) of the *Hygiene of Foodstuffs Regulations* provides that an EHO shall be furnished with a certificate of his appointment and, when exercising his powers under the regulations, shall, if so requested by a person affected, produce the certificate. Accordingly, when an EHO visits a premises, the proprietor himself or his employees should require the officer to produce his certificate of appointment. If he does not comply with this mandatory provision, it is arguable that he is then precluded from exercising his powers under the regulations. But once the officer has correctly identified himself, the proprietor of the food premises must co-operate fully with him. Refusal of entry will only result in a prosecution for obstruction and a possible forced entry.

It appears to be the policy of the health boards to enforce the regulations vigorously and to resist any attempt by proprietors of food premises to avoid compliance with the regulations.

Once the officer has gained entry to the premises, his powers are extensive. These are detailed in articles 7 to 10 of the *Official Control of Foodstuffs Regulations*. It is not the practice of environmental health officers to wait for legal representation before questioning staff or examining documents. In addition, it is unclear whether a member of staff or a proprietor may refuse to answer a question on the grounds of self-incrimination, given the 'unconditional priority' which these inspections must be given under European law.

Article 8 usefully summarises an EHO's powers of examination:

- Inspection
- Sampling and analysis
- Inspection of staff hygiene
- Examination of written and documentary material
- Examination of any verification systems set up by the undertaking and of the results obtained.

The staff hygiene examination mentioned in article 8(c) above extends to those who 'in the exercise of their activity come into contact, whether directly or

MAIN POINTS OF THE HACCP PROGRAMME

The HACCP system consists of seven key points which lead to establishing, implementing and maintaining a safety plan:

- Hazard analysis that yields a list of potential hazards associated with a food and measures to control and prevent those hazards. Employees must be competent in all aspects of the production process and must be willing to adhere to HACCP principles
- Identification of critical control points (CCPs) where controls can be implemented so the potential hazard can be controlled or eliminated from raw materials through processing
- For each CCP, it is essential to establish preventive measures with critical limits. For example, setting the minimum cooking temperature and time required to ensure elimination of any microbes
- Establishment of CCP procedures for the on-going monitoring of results, for example, determining how and by whom the cooking time and temperature should be monitored
- Deciding on corrective actions to be taken when monitoring shows that a limit has not been achieved. For example, reprocessing or disposing of food if the minimum cooking temperature has not been met
- Verification of the HACCP system, for example, by testing time and temperature recording devices to verify that a cooking unit is working properly
- Maintaining detailed documentation of the HACCP system, including records of hazards and their control methods, the monitoring of safety requirements and actions taken to correct potential problems.

The first and second steps are the most important part of the procedure. If these steps are inaccurate, then the entire HACCP plan is rendered virtually worthless. So it is vital that those responsible for HACCP are experts in the production process, knowledgeable about each step of the process and informed on the safety parameters associated with each step. G

indirectly' with virtually any stage in the preparation of the food, from the raw material stage to labelling and presentation. This provision is virtually boundless in scope and can clearly extend to non-employees of the proprietor, such as deliverymen and cleaners.

The environmental health officer is entitled to take measurements from any equipment on the premises and may, under articles 12 and 13, take samples of foodstuffs in any stage of preparation. Any such sample taken must then be divided into three equal parts and placed in sealed containers. One part is sent to the public analyst, one is retained by the EHO and the third part must be given to the person in charge of the food premises. The proprietor should keep this sample safe in a refrigerator or a freezer, as it may make for a vital part of any future defence.

Compliance issues

The regulatory agencies are only concerned with one outcome with regard to compliance: are businesses conforming to the regulations? It is unknown how much thought is given to the processes which must be put in place or re-channelled to produce that particular outcome, although it is the actual nature of the compliance processes that determines a lot of the associated costs. It is generally thought that a firm changes regulatory requirements into compliance in an easy and straightforward manner and that non-compliance is a rogue outcome and is to be punished, and it is this very mind set which needs to be changed.

In bigger firms, there will generally be a department for monitoring government regulations, but in smaller firms, this may be just one of a number of responsibilities held by one individual, often the managing director (and is he really the individual to take on this responsibility?). Small companies are sometimes more aware of compliance costs than large firms, and the scale and complexity of any changes required for compliance in a small company are usually less than in a large one.

Firms can adopt different strategies when responding to new regulations. They can fight the regulation and do the minimum to meet compliance or, at the other extreme, they can regard the regulation as an opportunity to lead the industry. However, this may actually reduce competitiveness if there are last-minute changes to the regulations which were not anticipated. In reality, though, firms rarely adopt pure strategies, tending to adopt a mixture, depending on the regulation itself and the company's size and structure.

The policy environment surrounding food safety regulations is in a state of disarray. There seems to be a never-ending demand for extra regulation of the food system so as to protect public health, but there are concerns over burdens imposed on the system by what are seen as a very onerous food safety regime. Therefore, attention has been turned in recent times to 'effective' food safety regulations – that is, those which achieve the desired level of safety at a minimum cost and so put the public at an increased risk for illness to gain some savings. It is quite likely, though, that people would be willing to pay premium prices, on top of the tax they already pay, for products that do not compromise the safety and health of their families.

PENALTIES FOR BREACHING THE REGULATIONS

The regulations provide that any person who breaches any article or sub-article shall be guilty of an offence and shall be liable on summary conviction to a fine of up to £1,000 or, at the discretion of the court, to imprisonment for a term of up to six months, or both.

In addition, article 19(2) of the *Official Control of Foodstuffs Regulations* empowers an environmental health officer to require a member of An Garda Síochána to assist him in the exercise of any power conferred on him by the regulations which involves the detention of any person, the bringing of any person to any place, the breaking open of any premises, or any other action in which the use of force may be necessary and is lawful. The said member of An Garda Síochána is bound to comply with this requirement. G

'The policy environment surrounding food safety regulations is in a state of disarray'

Future direction

The science of risk assessment is at an early stage of development. Numbers of bacteria in food are not constant and so present a key challenge to the application of risk assessment techniques. But recent advances in predictive microbiology and computer modelling have begun to allow the first quantitative microbial risk assessments.

The role of the government is absolutely crucial. A new type of professional specialising in food safety is needed, one who will eventually take over the role now filled by the environmental health officer. The education and training required will need to be worked out carefully. It is obvious the programme must include microbiology, chemistry, food science and technology, legislation, inspection procedures and investigative techniques. Succinctly, there will have to be a strong emphasis on an interdisciplinary approach.

To achieve this, a few centres of excellence will need to be established which will conduct detailed research and shoulder the burden of responsibility for devising suitable undergraduate and postgraduate courses. Such centres would be able to provide specialised expertise to help investigations when incidents arise.

In summary, the 1998 regulations have attempted to modernise an outdated food safety system, but this has only been partially successful. The new regulations have introduced the long-awaited concept of HACCP into food legislation and have greatly increased the practical enforcement powers of the environmental health officers. But food law merely reflects the current state of scientific thinking in the area. Accordingly, it is imperative that the regulations be expanded and consolidated to include the latest developments in risk management and investigative techniques. It is also essential that a single agency be given full control of food safety and education.

While the food safety authority is a step in the right direction, it is the first of many steps that need to be taken on the road to achieving consumer confidence in the food industry. G

Richard O'Sullivan is a solicitor in the Dublin law firm Mason Hayes & Curran and Niall Hunt is a doctoral research chemist in UCD's Chemistry Department.

Book reviews

Corporate finance law

Dermot Cahill. Round Hall Sweet & Maxwell (1999), 43 Fitzwilliam Place, Dublin 2. ISBN: 1-85800-131-5. Price: £98.

Corporate finance law, by solicitor and UCD law lecturer Dermot Cahill, is the latest in a series of recent offerings on this area of the law.

The book comprises nine chapters and deals with five core areas: equity financing, debt financing, grant aid, insider dealing, and take-overs and mergers. Chapter 1 considers admissions, listings and prospectuses and deals with the pre-conditions for admission to the stock exchange and the information to be disclosed under the listing process. The different methods of listing securities are also examined. Chapters 2 and 3 examine the prospectus in detail. These include the issue of what constitutes an offer to the public, the responsibilities of promoters, and the liabilities that may arise from the prospectus. Insider dealing is dealt with in chapter 4 and includes a consideration of the *Yellow book*'s model code and the provisions of the *Companies (Amendment) Act, 1999* on stabilisation rules, which were enacted in connection with the Telecom Éireann initial public offering. Chapters 5 to 7 examine debt subordination and debt factoring, which will be of interest to corporate finance specialists, and corporate borrowing and charging of book debts, which will be relevant to a wider audience. Chapter 8 considers grant aid and chapter 9 examines the regulation of mergers.

Dermot Cahill's book deals with a subject of growing importance. Although only 39 of the cases cited are Irish, nearly three-quarters of those have been decided or reported in the last 25 years – yet another indication of the Irish economy's coming of age. *Corporate finance law* will deservedly find a readership among specialists in the field, but it also has much that will be of interest to commercial lawyers generally. G

Niall O'Hanlon is a practising barrister and editor of Irish business law. *He is also a qualified chartered accountant.*

Bunreacht na hÉireann: a study of the Irish text

Micheál Ó Cearúil and the All-Party Oireachtas Committee on the Constitution. Government Publications Sales Office, SunAlliance House, Molesworth Street, Dublin 2. ISBN: 0-7076-6400-4. Price: £15.

The All-Party Oireachtas Committee on the Constitution, which commissioned this study, was established on 16 October 1997. The all-party committee was requested to undertake a full review of the constitution so as to provide focus to the place and relevance of the constitution and to establish those areas where constitutional change may be desirable or necessary.

Article 25 of the constitution provides that the constitutional text in both official languages is authentic. But article 25 stipulates that in case of conflict between the enrolled texts in both the official languages of the constitution, Irish and English, the Irish language text prevails.

The committee considered in the course of its work that a detailed study of the Irish text was required. In his foreword, Brian Lenihan TD notes that the present Irish text of the constitution illustrates the richness and antiquity of the language. In fact, some of the terms employed in the constitution have a lineage that can be traced back to the eighth century.

The study illustrates certain anomalies in the constitution. These particularly relate to the script, spelling, grammar and vocabulary of the Irish text.

This study of 768 pages will be of considerable assistance to those interpreting the provisions of the constitution. The author and the all-party committee present us with a rigorous, careful and significant work on the constitution of Ireland. G

Dr Eamonn Hall is company solicitor of Eircom plc.

Credit unions in Ireland (second edition)

Anthony P Quinn. Oak Tree Press (1999), Merrion Building, Lower Merrion St, Dublin 2. ISBN: 1-88076-122-4. Price: £18.95 (paperback).

Credit unions in Ireland is written by an author who is well placed to write it. Anthony P Quinn is a former assistant principal in the Registry of Friendly Societies. He is active in the Society for Co-operative Societies in Ireland and is a founder member of the Law Library Credit Union.

This is a book on a subject that might seem easy to dismiss. To do so would be an injustice, both to the subject and to the book. John Hume MP MEP explains in the foreword: 'The credit union movement is the most successful co-operative in the history of Ireland. Its positive work for individual human beings, families and communities is invaluable'.

Quinn puts credit unions in perspective by noting that total credit union membership throughout Ireland, even allowing for people who are members of more than one credit union, stands at over 2,200,000 members. The proportion of members among the professional classes is increasing, while that among farmers is decreasing. Total loans to members is almost £2,300 million, with savings of about £3,400 million.

The author does not purport to furnish us with detailed research into the effects, short- and long-term, of credit unions on the history of Ireland – both social and economic. Rather, his work is a useful and practical look at where credit unions have come from, what they do now, and how they do it.

The chapters range from the background and origins of the credit union movement, through such matters as their rules, their governance, the supervisory role of the registrar of friendly societies, the functions of credit unions' advisory committees and future trends for credit unions.

This is a readable book on an important subject. It provides a helpful index for those who would use it as a reference and also a helpful bibliography on credit unions. Surprisingly, the list of acts does not provide the pages on which they are mentioned – nor does it list the sections of the acts which are referred to in the text and the pages on which they are mentioned. But for most readers, the contents and index pages should be sufficiently helpful.

The author makes no assumptions about the knowledge of the reader. We are told in basic terms what credit unions actually are: mutual self-help societies, not charities. 'Fundamental to successful financial operations is the virtuous cycle of members saving money which is loaned out to other members, thus earning interest for the credit union', the author explains.

The work covers the provisions of the *Credit Union Act, 1997*. We are told that membership of credit unions 'is based on the basic concept of a common bond between members now provided for by section 6(1)(b) and(3) of the 1997 act and the Irish League of Credit Unions standard rules. Members must be in the same occupation, live or work in the same locality or be members of the same association'.

A glimpse through the contents pages confirms that this is a useful reference work on an important social and economic force in both old and modern Ireland. The author is careful to advise that professional advice should be sought on legal, financial, accountancy and insurance matters where considered necessary.

Quinn tells us that a greater degree of transparency is necessary in credit unions than in the usual commercial enterprise. Particularly in these times, can they teach us something? G

Pat Igoe is the principal of the Dublin-based firm Patrick Igoe & Co.

Commercial and consumer law (third edition)

Patrick F O'Reilly. Butterworths (1999), 26 Upper Ormond Quay, Dublin 7. ISBN: 1-85475-8403. Price: stg£50.

This is another book in Butterworths' *Irish annotated statutes* series. It will be found useful by all legal practitioners, particularly those working in the business law area. It has two main parts: part 1 comprising commercial legislation and part 2 comprising consumer legislation, each with three sub-categories. In part 1, under the sub-category *General statutes*, are found in alphabetical sequence (*Agricultural Credit Act, 1978* to *Trading Stamps Act, 1980*) no less than 27 commercial acts, including the *Bankruptcy Act, 1988*, the *Central Bank Acts* and the *Sale of Goods Act 1893*; under the sub-category *European legislation* are found the directives relating to self-employed commercial agents and investor compensation schemes; and under the sub-category *Statutory instruments* are found the regulations relating to agricultural credit and commercial agents. In part 2, which focuses on consumer legislation, there are six general statutes, including the *Consumer Information Act, 1978*, the *Sale of Goods and Supply of Services Act, 1980* and the *Consumer Credit Act, 1995*; under *European legislation* there are seven EU directives or regulations relating, among other things, to misleading advertising, liability for defective products and unfair terms in consumer contracts; and under *Statutory instruments* there are the regulations which apply those consumer-related EU directives to Ireland.

Throughout the text of each enactment, the author includes cross-references to subsequent amendments where they occur and also includes incisive commentary notes which are particularly helpful where a section (or equivalent section) has been the subject of judicial interpretation, either in this jurisdiction or in the UK.

Patrick F O'Reilly is to be complimented on his manner of presentation in this compilation, showing concisely the ever-increasing and important incursion of statute law into areas concerned with the regulation of commercial activity and the protection of the consumer. His book represents a most helpful substitute for what in other jurisdictions would be a codified and coherent legislative 'corpus'.

The author is a barrister, but his name will have more than a ring of familiarity to many solicitors (particular those in Dublin), who will associate the name Patrick F O'Reilly with the firm of the same name in South Great George's Street established by and called after his solicitor grandfather (who finished up his illustrious legal career as taxing master and was fondly referred to as PF by those of that vintage). That practice was continued and expanded by his solicitor father, T Finbarr (Barry) O'Reilly (RIP), to whom the book is appropriately dedicated. G

Michael V O'Mahony is a partner in the Dublin firm McCann FitzGerald.

Book reviews

Trade union membership and the law

Cathy Maguire. Round Hall Sweet & Maxwell (1999), 43 Fitzwilliam Place, Dublin 2. ISBN: 1-899738-74-X. Price £35 (paperback).

A trade union is an unincorporated association, a bit like a members' club. The relationship between a member and his club is a contractual one. Membership is a contract of membership and Ireland has a very high percentage of its workers in registered trade unions. In the last 100 years or so, there have been only two major works published on Irish trade union law. The first one, Kerr and Whyte's *Irish trade union law* (1985) and the second being Cathy Maguire's recent book.

Trade unions were originally outlawed as being in restraint of trade, but they have come a long way since then. The *Trade Disputes Act* of 1906 remained in force in Ireland for some 84 years until it was updated by the *Industrial Relations Act, 1990*.

Maguire's book is the first major work that has been published since the coming into operation of the 1990 act. It deals very fully with the relationship between members and their trade union. The topics covered include the contents of the rule book and what must be contained therein under the various acts, including the *Trade Union Act 1871* and amendments made in 1913, 1947 and 1990. Perhaps the most important amendment – which has given issue to the most litigation so far – is section 14 of the *Industrial Relations Act, 1990*, which states that a union rule book must contain rules about secret ballots prior to sanctioning official strike and industrial action. Most trade unions had these rules in their books prior to 1990, but because of the 1990 act employers have started looking very closely at internal procedures within unions for balloting strike/industrial action, and there have been several cases in the superior courts on this issue. This book deals very fully with the cases involved and they are cited and analysed fully.

Maguire also deals very thoroughly with admission into membership of a trade union, members' conduct, rights and obligations, as well as expulsion. She deals with union discipline and, again, this is an area where solicitors are being increasingly consulted when members see themselves in difficulty or in conflict with their union. The text sets out very fully what the fair procedures are, as well as their limits. All recent decisions are comprehensively cited and analysed.

Maguire also discusses the rule book and litigation dealing with the principles of law involved, and the rights and obligations of the controlling authorities of the union.

A practitioner, trade union official or member need go no further than this volume to answer whatever queries they might have. It is very reasonably priced and it should be on the shelves of practising lawyers, trade union officials and members holding senior positions in unions. I have no doubt that it is an area where solicitors are going to be increasingly consulted by their clients, and it will be necessary for them to have this volume available to help in advising those clients. G

Kieran O'Brien is a solicitor in the Dublin law firm Bowler Geraghty & Co.

Law and finance in retirement

John Costello. Blackhall Publishing (2000), 26 Eustace Street, Dublin 2. ISBN: 1-901657-809. Price: £9.99 (paperback).

The title of this book is somewhat misleading, as it implies that it only applies to retired people or those on the verge of retiring. My own view is that this book has a place in every person's home. It is a comprehensive layperson's guide to a wide range of issues that most of us will face sooner or later.

Key areas covered in the book include wills and inheritance tax, health and incapacity, community, residential care, nursing homes, separation and divorce. Topics such as social welfare, pensions, taxation and family savings are also addressed in a very clear and practical manner.

One of the greatest attractions of this book is its comprehensive nature. Personally, in the past I have had to trawl through a variety of publications before having the full picture of, for example, a person's financial entitlements when faced with long-term care. In the chapter on pensions, the three sources of pensions (occupational, state and personal pensions) are covered in a clear and unambiguous style.

An added valuable dimension to this book is the section containing relevant telephone numbers and addresses of health boards, social welfare agencies and revenue offices. Additionally, a list of the organisations and citizens' information centres working for or with older people is provided.

The glossary offers enormous help to people who are otherwise intimidated by the use of technical and legal language.

Law and finance in retirement highlights a number of areas which require, in my view, a wide public debate. Among such topics is the medico-legal issue of living wills or advance directives.

Many older people have strong views on what they believe is their right to make decisions about their future healthcare needs, should they become mentally or physically incapacitated.

Law and finance in retirement will help readers to deal with potential problems both effectively and efficiently. I am delighted to have a copy of this book, which I strongly recommend as a pertinent compendium of advice on so many current social issues. G

Lenore Mrkwicka is deputy general secretary of the Irish Nurses Organisation.

Tech trends

Compiled by Maria Behan

Protecting your precious assets

Murphy must have been in the computer business, since his law seems to apply to that realm more than any other. But the well-prepared needn't be unduly worried, since the Hewlett-Packard *Colorado* back-up drive equips computer users with serious PC protection. It's designed to be data protection that's easy-to-install, easy-to-use (with one-button back-up) and, above all, reliable. Whichever size drive you choose (up to 14 GB depending on your needs), the *Colorado* comes with disaster-recovery software and a two-year warranty, which should still the fluttering heart of any nervous Nellie. *Available for about £260 for a 14 GB drive at computer outlets or from Hewlett-Packard on 1850 474727.*

Bug zapper

Your home or office computer needs virus protection if it is connected to the Internet – or even reads diskettes from another machine. *McAfee Active Virus Defense* from Network Associates is designed to protect your system from the latest digital beasties lurking out there, including Love Bug-type viruses. *Available for about £45 from the Electronics Boutique and other computer retailers.*

Is the Handspring mightier than the Palm?

The *Handspring Visor* is a pocket-sized (4.8' by 3.0') computer that can convert from an organiser to a digital camera to a music player – and it's compatible with thousands of *Palm* programs. The top-of-the-line *Handspring Visor Deluxe* packs 8 MB of memory, so busy anal-retentives with loads of friends can store 12,000 addresses, ten years of appointments, 6,000 to-do items, 6,000 memos and 400 e-mail messages. Those who are stylish as well as organised will be pleased to learn that it comes in a variety of colours. *The deluxe model, priced at £280, is available from Dixons.*

Jack of the paper trade

When it comes to printing, copying, faxing, even reading paper, this versatile machine can get the job done for a small business or home office. The Canon *MultiPASS L90* features a laser printer, fax capabilities (either directly from the machine or an attached PC), a copier with text-reduction facility, and a high-resolution (up to 400 dpi) scanner and optical character-recognition software that lets you convert hardcopy documents into editable text. *Available at computer outlets for approximately £1,375.*

Legal accountability

Billing itself as the most widely installed legal accounting system in the UK and Ireland, the *AlphaLAW* software range also includes applications designed to handle such areas as time recording and case management. *Packages start at less than £1,000 for a solution tailored to a small practice; contact AM Systems on 01 292 8500 for more information.*

AlphaLAW.

Coming to the point

According to Kanitech, the Danish outfit behind the Freepen cordless computer mouse, it affords freer movement and a more natural working position, which may translate into less wrist and back pain. It uses laser technology so you can draw and click on commands when you're as far away from your PC as 2.5 meters. This little gizmo also lets you programme in your own shortcuts to commonly-used programs or functions, as well as input commands by touching the Freepen to a computer screen. *Available for £35 from Euro IT Products on 01 856 1086.*

Sites to see

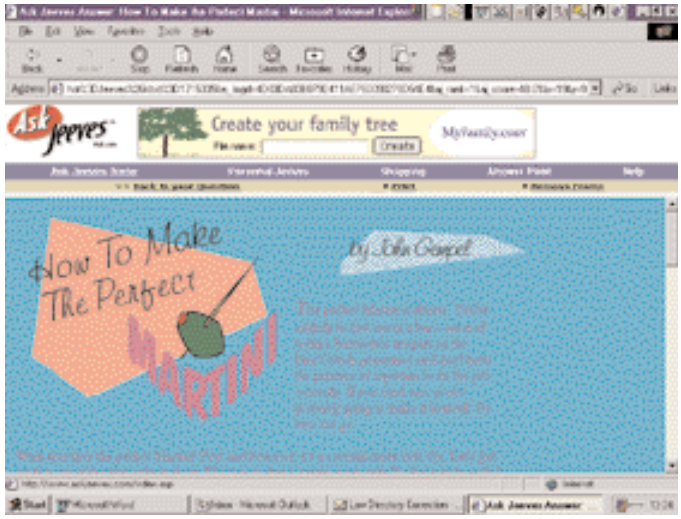
Roller Coaster.ie (*http://www.rollercoaster.ie*). This site aims to help parents deal with the ups and downs of child-rearing by offering tips on everything from new babies to nutrition to handling separation and divorce.

Legal-Island (*http://www.legal-island.com*). Catering to the total lawyer, this site offers updates on legislation, court judgments and legal news as well as weather reports and TV listings. There's also an employment-law update service that operates via e-mail, links to search engines and newspapers, and a solicitor locator service – whatever that is.

The Office of the Attorney General (*http://www.irlgov.ie/ag*). Offers legal and governmental goodies such as information on the attorney general and chief state solicitor, Dáil debates, *Acts of the Oireachtas, 1922-1997*, and a study of the public prosecution system.

Embarrassing Problems (*http://www.embarrassingproblems.co.uk*). The Internet is as anonymous as the confessional, and certainly less judgemental. So if you're worried about wind, baldness or snoring (or know someone who should be), this site offers comprehensive, sensitively-delivered information on health problems that are sometimes difficult to discuss.

Ask Jeeves (*http://www.askjeeves.com*). This virtual butler can't make you a perfect martini, but he can tell you how to do it yourself. Jeeves can also answer a host of other questions, on everything from business to sport – and even what you should name your dog or cat.



Report of Law Society Council meeting held on 23 June

Motions for September meeting

'That this Council recommends that a statutory instrument be passed prohibiting solicitors representing both parties in a family law dispute.'

Proposed: Sean Durcan
Seconded: Stuart Gilhooly

'That this Council approves the scheme of assistance for solicitors about whom a complaint has been made to the Law Society or who are in difficulty with the Law Society.'

Proposed: Keenan Johnson
Seconded: John P Shaw

Revenue audits of solicitors: access to client account information

The president reported on a recent meeting with the chairman of the Revenue Commissioners and his officials to discuss certain issues arising in the context of Revenue audits of solicitors' practices and, in particular, the implications for solicitor/client confidentiality arising from the Revenue's requirement that solicitors should divulge the names and addresses of their clients. The Council noted that the judicial review proceedings being brought by Stephen Miley, solicitor, against the Flood Tribunal related to the confidentiality of client names and the Council agreed that any further discussions with the Revenue should be deferred, pending the outcome of those proceedings.

Judicial review proceedings by Stephen Miley against the Flood Tribunal

The Council considered an order made by the president of the High Court (a) granting leave to apply for judicial review to Stephen Miley, solicitor, against decisions made by the Flood Tribunal, and (b) granting leave to the society to be joined as a notice party to the proceedings. The Council unanimously agreed that the society should be a party to the proceedings and should take the opportunity to assist the court by setting out the law and practice surrounding legal professional privilege and solicitor/client confidentiality. It was also agreed that the society should adopt a neutral stance in relation to the specific case and should neither support nor oppose the positions of either party to the proceedings.

Army deafness litigation

James McCourt briefed the Council in relation to meetings held on 16 June with representatives of the state and representatives of the plaintiffs' solicitors, which were facilitated by the society. Various matters had been agreed which, ultimately, had assisted Mr Justice Johnston to make an order on 21 June to resume the Dublin High Court list on 11 July 2000, for the remainder of the term, with the first two weeks of Michaelmas term being adjourned and the entire matter being reviewed by him on 2 October 2000.

EU directive on money-laundering

The president reported on meetings held by representatives of the society with Irish MEPs, the CCBE and the Irish EU commissioner to emphasise the society's opposition to reporting requirements being placed upon lawyers in the forthcoming EU directive. Following these meetings, amendments to the draft directive had been prepared by Mary Keane and were circulated for consideration by the Council.

The draft amendments proposed (a) the removal of any obligation on lawyers to report suspicions in relation to their clients, (b) the removal of the provision permitting member states to designate 'any other criminal activity' for the purposes of the directive, (c) the removal of the new proposal that national representative bodies become involved in a reporting regime, and (d) the removal of the provision entitling member states to use the information gathered for other purposes.

These submissions were totally consistent with the society's fundamental objection to the requirements of section 32 of the *Criminal Justice Act, 1994*. The Council approved the proposed amendments to the EU directive, for submission to those MEPs with whom the society had met on the issue.

Report of the independent adjudicator

The director general reported that, both at his meeting with the minister for justice and at the press conference to launch his report, the independent adjudicator had referred to the society's complaints-handling as 'admirable' and 'extremely satisfactory' and had expressed his satisfaction that the society had provided its complaints section with all necessary IT and other resources.

European convention on human rights

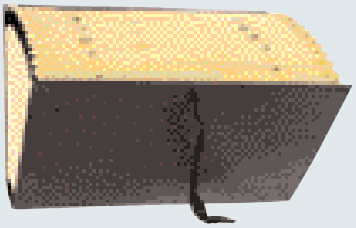
James MacGuill reported that the society's task force on the convention had made contact with the relevant department of justice officials. Proposals for joint seminars on the convention were being discussed and the task force also intended to meet with solicitors from Scotland, who could share their experiences on the consequences of implementation of the convention in that jurisdiction over the past six months. The next step was to consider and make submissions on the draft heads of the bill, which had been requested from the department.

Solicitors (Amendment) Bill, 1998

The Council noted, with approval, draft amendments to the *Solicitors Bill* to give effect to elements of the EU directive on the establishment of lawyers and also noted that a sub-committee, chaired by Michael Irvine, was involved with the department in drafting implementing regulations.

International Bar Association

On the recommendation of the society's representative on the IBA, Laurence K Shields, and the society's Criminal Law Committee, the Council approved the nomination of Michael Farrell, solicitor, co-chairperson of the Irish Council for Civil Liberties, for the IBA *Bernard Simons Award for the Advancement of Human Rights*. The Council also endorsed an invitation to the International Bar Association to hold its council meeting in Dublin in May 2002. G



Committee reports

PROBATE, ADMINISTRATION AND TAXATION

TAX BRIEFING

The following extract from *Tax briefing*, issue 40 (June 2000), is reproduced by kind permission of the Revenue Commissioners.

Capital acquisitions tax

Residence rules

Section 137 of the *Finance Act, 2000* provides that a person will be resident in the state on a particular date if he or she is resident in the state for the tax year in which that date falls. Following a committee stage amendment, the section provides that it will not be necessary to await the end of a tax year before being able to decide whether or not a person is resident in the state on a particular date within that tax year.

Inheritance tax/residence

Section 139 of the *Finance Act, 2000* provides that a charge to inheritance tax will arise in respect of foreign assets where either the disponer or the beneficiary is resident or ordinarily resident in the state at the relevant date. The section, as amended at committee stage, now ensures that foreign assets will only be subject to discretionary trust tax or to probate tax where the deceased person concerned was resident or ordinarily resident in the state at his or her date of death (or, in the case of a discretionary trust created in the lifetime of the deceased, at the date the property entered the trust).

In other words, the amended section ensures that a charge to either tax will not arise solely on the basis of the residence of a trust – which has no legal personality in its own right.

Dwelling-house exemption

The clawback provision in section 151 of the *Finance Act, 2000* provides that a person who takes a gift or inheritance of a house must continue to own and occupy it for a period of six years after the date of the gift or inheritance or lose the exemption (except in certain prescribed circumstances).

As amended at committee stage, the clawback provision now enables a beneficiary to sell the house and reinvest the proceeds in a replacement house without losing the exemption – on condition that he or she continuously owns and occupies both houses for a total of six out of the seven years after the date of the gift or inheritance. In such circumstances, the clawback will be limited to any proceeds of the sale not invested in the replacement house.

Treatment of orphaned minor children

Section 58 of the *Capital Acquisitions Tax Act, 1976* exempts from the tax reasonable expenditure by parents during their lifetime towards the support, maintenance and education of their children. Section 152 of the *Finance Act, 2000* extends the exemption to include reasonable contributions from a trust holding the property of deceased parents towards the support, maintenance and education of their orphaned minor children. The exemption contained in section 152 applies to gifts or inheritances taken on or after 23 March 2000.

Topical questions

1) Schedule D

How is an Irish-resident individual assessed to tax in respect of dividends paid by a UK company?

With effect from 6 April 1999, an Irish-resident taxpayer in receipt of dividends from a UK company is liable to Irish tax under case III, schedule D on the actual amount of the dividend received. While the dividend certificate may contain a reference to a UK tax credit, this reference has no relevance for Irish tax purposes.

Up until the Ireland-UK double-taxation convention was amended at the end of 1998, there were provisions in the convention which allowed residents of each country a credit for part of the tax paid by the company in the other country paying the dividends (known as a repayable tax credit). This reflected the position in the tax laws of each country of allowing recipients of dividends a credit in respect of part of the tax paid by the company on the profits out of which the dividends were paid.

However, following the abolition of tax credits in Ireland in 1999, and a significant reduction in the amount of the credit in the UK (the effect of which was to largely eliminate repayable credits in the case of non-UK residents in receipt of UK dividends), the double-taxation convention was amended to take account of these developments. Accordingly, there are no longer any reciprocal provisions which allow for repayable tax credits.

2) Schedule E

Minimum Notice and Terms of Employment Act, 1973 to 1991: *what is the taxation treatment of sums paid under this act?*

Normal pay/sick pay/holiday pay. Tax should be deducted by the employer under PAYE in the normal way.

Payment in lieu of notice. This income is chargeable to tax but qualifies for the £8,000 (plus £600 for each complete year of service) exemption (and the additional exemption and reliefs, where they apply) provided for in section 201 and schedule 3, *TCA 1997*. However, where the contract of employment provides for a payment of this kind on termination of the contract, whatever the circumstances, such payment is chargeable to income tax in the normal way without the benefit of the exemption and reliefs mentioned above.

Awards made by the Employment Appeals Tribunal: what is the tax treatment of awards made?

In general, awards made by the Employment Appeals Tribunal will have tax implications because the payments will normally be connected with the employment. It will depend on what the award covers as to the amount taxable. If it covers, say, a reimbursement of arrears of pay, holiday pay or sick pay, it is taxable in full in the normal way. If it covers, say, a payment for breach of contract of service or compensation for loss of employment under the *Unfair Dismissals Act, 1977 to 1993*, the £8,000 (plus £600 for each complete year of service) exemption (and the additional exemption and reliefs, where they apply) provided for in section 201 and schedule 3, *TCA 1997* will generally apply.

3) Capital gains tax

What are the rates of capital gains tax for 1999/2000?

The capital gains tax rates are 20% and 40%. The 20% rate applies to gains on disposals made on or after 6 April 1999, except for:

- Disposals of development land in the period to 30/11/99 – 40%*
- Disposals of foreign life assurance policies – 40%
- Disposals of units in certain offshore funds – 40%.

* The 20% rate applies to gains on disposals of development land (other than disposals to connected persons) (a) which is zoned for use solely or primarily for residential purposes in the development plan of the planning authority for the area in which the land is located or (b) with planning permission for residential development or (c) disposed of to a housing authority, the national building agency or voluntary housing bodies, in certain circumstances. All disposals of development land on or after 1 December 1999 are at the 20% rate.

ment of a life policy to the lender – such assignments attract a flat rate of duty of £10 each where the amount of the mortgage exceeds £20,000.

Is there stamp duty on gifts of property?
Yes. Where the property is transferred as a gift or for less than its full value, duty is charged on the market value of the property. This is the price that the property would make if sold on the open market. In the case of land and buildings, the rates of duty are the same as those that apply to conveyances or transfers on sale. In the case of shares, the rate of duty is 1%.

Year in which expenditure incurred: indexation factor for disposals in 1999/2000

74/75	**75/76**	**76/77**	**77/78**	**78/79**	**79/80**
6.313	5.099	4.393	3.766	3.479	3.139
80/81	**81/82**	**82/83**	**83/84**	**84/85**	**85/86**
2.718	2.246	1.890	1.680	1.525	1.436
86/87	**87/88**	**88/89**	**89/90**	**90/91**	**91/92**
1.373	1.328	1.303	1.261	1.210	1.179
92/93	**93/94**	**94/95**	**95/96**	**96/97**	**97/98**
1.138	1.117	1.098	1.071	1.050	1.033
98/99					
1.016					

No indexation relief is allowed for expenditure incurred within one year of a disposal. There are restrictions on the availability of relief in development land cases. Personal exemption = £1,000 per person. The exemption is not transferable between spouses.

4) Stamp duty

Conveyance or transfer on sale of shares: what is the stamp duty position?
Where shares in a company are being transferred, duty is payable at the rate of 1% on the consideration paid. There is no exemption threshold and the duty is rounded up to the nearest pound.

Mortgage: what stamp duty is chargeable?
Where a mortgage is taken out to purchase a property, stamp duty is chargeable on the mortgage deed as follows:

- Where the amount of the mortgage does not exceed £20,000, no stamp duty is chargeable
- Where the amount of the mortgage exceeds £20,000, stamp duty is chargeable at the rate of 0.1% rounded up to the nearest pound. The maximum duty chargeable is £500
- Where a lending institution requires a borrower to provide secondary security for a mortgage – for example, the assign-

When must stamp duty be paid?
Stamp duty must be paid not later than 30 days after the date of first execution of the deed. This means the date on which the deed takes effect and is normally the date on the deed.

Does stamp duty apply on a transfer of property between spouses?
No. A transfer of any property between spouses is exempt from stamp duty and there is no need to submit these transfers to the stamp duty office for 'exempt' stamping.

Personal public service number

The revenue and social insurance (RSI) number will in future be known as the individual's *personal public service (PPS) number*. The 1998 *Social Welfare Act* which came into effect on 5 February 1999 provides for the use of the PPS number. The PPS number replaces the existing RSI number which has been in use for both tax and social insurance purposes. *Existing numbers will remain unchanged.* The PPS number has wider use and is now the individual's unique reference number for dealings with government departments and public service agencies.

The PPS number/RSI number is essential to register for tax and has always been allocated by the department of social, community & family affairs. Up to now individuals who did not have an RSI number applied to the tax office for this number as part of the application for a tax-free allowance certificate or self-employment registration. The tax office located the number from their records or liased with the registration section of the department of social, community & family affairs for individuals who did not hold an RSI number. From 19 June 2000, the new procedures in relation to registration will be in place.

New procedures when registering for a PPS number
From 19 June 2000, applicants who do not hold (and require) a PPS number must first register with the department of social, community & family affairs by:

- Calling in person to the nearest or most convenient social welfare local office or social welfare branch office
- Completing a PPS number application form REG 1, and
- Presenting documentary evidence as requested in the application form to verify their identity.

An individual will be notified of his or her PPS number by the issue of a social services card.

Individuals with existing PPS numbers/RSI numbers are not affected by the change. Irish nationals should have a PPS number/RSI number if they:

- Were born in the state after 1971
- Registered for tax since 1979
- Are/were in receipt of social welfare benefit payment
- Were issued with a social services card.

In the main, the category of individuals who do not hold a PPS number/RSI number and who must first register with the department are:

- Irish nationals born before 1971 who are/were not registered for tax in the state
- Nationals of another country.

Probate cases
In order to facilitate the special needs of probate cases, solicitors or executors can contact the Department of Social, Community & Family Affairs, Client Identity Services, Registration, Gandon House, Amiens Street, Dublin 1, directly, if required, in exceptional circumstances, such as:

- A PPS number is required for a person who is deceased
- A beneficiary resides outside the state.

Tax registrations: new entrants to the PAYE/self-assessment system
Taxpayers should *first* obtain their PPS number/RSI number before submitting an application form (forms 12A, STR, TR1 and so on) to the tax office. While the tax office may be able to trace some PPS numbers/RSI numbers, forms submitted without this number will lead to delays in processing the application. Those forms will be returned to the applicant where the tax office is unsuccessful in tracing the number.

Pending a full changeover to the PPS number, some forms and publications will continue to refer to the RSI number. As supplies of existing forms are reprinted, the term 'PPS number' will replace the 'RSI number'.

Leaflet SW 100, *Personal public service number*, issued by the department of social, community & family affairs gives further information. Supplies of this leaflet are available from that department, local tax offices and from the Revenue's forms & leaflet service on tel: 01 878 0100.

Probate, Administration and Taxation Committee

LEGISLATION UPDATE: 13 JUNE – 14 AUGUST 2000

ACTS PASSED

Copyright and Related Rights Act, 2000
Number: 28/2000
Contents note: Makes provision in respect of copyright, protection of rights of performers and rights in performances; makes provision for licensing schemes and registration schemes for copyright and related rights; restates the law in respect of council directive 91/250 on the legal protection of computer programs; gives effect to council directive 92/100 on rental right and lending right and on certain rights relating to copyright in the field of intellectual property; gives effect to council directive 93/83 on copyright applicable to satellite broadcasting and cable retransmission; restates the law in respect of council directive 93/98 on the term of protection of copyright and certain related rights and gives effect to article 2.1 thereof; gives effect to directive 96/9 on the legal protection of databases; and provides for related matters
Date enacted: 10/7/2000
Commencement date: Commencement order/s to be made (per s1(2) of the act)

Courts (Supplemental Provisions) (Amendment) Act, 2000
Number: 15/2000
Contents note: Provides for the grant of full pension rights to a judge of the High Court who on his retirement on 9/7/2000 will not have accumulated the necessary 15 years' service as a judge which would entitle him to a full pension. Amends in a specified case part 1 of the second schedule to the *Courts (Supplemental Provisions) Act, 1961*
Date enacted: 28/6/2000
Commencement date: 28/6/2000

Criminal Justice (Safety of United Nations Workers) Act, 2000
Number: 16/2000
Contents note: Gives effect to the *United Nations convention on the safety of United Nations and associated personnel*, done at New York 9/12/1994. The purpose of the convention is to secure the better protection of personnel engaged in UN efforts in the field of preventive diplomacy, peace-making, peace-keeping, peace-building, and humanitarian and other operations
Date enacted: 28/6/2000
Commencement date: 28/6/2000

Criminal Justice (United Nations Convention Against Torture) Act, 2000
Number: 11/2000
Contents note: Gives effect to the *United Nations convention against torture and other cruel, inhuman or degrading treatment or punishment 1984*. Creates a statutory offence of torture in line with that contained in the convention. Amends the *Extradition Act, 1965*, the *Defence Act, 1954*, the *Criminal Procedure Act, 1967*, and the *Extradition (Amendment) Act, 1994*
Date enacted: 14/6/2000
Commencement date: 14/6/2000

Education (Welfare) Act, 2000
Number: 22/2000
Contents note: Provides for a national system of school attendance and minimum education; establishes the national educational welfare board which will have overall responsibility, subject to ministerial policy, for the implementation and operation of the act; repeals the *School Attendance Acts, 1926 to 1967*; amends the *Protection of Young Persons (Employment) Act, 1996*, and provides for related matters
Date enacted: 5/7/2000
Commencement date: Commencement order/s to be made (per s1(2) of the act); 5/7/2000 for any sections of the act not in operation by that date (per s1(3) of the act)

Electronic Commerce Act, 2000
Number: 27/2000
Contents note: Provides for the legal recognition of electronic contracts, electronic writing, electronic signatures and original information in electronic form in relation to commercial and non-commercial transactions and dealings and other matters; provides for the admissibility of evidence in relation to such matters, the accreditation, supervision and liability of certification service providers, and the registration of domain names, and provides for related matters
Date enacted: 10/7/2000
Commencement date: Commencement order/s to be made (per s1(2) of the act)

Finance (No 2) Act, 2000
Number: 19/2000
Contents note: Part 1 of the act provides for new rates of stamp duty for residential property for first-time purchasers, other owner-occupiers and investors. Subject to certain transitional arrangements, these new provisions will apply to instruments executed on or after 15/6/2000. Part 2 of the act introduces anti-speculative property tax on residential property in the state which is acquired on or after 15 June 2000 and which is not the principal private residence of the new owner
Date enacted: 5/7/2000
Commencement date: 15/6/2000 for part 1 (stamp duties), except where otherwise provided; see act for part 2 (anti-speculative property tax) and part 3 (miscellaneous)

Firearms (Firearm Certificates for Non-Residents) Act, 2000
Number: 20/2000
Contents note: Amends the provisions governing the limitations and restrictions for the granting of firearm certificates under s3 of the *Firearms Act, 1925* to persons not ordinarily resident in the state; also amends the provisions governing the granting and renewal of hunting licences under s29 of the *Wildlife Act, 1976*
Date enacted: 5/7/2000
Commencement date: 14/7/2000 (per s8(3) of the act)

Gas (Amendment) Act, 2000
Number: 26/2000
Contents note: Provides for a scheme, to be implemented by the commission for electricity regulation, to allocate a certain amount of capacity in the natural gas network to up to three persons for the purpose of supplying natural gas for the generation of electricity; provides for an extension of the powers of Bord Gáis Éireann and an increase in the borrowing powers of the board; provision is also made to give private operators the same powers of access to, and acquisition of, land that are presently enjoyed by Bord Gáis Éireann. Amends and extends the *Gas Acts, 1976 to 1998* and amends the *Electricity Regulation Act, 1999*, and provides for related matters
Date enacted: 10/7/2000
Commencement date: 10/7/2000

Harbours (Amendment) Act, 2000
Number: 21/2000
Contents note: Amends the *Harbours Act, 1996* to enable the minister for the marine and natural resources to transfer the functions of a harbour company to another company, or to amalgamate the functions of harbour companies, and provides for related matters
Date enacted: 5/7/2000
Commencement date: 5/7/2000

Hospitals' Trust (1940) Limited (Payments to Former Employees) Act, 2000
Number: 23/2000
Contents note: Provides for the making of lump-sum payments to former employees of Hospitals' Trust (1940) Ltd
Date enacted: 8/7/2000
Commencement date: 8/7/2000

International Development Association (Amendment) Act, 2000
Number: 12/2000
Contents note: Enables the government to make a total payment of £20 million to the 12th replenishment of the international development association
Date enacted: 20/6/2000
Commencement date: 20/6/2000

Intoxicating Liquor Act, 2000
Number: 17/2000
Contents note: Amends the times at which it is lawful to sell or expose for sale any intoxicating liquor; provides for the temporary closure of licensed premises where the licence-holder is convicted of certain offences related to the presence of persons under 18 on those premises; provides further in relation to the issue, upgrading and transfer of intoxicating liquor licences; provides for the issue of licences in respect of certain authorised events at greyhound race tracks and racecourses; increases the maximum fines for certain offences. Amends the *Licensing Acts, 1833 to 1999* and the *Registration of Clubs Acts, 1904 to 1999*
Date enacted: 30/6/2000
Commencement date: 6/7/2000 for all sections, other than sections 15, 17 and 27 (per SI 207/2000)

Local Government Act, 2000
Number: 25/2000
Contents note: Amends the *Local Government Act, 1991* by the insertion of a new section 47A which provides for an option for the extension of the tenure of office of local authority managers
Date enacted: 8/7/2000
Commencement date: 8/7/2000

Medical Practitioners (Amendment) Act, 2000

Number: 24/2000
Contents note: Amends section 29 of the *Medical Practitioners Act, 1978* in relation to the extension of the period of temporary registration
Date enacted: 8/7/2000
Commencement date: 8/7/2000

Merchant Shipping (Investigation of Marine Casualties) Act, 2000
Number: 14/2000
Contents note: Provides for the investigation of marine casualties, the publication of reports on the investigation of marine casualties and the conducting of inquiries into marine casualties; repeals certain provisions of the *Merchant Shipping Act 1894* relating to marine casualties; amends the *Merchant Shipping Act, 1992* in relation to the regulation and use of pleasure craft; amends the definition of 'maritime casualty' in the *Sea Pollution Act, 1991*, and provides for related matters
Date enacted: 27/6/2000
Commencement date: Commencement order/s to be made (per s1(2) of the act)

Statute of Limitations (Amendment) Act, 2000
Number: 13/2000
Contents note: Amends the *Statutes of Limitation, 1957 and 1991* by inserting a new section 48A into the *Statute of Limitations, 1957* making new provision for persons under a disability in consequence of childhood abuse. Actions under s48A may be brought not later than one year after the passing of this act, that is, 21/6/2001, subject to certain conditions
Date enacted: 21/6/2000
Commencement date: 21/6/2000

Town Renewal Act, 2000
Number: 18/2000
Contents note: Provides a framework for a new town renewal scheme aimed at the physical renewal of smaller towns, in the population range 500 to 6,000; provides for the application of town renewal tax reliefs provided for under chapter 10 of part X of the *Taxes Consolidation Act, 1997*, as inserted by the *Finance Act, 2000*
Date enacted: 4/7/2000
Commencement date: 16/2/1999 for ss3, 4, 5 and 6; 17/7/2000 for all other sections (per SI 226/2000)

SELECTED STATUTORY INSTRUMENTS

Building Regulations (Amendment) Regulations 2000
Number: SI 179/2000
Contents note: Amend part M of the *Building Regulations 1997* by requiring that all new dwellings should be visitable by people with disabilities
Commencement date: 1/1/2001

Circuit Court Rules (No 2) (Parental Leave Act, 1998) 2000
Number: SI 208/2000
Contents note: Add a new order 63C (*Parental Leave Act, 1998*) to the *Circuit Court Rules 1950*, which prescribes Circuit Court procedures in respect of applications brought under section 22 of the *Parental Leave Act, 1998* for the enforcement of decisions of a rights commissioner or determinations of the Employment Appeals Tribunal pursuant to the act
Commencement date: 28/7/2000

Criminal Justice (Legal Aid) (Amendment) Regulations 2000
Number: SI 235/2000
Contents note: Provide that defence counsel who appear in an adjourned sentence hearing or a trial hearing which is adjourned within seven days of the scheduled trial date in the Circuit Court outside Dublin shall be entitled to receive a fee equivalent to the fee which is payable to prosecution counsel by the DPP for such hearings in Circuit Court cases in Dublin
Commencement date: 1/6/1999

District Court (Attachment and Committal) Rules 2000
Number: SI 196/2000
Contents note: Amends order 46B of the *District Court Rules 1997* (SI 93/1997), as inserted by the *District Court (Attachment and Committal) Rules 1998* (SI 124/1999), by the addition of a form of endorsement to orders of the District Court indicating the consequences of non-compliance with the order
Commencement date: 27/7/2000

Commission to Inquire into Child Abuse Act, 2000 *(Establishment) Order 2000*
Number: SI 149/2000
Contents note: Appoints 23/5/2000 as the establishment day for the purposes of the *Commission to Inquire into Child Abuse Act, 2000*

European Communities (Parental Leave) Regulations 2000
Number: SI 231/2000
Contents note: Give full effect to council directive 93/34. Amend the *Parental Leave Act, 1998* to extend entitlement to parental leave to (i) natural parents of children born between 3/12/1993 and 2/6/1996, and (ii) adoptive parents of children born on or after 3/12/1993, and in whose case an adoption order was made between 3/12/1993 and 2/6/1996. Parents are entitled to 14 weeks' parental leave in respect of each child and must avail of the new entitlement to parental leave not later than 31/12/2001
Commencement date: 19/7/2000

Employment Regulation Order (Law Clerks Joint Labour Committee) 2000
Number: SI 193/2000
Contents note: Fixes statutory minimum rates of pay and regulates statutory conditions of employment for certain workers employed in solicitors' offices
Commencement date: 7/7/2000

Equal Status Act, 2000 *(Section 47) (Commencement) Order 2000*
Number: SI 168/2000
Contents note: Appoints 14/6/2000 as the commencement date for section 47 of the *Equal Status Act, 2000* which deals with transitional arrangements for the *Employment Equality Act, 2000*

Finance Act, 2000 *(Section 63) (Commencement) Order 2000*
Number: SI 183/2000
Contents note: Appoints 21/6/2000 as the commencement date for section 63 of the *Finance Act, 2000*. This section amends section 843A of the *Taxes Consolidation Act, 1997* (capital allowances for expenditure on the construction, refurbishment or extension of childcare premises which meet the required standards as provided for in the *Child Care Act, 1991* and the *Child Care (Pre-School Services) Regulations 1996*)

Food Safety Authority of Ireland Act, 1998 *(Amendment of First and Second Schedules) (No 1) Order 2000*
Number: SI 184/2000
Contents note: Amends the first schedule to the *Food Safety Authority of Ireland Act, 1998* in order to update the list of food legislation contained in the first schedule. Amends the second schedule of the act to take into account the change in the name of the minister for agriculture and food (now the minister for agriculture, food and rural development)
Commencement date: 22/6/2000

Land Registration Rules 2000
Number: SI 175/2000
Contents note: Amend rules 19, 35 and 82 and forms 3 and 15 of the *Land Registration Rules 1972 to 1986*
Commencement date: 1/8/2000

Local Government (Planning and Development) Regulations 2000
Number: SI 181/2000
Contents note: Substitutes a new class 1 (development within the curtilage of a dwellinghouse) in part 1 of the second schedule to the *Local Government (Planning and Development) Regulations 1994* (SI 86/1994). The changes relate to domestic extensions
Commencement date: 22/6/2000

Lottery Prizes Regulations 2000
Number: SI 174/2000
Contents note: Increase the limit on the total value of prizes for lotteries held under section 28 of the *Gaming and Lotteries Act, 1956* from £10,000 to £15,000
Commencement date: 1/8/2000

Safety Health and Welfare at Work (Pregnant Employees etc) Regulations 2000
Number: SI 218/2000
Contents note: Revoke and replace the *Safety Health and Welfare at Work (Pregnant Employees etc) Regulations 1994* (SI 446/1994) in order to give full effect to council directive 92/85
Commencement date: 30/6/2000

Town Renewal Act, 2000 *(Commencement) Order 2000*
Number: SI 226/2000
Contents note: Appoints 17/7/2000 as the commencement date for the act

Waste Management (Licensing) Regulations 2000
Number: SI 185/2000
Contents note: Give effect to a number of EU directives on waste and pollution control. Set out procedures for the making of waste licence applications, reviews of licences and consideration by the environmental protection agency of objections, including oral hearings. Revoke the *Waste Management (Licensing) Regulations 1997* (SI 133/1997) and the *Waste Management (Licensing) (Amendment) Regulations 1998* (SI 162/1998)
Commencement date: 23/6/2000

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Personal injury judgments

Public liability – alleged negligence and breach of duty – volunteer assisting in outdoor competition for children – fall on ground – injury – whether employer liable

CASE

***Rose O'Byrne v Ogra Corcaigh Ltd*, High Court on circuit in Cork, before Mr Justice Brian McCracken, judgment of 13 October 1999.**

THE FACTS

Rose O'Byrne was a voluntary worker in the South Parish Youth Club in Cork City. On 27 June 1993, an event was organised by Ogra Corcaigh Ltd at a school just outside Cork for the benefit of various youth clubs in and around Cork. Ogra Corcaigh is a voluntary organisation providing facilities for young people in the Cork area and is partly funded by the department of education. The event organised by Ogra Corcaigh on the particular day was called 'Super Stars Event' and consisted of a number of competitions for teams of children. There were events for senior and junior children.

The incident which was the subject of litigation related to the junior events for children between eight and 12 years of age. Points were given in each competition and were added up to determine which team was the winner. One of the competitions was called a mini-assault course. This consisted of four parts. In the last part, each child was obliged to take off his or her shoes and put on adult wellington boots and then walk or run between certain points.

Mrs O'Byrne and a friend of hers, Mrs Neary, were part of a group called 'leaders' and they were assigned, at the beginning of the day, to look after one of the teams. Both these women shared general duties, ensuring that the children were in the right place at the right time, ensuring that they got their lunch and keeping the children generally under control. There were ten children under the control of the two women.

Mrs Byrne claimed that she had been asked to assist an instructor on the assault course competition and agreed to do so. She stated that she walked across to a young man who explained to her what she was expected to do. Evidence was given by Mrs O'Byrne that the man told her that each child would come to a certain spot at a tree, take off his or her shoes, put on wellington boots, then go to another tree and pick up a container of water, carry it to a third tree, leave it there, proceed to a fourth tree, take off the wellington boots and put on his or her shoes again. The route between the trees was curved. It was stated by Mrs O'Byrne that her function was to take the child's shoes from the first point where they had been taken off to the last point in a direct line, which she claimed was a distance of some 28 yards. Mrs O'Byrne claimed she asked the instructor to stay, but he wouldn't or did not do so; he went away and left her on her own.

When the first child, a girl, came to this part of the competition, the child took off her shoes, put on the wellington boots and started on her journey. Mrs O'Byrne took the shoes and started for the finishing point. She claimed she wasn't running but was hurrying. She felt under pressure to get to the final point before the child. She claimed that the grass was a bit high and the ground was 'bumpy and lumpy' and she fell forward. It was claimed that she put her hand out to try to save herself and suffered a Colles fracture of her left wrist. She claimed nobody came to her assistance for some time; then the first aid personnel who were at the competition came. She was taken to hospital and the wrist was manipulated and put into plaster.

Mrs O'Byrne sued Ogra Corcaigh Ltd for damages in negligence and breach of duty. Significant parts of Mrs O'Byrne's account of the incident were disputed in the case.

THE JUDGMENT

Mr Justice McCracken delivered judgment on 13 October 1999. He noted that vital elements of Mrs O'Byrne's account were disputed. There was a considerable dispute as to what exactly the children were obliged to do at the competition. The judge noted that Mrs O'Byrne was not in a position to identify either the person who asked her to go to the instructor or the instructor himself, and Ogra Corcaigh had not identified any such persons.

The judge referred to evidence from three people involved in the competition and also from Dominic Leahy, who was the overall organiser on behalf of the voluntary organisation. None of the three could confirm Mrs O'Byrne's evidence and none of them appeared to have seen her before. There were three relevant helpers in the same area of the competition and none of them was asked for assistance or saw Mrs O'Byrne fall or, indeed, went to her assistance. In fact, it was suggested to Mrs O'Byrne that the accident didn't happen where she claimed it did.

The judge noted that there was no doubt that Mrs O'Byrne suffered the injury and he had no doubt she fell and that she was treated by Civil Defence personnel. The only confirmation was from Mrs Neary, Mrs O'Byrne's friend, who was present. Mrs Neary confirmed in evidence that a request was made to both women to assist in the competition. Mrs Neary declined to assist. The judge stated that he was impressed with Mrs Neary as a witness and on balance he accepted the generality of her evidence and that of Mrs O'Byrne that Mrs O'Byrne was

asked to help and did go down to that part of the ground and that she suffered a fall in that general area. To that extent, the judge accepted Mrs O'Byrne's evidence.

The next issue in dispute was what the children were supposed to do. Ogra Corcaigh had stated that there was no question of the children carrying a container of water and that there were only two points between which this competition took place: where the children put on the wellington boots and where they were taken off again. Crucially, according to the judge, Ogra Corcaigh stated that these points were only 25 feet apart and this was supported, to some extent, by the evidence of Rosalind Barrett, another helper, who actually said she could throw the wellington boots from where they were taken off back to the start again, which would confirm a distance of around 25 feet.

The judge noted that Ogra Corcaigh was very experienced in organising children's events and it was acknowledged by all that it was highly efficient and professional. The judge considered it most unlikely that the organisation would have asked a child as young as eight years of age to run in adult boots on a circuitous route about 30 yards and in the course of this run to carry a container of water where the ground was overgrown and rough. The judge noted that it would be highly dangerous for young children to be asked to do what Mrs O'Byrne claimed they were doing. The judge stated that he did not believe that the children were so engaged.

The judge noted that the case had started out in the Circuit Court. An application had been successfully made to have the case transferred to the higher jurisdiction of the High Court. In the civil bill, it was claimed that Mrs O'Byrne 'tripped and fell on a dangerous and slippery and unsafe area of terrain'. In the notice for particulars, Mrs O'Byrne was asked what caused her to fall; she replied: 'the slippery nature of the ground'. It was noted by the judge in the evidence before him that not a word was said about the ground being slippery or having been worn down by a number of children. Mrs O'Byrne stated: 'it was bumpy or lumpy'. In the notice for particulars, she was asked to identify the servants or agents of Ogra Corcaigh who allegedly caused or directed her to assist in the competition. In the replies to particulars, she stated that the identity of the person concerned was unknown to her, but she was a female member of the Ogra committee and was apparently in charge of the event in question. There was no mention of the male instructor at all.

In relation to the children carrying a container of water and the evidence to that effect by Mrs O'Byrne, the judge found this rather 'strange'. He stated there was no mention of this in the civil bill or the notice for particulars and the evidence of Ogra Corcaigh was quite clear to the effect there were no containers of water involved in the competition. A container of water was involved, however, in a different competition. The judge came to the conclusion that there was no question of the children carrying containers of water. He said he was not making these comments to state that Mrs O'Byrne was bound by her notice for particulars in the pleadings, but he noted the accident took place in June 1993, the civil bill was issued in October 1995, and the reply to particulars was made in January 1997. The judge noted that at the hearing in October 1999, the accounts stated in the civil bill four years previously were more likely to be accurate than the account given in court.

The judge stated that he did not believe Mrs O'Byrne was giving false evidence. He did not consider she was telling deliberate lies. He was satisfied that she was not perjuring herself, but he did consider she was mistaken in her evidence. He said it was now six years since the event took place. Mrs O'Byrne had revisited the site in 1996 and took certain photographs. The judge considered that unfortunately she had convinced herself of certain matters, probably on that visit. She may very well have got confused when she revisited the scene of the accident three years later because there would have been a different growth and the scene of the accident would have changed.

Ogra Corcaigh undoubtedly owed a duty of care to Mrs O'Byrne, according to the judge. It was their duty to take reasonable care not to injure her. What is reasonable depended on the circumstances and on the facts. The judge stated he believed that Mrs O'Byrne was asked to assist in a very simple task, to carry a pair of shoes over a distance of some 25 feet while a young child covered the same distance wearing a pair of adult wellington boots. He accepted that the child was under a certain time pressure, but an eight-year-old child wearing adult wellington boots was not able to move quickly. Mrs O'Byrne was not required to run between these points. The judge noted that if Mrs O'Byrne had the appearance of being somewhat disabled, Ogra Corcaigh would have a duty to make careful enquiries as to her capability. In fact, she was a woman of 47 years of age. She was somewhat overweight but she was not suffering from any obvious disability. The judge noted that she did suffer from some back problems but that wouldn't have been known to Ogra Corcaigh.

The judge did not accept that Mrs O'Byrne was not properly instructed as to what to do in relation to the competition. He found that Mrs O'Byrne had been mistaken in relation to these matters and therefore considered that Ogra Corcaigh were not negligent at all in the circumstances. Regretfully, he was obliged to dismiss the claim of Mrs O'Byrne.

Counsel for Ogra Corcaigh sought costs. Counsel for Mrs O'Byrne asked that in the circumstances there would be no costs awarded. The judge, addressing counsel for Ogra Corcaigh, noted that it was a charitable organisation and asked counsel to take instructions. However, the judge noted that he probably would not refuse costs, if insisted upon. Counsel for Ogra Corcaigh stated he would not press the application for costs. Accordingly, the judge made no order as to costs.

Counsel for Mrs O'Byrne: Mr O'Driscoll SC, Mr Gleeson BL, instructed by MJ Horgan & Sons, Solicitors.
Counsel for Ogra Corcaigh Ltd: Mr Hickey SC, Mr O'Mahoney BL, instructed by O'Flynn Exhams & Partners, Solicitors.

Public liability – fall on public pavement – liability of public utility – reinstatement of footpath – consumption of alcohol by injured person – liability denied – conflict of evidence – issue of contributory negligence

CASE

***Kevin Duffy v Electricity Supply Board*, High Court, before Mr Justice Declan Budd, judgment of 18 February 1999.**

THE FACTS

Kevin Duffy, aged 61, normally unemployed, claimed that on the evening of 3 October 1992 he had gone with his girlfriend, Mrs Catherine McGarry, to the Savoy Cinema in Dublin. He described how he met Mrs McGarry just before 8pm. Before this, he had a couple of pints of Guinness in the Shakespeare pub in Parnell Street. Both went to the film, but left before it finished, walked down O'Connell Street, took a bus to Aungier Street and got off beside Whitefriars Church.

Mrs McGarry stopped to talk to a woman and Mr Duffy walked slowly ahead, passed two people by the corner of the street, said 'goodnight' to them and fell over. He claimed he had fallen down on the road because of the state of the footpath which, it was alleged, was the responsibility of the ESB because the section of the footpath had been reinstated by the ESB. The two men whom he had bid goodnight lifted him in off the road and put him sitting on the pavement with his back to a pub. Mr Duffy did not know the names of the two men but he did know their appearance.

A garda and an ambulance were called and Mr Duffy claims that Mrs McGarry came with him in the ambulance to the Meath Hospital. The garda stated he didn't notice anybody who seemed to be, as it were, attached to Mr Duffy at the scene. Two ambulance men were categorical that Mrs McGarry did not travel in the ambulance to the Meath Hospital that night.

Mr Duffy was operated on the next day. He sustained fractures of the shafts of the right tibia and fibula. A plaster splint was applied and a steel intramedullary nail with locking screws at both ends was inserted in his leg. Mr Duffy made good post-operative progress and was subsequently allowed to walk with crutches. He was discharged from hospital on 13 October. On 26 November 1992, one of the screws was removed from the upper end of the tibia to allow some weight-bearing pressure at the fracture site.

Medical reports recorded that Mr Duffy was subsequently brought to the accident and emergency department in the Meath Hospital on 5 April 1993 suffering hallucinations. He suffered pain in his right leg for the previous five days and his right leg appeared bruised and swollen. He was admitted to the Adelaide Hospital under the care of Professor Ian Graham and became very ill, developing acute renal failure. This was associated with evidence of infection around the nail in the right tibia and necrosis (localised tissue death) of muscles in the right thigh and lower leg. Subsequently, a steel wire was inserted into the medullary cavity of the tibia. Mr Duffy was transferred to the Meath Hospital on 10 April where he was treated for renal failure with dialysis. He remained very ill for several days but the various wounds healed relatively well.

There was evidence that his left leg felt stiff in the mornings, the symptoms being concentrated in the lower shin. The leg would loosen up as the day went by, but it was neither improving nor deteriorating. In his right knee, Mr Duffy felt a little stiff but there was no feeling of instability.

Mr Duffy issued proceedings against the ESB for damages for personal injury.

THE JUDGMENT

In his judgment delivered on 18 February 1999, Mr Justice Budd stated that Mr Duffy was in reality 'a recidivist professional criminal with an impressive series of convictions since he was ten years of age'. He had served many sentences of imprisonment, both in Ireland and in England. The judge noted that Mr Duffy had a stoic resignation in respect of the serious right leg injuries which he sustained. He was uncomplaining about 'these nasty and serious injuries'.

The judge noted that Mr Duffy must have impressed a number of judges by his candid manner and quick wit in the past as his *curriculum vitae* of previous convictions revealed a number of apparently light sentences for larceny and receiving. The judge stated he had taken the unusual step of outlining Mr Duffy's past at the outset of his judgment as credibility was very much an issue and the veracity of a number of witnesses had been strongly called in issue, particularly the credibility and veracity of witnesses called on Mr Duffy's part. Indeed, the veracity of Mr Duffy's evidence itself was rigorously challenged.

In cross-examination, the judge noted that Mr Duffy could not remember the name of the film, neither could his girlfriend Mrs McGarry. Indeed, they were criticised for that by counsel. It seemed strange, according to the judge, that on the night when he had a severe accident, neither of them could remember the name of the film they had seen.

The judge noted that Mr Duffy was adamant that he only had two pints of Guinness, which would not make him drunk, and he had consumed these pints before he went to the film. When it was suggested to him that he was incoherent with alcohol, Mr Duffy denied this.

The judge referred to the evidence of Mrs McGarry, who did not see Mr Duffy falling but saw two men placing him against the pub. She was adamant she got into the ambulance as it went to the Meath Hospital. Evidence was given by Mr Halpin, who had lifted Mr Duffy from the road up to the wall of the pub. When asked whether Mr Duffy had alcohol in him, Mr Halpin replied that he had no reason to think he had taken alcohol. Mr Duffy didn't even seem to be 'sociable or merry'.

The judge then referred to the evidence of Garda Lowney who arrived at the scene of the accident. The garda's view was that Mr Duffy had consumed a large quantity of alcohol and was quite incoherent. The garda stated that he considered that Mr Duffy was quite aggressive towards him at the time. He noted that the footpath was broken and uneven.

Reference was made to the evidence of the two ambulance drivers who found Mr Duffy very incoherent and considered that he had consumed a considerable amount of alcohol. The judge noted that both ambulancemen were adamant and categorical that they did not carry Mrs McGarry in the back of the ambulance the night of the injury.

The judge referred to the medical report of Professor Brian Keogh who dealt with the renal failure problem. The medical report noted that Mr Duffy had a history of a very large intake of alcohol in the preceding months before he came into hospital in April suffering from hallucinations. The hospital had given him dialysis; 'he had a very stormy passage' and then his renal function recovered well. The judge gained the impression that Professor Keogh was saying that it would be stretching the matter to suggest that the leg injury could be held responsible for, and linked to, his renal failure. The judge noted that the infection at the pin in the leg certainly could not have helped Mr Duffy's condition, but said it would seem from what Professor Keogh had stated that one could not make any direct link between the infection at the pin and the subsequent renal failure.

The nature of Mr Duffy's background and his *curriculum vitae* were such that one had a natural scepticism about his evidence and, indeed, about a number of the witnesses who had been called on his behalf, according to the judge. But there was one thing absolutely certain: Mr Duffy was involved in an accident on the night of 3 October 1992 and had suffered a 'very nasty injury to his right leg'. There was conflict as to the credibility of the witnesses. There had been conflict in relation to the time of the fall and there was conflict as to the location of the fall.

The judge came to the conclusion based on his observance of the witnesses, his observations of them as they sat in court and their general demeanour, and on a careful consideration of the evidence, that Mr Duffy did fall at the point indicated in relevant maps and that the ESB was responsible for the state of the pavement in that location. The judge accepted evidence about the tarmac and reinstatement of the pavement and the fact that the ESB was responsible for the creation of a dangerous hazard on that street corner. He noted that the ESB should have come back and levelled up the tarmac.

As to the time of the fall on the night in question, the judge accepted that it was probably later than that stated by Mr Duffy. The judge came to the conclusion that Mr Duffy had very much more drink 'on board' than two pints of Guinness. Accordingly, he did not accept that Mr Duffy came straight from the cinema to Aungier Street. He accepted the evidence of the garda and the ambulancemen with regard to Mr Duffy's incoherence in speech.

On the issue of contributory negligence, the judge stated that a very large contributory factor in Mr Duffy's falling on the 'hazardous reinstated pavement' was because he failed to take care for his own safety. He failed, despite reasonably good lighting in the vicinity outside the pub, to note the generally poor state of the pavement in that area. This was an area which Mr Duffy knew fairly well. He must have known that the pavements in that area of Aungier Street/York Street were very poor and despite this, and probably because of his state of inebriation, he wasn't keeping a proper look-out. The judge regarded him as 75% negligent and culpable in relation to his fall. He held the ESB 25% liable for the hazardous state of the footpath.

Counsel for Mr Duffy: K Mills SC, S O'Tuathail BL, instructed by Chris Ryan, Solicitors.
Counsel for the ESB: A McGovern SC, M Christle BL, instructed by ESB Legal Division. G

THE AWARD

On the issue of *quantum*, in relation to pain and suffering to the date of the trial including the operation on Mr Duffy's leg, the three fractures and the scarring, the judge awarded £27,500 in damages. In relation to future pain and suffering, he noted that Mr Duffy would probably walk with a stick for the rest of his days and that he was open to some vulnerability and risk of further problems. He considered a figure of £8,500 appropriate under this heading, making a total of £36,000. In view of the contributory negligence (Mr Duffy was 75% responsible, with the ESB 25% liable), Mr Justice Budd awarded £9,000 to Mr Duffy against the ESB.

These summaries were compiled by Dr Eamonn Hall, solicitor, from Reports of personal injury judgments *from Doyle Court Reporters, 2 Arran Quay, Dublin 7.*

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ADMINISTRATIVE

Education, planning and trusts

Agricultural law – planning – agricultural college – rates exemption certificate refused by registrar of friendly societies – appeal to Circuit Court dismissed – whether lands and buildings belonging to society instituted for purpose of science – whether society was supported wholly or in part by annual voluntary contributions – whether agriculture could be considered to be a science – Scientific Societies Act 1843, *sections 1, 5*

Gurteen Agricultural College was established by the Methodist Church. The college's trust deed provided that any surplus profit made by the society be reinvested in the college. The college received funding from Teagasc, the European social fund and from students' fees. The appellants applied to the registrar of friendly societies for a rates exemption certificate pursuant to section 1 of the *Scientific Societies Act 1843*. That section provided that the society in question must be instituted for the purposes of science and that it must be funded wholly or in part by annual voluntary contributions. The registrar refused to issue a certificate on the grounds that the college had not been instituted for the purpose of science exclusively. The appellants' appeal in the Circuit Court had been dismissed and an appeal was taken to the High Court. In allowing the appeal, McGuinness J held that agriculture was a science in both its pure and applied forms. Although not a large proportion of the college's income came from voluntary subscriptions, it was clear that the college was seen by some as a charitable institution and had benefited from donations of land and money. Accordingly, it fulfilled the requirements as set out under section 1 of the 1843 Act. The college's role as an educational institution was incidental to its role as a scientific society.

***Gurteen v Friendly Societies*, High Court, Mrs Justice McGuinness, 30/07/99** [FL1464]

Aviation and employment

Industrial dispute – enquiry carried out pursuant to Industrial Relations Act, 1990, *section 38(2) – scope of judicial review – whether mistake of fact basis for judicial review – whether justiciable issue present*

As a result of an industrial dispute at Dublin Airport, the tánaiste appointed the respondents to carry out an enquiry under the *Industrial Relations Act, 1990*. The respondents carried out the said enquiry and as part of the enquiry the notice party was appointed to undertake a survey into the pay and conditions of certain workers. All interested parties, including the applicant, were invited to make submissions. The enquiry's report did not support certain statements made by Ryanair's management. The applicant initiated judicial review proceedings, challenging the report and seeking to have certain findings quashed. Kearns J held that the matters raised were not justiciable as there was no decision capable of being quashed. No legal right of the applicant was thereby affected. The application would be dismissed.

***Ryanair v Irish Productivity Centre*, High Court, Mr Justice Kearns, 24/03/2000** [FL2563]

Discovery

Administrative law – criminal law – constitutional law – practice and procedure – discovery – number of summonses issued against applicant – Garda Síochána – on-going garda investigation – application to prohibit impending prosecutions

The applicant issued proceedings seeking to have orders of prohibition granted against various prosecutions. The summonses in question amounted to 160 offences. The applicant also claimed that there were various discovery issues outstanding. The relief sought by the applicant had been refused in the High Court and the applicant appealed. Hamilton CJ, delivering judgment in the Supreme Court, held that the court was concerned that a number of the allegations by the applicant were the subject of an inquiry by the assistant garda commissioner. The trial judge would accordingly have regard to these issues and all relevant documents and facts when hearing the summonses in question.

***McBrearty v Judge O'Donnell and DPP*, Supreme Court, 22/11/99** [FL1905]

European Investment Bank

Administrative law – employment law – constitutional law – European law – separation of powers – role of courts – whether method of selection of candidate unconstitutional – whether applicant's constitutional rights infringed – whether decision taken by executive – Bunreacht na hÉireann, 1937, *articles 28(2), 40*

The applicant initiated judicial review proceedings challenging the nomination of former Supreme Court judge Hugh O'Flaherty to the post of vice-president of the European Investment Bank. Morris P held that there was no constitutional imperative on the government to consult the public with regard to such nominations. To hold otherwise would render the day-to-day business of the government virtually impossible. There was therefore no actual or threatened invasion of the applicant's constitutional rights. The relief sought by the applicant would accordingly be refused.

***Riordan v Ireland*, High Court, Mr Justice Morris, 12/06/2000** [FL2879]

Extradition and the AG's scheme

Legal aid – litigation – practice and procedure – judicial review – contempt – whether respondent possessed necessary jurisdiction to cite attorney general for contempt – Petty Sessions (Ireland) Act 1851, *section 9* – Extradition Act, 1965 – Bunreacht na hÉireann, 1937, *article 30*

The case concerned the applicability of the attorney general's scheme to extradition proceedings in the District Court. The respondent was hearing a case at which an application was made in relation to the attorney general's scheme. Initially, the respondent was of the opinion that the scheme did not apply to the instant case but at an adjourned date accepted an undertaking by counsel that the scheme did apply. A letter was furnished to the respondent from a representative of the attorney general in which it was

stated that the scheme did apply. The respondent held that the letter in question was a contempt of court and issued an order to that effect. The applicant sought to have the decision quashed. Kearns J held that the respondent had no jurisdiction to inquire into the views of the applicant. The letter in question could not constitute a contempt of court. Accordingly, the decision of the respondent would be quashed.

***AG v Judge McDonnell*, High Court, Mr Justice Kearns, 29/03/2000** [FL2582]

Inculpatory statement

Road traffic accident – absence of caution – whether principle of audi alteram partem *breached – whether applicant convicted in absence of necessary statutory proofs – whether evidence tendered offended against hearsay rule – whether prosecution had discharged necessary onus of proof* – Road Traffic Act, 1961, *sections 49, 107* – Road Traffic Act, 1994, *section 10*

The applicant had been involved in a road traffic accident and had left the scene. The applicant had subsequently been prosecuted and convicted. The applicant sought an order of *certiorari*, claiming that evidence had been tendered at his prosecution which offended against the hearsay rule. In addition, the applicant claimed that he had been convicted in the absence of the necessary statutory proofs. Finnegan J held that the applicant had been afforded an opportunity to make submissions and the principle of *audi alteram partem* had not been infringed. The first-named respondent was entitled to hold that a statement made by the accused was a voluntary one and should be admitted. Despite the absence of a caution by the arresting garda, the evidence in question was admissible. Although no evidence had been adduced that the offence had been committed in a public place, the error did not appear on the face of the record. In addition, the applicant had an alternative remedy in the form of an appeal which was presently pending. Accordingly, it was not appropriate that an order of *certiorari* be made and the application was refused.

***Moore v DPP*, High Court, Mr Justice Finnegan, 29/05/2000** [FL2895]

Street trading

Administrative law – local government – statutory interpretation – meaning of word 'market' – street trading – delegation of legislation – judicial review – locus standi – Casual Trading Act, 1995, *sections 4 and 6* – Casual Trading Act, 1980 – Street Trading Act, 1926 – Hawkers Act 1888 – Limerick Markets Act 1852, *section 32.*

The applicant was a market trader in Limerick city. The respondents had enacted by-laws designating a certain casual trading area. The applicant initiated judicial review proceedings, claiming that the by-laws in question were in breach of existing legislation. The respondent challenged the *locus standi* of the applicant, contended that the application was out of time and claimed that relief sought should be refused as the applicant had not availed of the appropriate procedures as set out under the *Casual Trading Act, 1995*. Finnegan J held that the creation of a casual trading area did not contravene existing legislation. The applicant did have *locus standi* to make such an application. In this instance, the existence of other avenues of appeal would not have deprived the applicant of the remedies sought had the court been persuaded to exercise its discretion in the applicant's favour. The application was dismissed.

***Bridgeman v Limerick Corporation*, High Court, Mr Justice Finnegan, 02/06/2000** [FL2911]

Planning permission

Local government – plaintiff applied for planning permission – permission initially refused but granted on appeal – role of An Bord Pleanála – whether An Bord Pleanála obliged to give reasons for its decision – Local Government (Planning and Development) Act, 1963 – Local Government (Planning and Development) Regulations 1994 – Local Government (Planning and Development) Act, 1976 – Local Government (Planning and Development) Act, 1992

The proceedings concerned planning permission granted to McDonald's for a restaurant in Kilkenny. Planning permission had initially been refused by Kilkenny Corporation and was subsequently granted by An Bord Pleanála. The applicant took judicial review proceedings, claiming that the decision to grant planning permission was in breach of the relevant development plan and that there had been a failure to furnish reasons for its decision. Laffoy J held that the document issued by An Bord Pleanála sufficiently disclosed reasons for its decision. The board's stated reasons addressed all the issues of substance which were raised. The application would be dismissed.

***Village Residents Ltd v McDonald's*, High Court, Ms Justice Laffoy, 05/05/2000** [FL2919]

COMMERCIAL

Contract law and intellectual property

Distribution agreement – selective distribution agreement – statutory interpretation – whether concerted practice existed – whether actions of party terminating distributor agreement anti-competitive – whether supplier abusing dominant position – Competition Act, 1991, *sections 4 and 5*

The plaintiff had operated as one of the main wholesale distributors for the defendant. The defendant had terminated the distributorship agreement with the plaintiff. The plaintiff instituted proceedings claiming that the actions of the defendant were anti-competitive and were in breach of European law. The plaintiff sought an injunction to compel the defendant to recommence the supply of its products on the original terms. The plaintiff contended that the distribution agreement constituted a selective or restrictive distribution system which was anti-competitive. The plaintiff's claim was dismissed and the plaintiff appealed. Murphy J, delivering judgment, held that there was no evidence to suggest the existence of a concerted practice to exclude a distributor engaged in competitive trading. The delisting of the plaintiff as a distributor was not anti-competitive. The plaintiff's appeal would be dismissed.

***Chanelle Veterinary Ltd v Pfizer (Ireland) Ltd (& Others)*, Supreme Court, 11/02/99** [FL0966]

Credit and security

Land law – practice and procedure – summary judgment – concurrent tortfeasors – Statute of Limitations – *statutory interpretation – advancement of loan – accord and satisfaction – joint and several liability – solicitor's undertaking – whether previous settlement discharged liability of both debtors – whether claim statute barred – whether plaintiff entitled to summary judgment* – Civil Liability Act, 1961 – Statute of Limitations, 1957

The plaintiff had extended credit facilities to the plaintiff and his wife and a loan agreement was entered into to this effect. The credit facility was subsequently withdrawn, with a sum outstanding of approximately £140,000. In due course, the family home was sold and the proceeds of sale were released to the defendant's wife, except for £70,000 which was paid to the plaintiff as a settlement. The plaintiff now sought to reclaim the sum of £86,465.75 which it was claimed was due and owing by the defendant in relation to the original loan agreement. The defendant disputed the claim and argued that the claim had already been settled and also

contended that the claim was statute barred. Laffoy J held that the onus of proof fell on the defendant to prove that a settlement by a co-debtor released other co-debtors from the debt in question. As the defendant could be said to have a real or *bona fide* defence, summary judgment would not issue and the matter should proceed to plenary hearing. Interest which accrued after the withdrawal of credit facilities had not become principal and was subject to the provisions of the *Statute of Limitations, 1957*.

***ACC Bank v Malocco*, High Court, Ms Justice Laffoy, 07/02/2000** [FL2319]

COMPANY

Telecommunications licences, bias

Competition for licences – bias – judicial review – tender process – practice and procedure – whether applicant obliged to furnish security for costs – whether applicant obliged to give undertaking as to damages – whether competition process biased – Postal and Telecommunications Act, 1983 – European Communities (Telecommunications Licences) Regulations 1998 – Rules of the Superior Courts, 1986, *order 29, rule 1; order 84, rules 20, 22* – Companies Act, 1963

The applicant had entered a tendering process for the award of a broadband licence and was ultimately unsuccessful in its bid. It issued proceedings seeking to have the decision of the respondent to refuse it a licence quashed. The applicant claimed that the tendering process had been evaluated in a biased manner so as to give Eircom, which was awarded a licence, a distinct advantage. In this motion, both the respondent and notice parties, who were the successful bidders, sought orders for security of costs and undertakings as to damages in respect of the proceedings. Laffoy J held that further prosecution of the proceedings be stayed until such time as the applicant furnish both undertakings as to damages and security for costs to the respondent and the notice parties.

***Broadnet v Telecommunications Regulator*, High Court, Ms Justice Laffoy, 13/04/2000** [FL2688]

CONSTITUTIONAL

Prohibition and discovery

Criminal law – constitutional law – road traffic offence – applicant seeking orders of prohibition and discovery – whether applicant entitled to have prosecution prohibited – whether applicant entitled to examine alcolyser apparatus used to ground charge – Road Traffic Act, 1961, *sections 49, 50, 53* – Road Traffic Act, 1994, *section 12* – Bunreacht na hÉireann, 1937, *article 30* – European convention on human rights, *article 6*

The applicant had initiated judicial review proceedings in regard to a pending criminal prosecution against him. The prosecution was in regard to an alleged offence under the *Road Traffic Act, 1961*. The applicant claimed to be entitled to examine the apparatus used to ground the charge against him. The applicant claimed that the information required was necessary in order to properly conduct his defence. The applicant sought to have his impending prosecution prohibited failing the opportunity to examine the apparatus and ancillary witnesses. Further problems arose as the original District Court judge having carriage of the case had died. Kinlen J held the respondents were relying on section 12 of the *Road Traffic Act, 1994* which contained a presumption in favour of the legality of the apparatus in question. The court was not prepared to interfere with the jurisdiction of the District Court judge having seisin of the matter. The judge in question would take all steps to ensure that all relevant facts were before him. The application would be dismissed.

***Manson v DPP*, High Court, Mr Justice Kinlen, 27/01/2000** [FL2660]

Drug offenders and ministerial policy

Criminal law – constitutional law – prison regulations – ministerial policy not to grant temporary release to drug offenders – whether applicant entitled to avail of temporary release – whether legislation permitted categorisation of prisoners – Misuse of Drugs Regulations 1979 – Criminal Justice Act, 1960 – Misuse of Drugs Act, 1977

The applicant, while serving a sentence for drug possession, sought to avail of temporary release. The prison authorities refused the request. The applicant initiated judicial review proceedings claiming that the ministerial policy to treat drug offenders as a special category of prisoners was in breach of his constitutional rights. O'Neill J held that the terms of the *Criminal Justice Act, 1960* did not permit the minister to deal with prisoners on a category basis. The regulations which therefore purportedly granted the power to the minister to act in such a manner exceeded and were *ultra vires* the provisions of the *Criminal Justice Act, 1960*.

***Corish v Ireland*, High Court, Mr Justice O'Neill, 13/01/2000** [FL2299]

Fair procedures

Road traffic accident – evidence – conflicting statements from witnesses as to cause of accident – whether prosecution obliged to procure attendance of all witnesses – Bunreacht na hÉireann, 1937, *article 31.1*

The applicant had been involved in a car accident. Statements had been taken from a number of witnesses. Pursuant to the accident, the applicant was prosecuted. One of the statements appeared to support the applicant's case. It transpired that the prosecution did not intend calling the witness whose statement supported the applicant. The whereabouts of the witness were unknown. The applicant initiated judicial review proceedings seeking to prohibit the prosecution on the grounds that prosecution were obliged to call the witness in question. O'Sullivan J held that there was no obligation in law upon the prosecution to call the witness in question. The applicant was, however, entitled to all the relevant information in the possession of the prosecution as to the whereabouts of the witness in question.

***Geaney v DPP*, High Court, Mr Justice O'Sullivan, 08/12/99** [FL2016]

Imprisonment and statutory interpretation

Common-law offence – indecent or sexual assault – abolition of assault and battery – applicant serving sentence for indecent offence – habeas corpus – *whether offence of indecent or sexual assault abolished – whether applicant lawfully detained* – Bunreacht na hÉireann, *article 40.4.2°* – Interpretation Act, 1937 – Interpretation (Amendment) Act, 1997 – Criminal Law (Rape) (Amendment) Act, 1935 – Criminal Law (Rape) (Amendment) Act, 1990, *s2* – Criminal Law (Rape) Act, 1981, *s10 – Offences Against the Person Act 1861* – Non-Fatal Offences Against the Person Act, 1997, *section 28*

The applicant was serving a sentence having pleaded guilty to an offence of indecent assault. Section 28 of the *Non-Fatal Offences Against the Person Act, 1997* abolished the common-law offence of assault and battery. Counsel for the applicant claimed that indecent or sexual assault was not an offence in its own right but was an instance of common law assault. It was argued that there was no saving provision in the legislation which preserved prosecutions in respect of indecent or sexual assault. Therefore, it was claimed, the continued imprisonment of the accused was unlawful.

Geoghegan J held that the *Non-Fatal Offences Against the Person Act, 1997* only dealt with non-fatal offences and did not deal with sexual offences. The offence of indecent or sexual assault had not been abolished by the *Non-Fatal Offences Against the Person Act, 1997* and consequently the applicant was lawfully detained.

• *Obiter* arguments by counsel relying on certain authorities to the effect that the abolition of certain offences by statute automatically put an end to existing or pending prosecutions of those offences, where those offences were committed before the enactment of that statute, were not accepted by the court.

***SO'C v Governor of Curragh Prison (& Others)*, High Court, Mr Justice Geoghegan, 14/01/2000** [FL2168]

Family law

Divorce – nullity of marriage – recognition of foreign divorces – domicile – validity of decree of dissolution of marriage – finality of litigation – whether attorney general should be joined as notice party to proceedings after final court order had been made – whether variation of High Court order permissible – Legitimacy Declaration (Ireland) Act 1868 – Rules of the Superior Courts, 1986, *order 28, rule 11* – Family Law Act, 1995, *section 29* – Family Law (Divorce) Act, 1996 – Status of Children Act, 1987, *section 35* – Bunreacht na hÉireann, 1937, *articles 41.3.2*

The proceedings concerned the validity of a marriage and the recognition of a foreign divorce. McGuinness J had held that a divorce granted in England between the petitioner and the notice party was entitled to recognition in this state and that accordingly the marriage between the petitioner and respondent was a valid one. After judgment had been delivered in the High Court, the attorney general made an application to be joined as a party to the proceedings which was refused. The attorney general appealed that refusal. Denham J held that it was not mandatory that the attorney general be joined to the proceedings. A final order had been delivered so there were no proceedings in being. The appeal would be dismissed. Murphy J held that the order of the High Court was final and conclusive and disposed of the issues between the parties. There was no basis for an amendment of the order and the appeal would be dismissed. Murray J held that neither the High Court nor the Supreme Court could attribute to itself some inherent jurisdiction for the purpose of joining the attorney general to the proceedings beyond those already set out in legislation. Accordingly, the application of the attorney general should be refused. Barron J and Hardiman J agreed with all three judgments.

***GMcG v DW, and AR, notice party*, Supreme Court, 31/03/2000** [FL2906]

CRIMINAL

Evidence and sexual offences

Rape – sexual assault – judges' rules – conviction – leave to appeal refused – whether leave should be granted – whether trial judge erred in admitting evidence of doctor – Criminal Law (Rape) Act, 1981 – Criminal Law (Rape) (Amendment) Act, 1990 – Criminal Justice (Forensic Evidence) Act, 1990

The applicant claimed that, the trial judge had erred in law and on the facts in admitting the evidence of a doctor concerning the injuries which he observed on the lip of the accused while in garda custody. The court was satisfied that the doctor would have been entitled to give evidence of his observations in the course of his first examination, when he was taking the samples authorised by the *Criminal Justice (Forensic Evidence) Act, 1990*. The applicant contended that he was not cautioned by the doctor or the gardaí as to the consequences of a second examination by the doctor or the use which might be made of any information obtained as a result of it. The Court of Criminal Appeal rejected the argument that the examination constituted an intrusion of the applicant's constitutional right to privacy. The trial judge did not err in exercising his discretion to admit evidence of the disputed examination. The Court of Criminal Appeal so held in refusing the application for leave to appeal.

***DPP v Murray*, Court of Criminal Appeal, 12/04/99** [FL2912]

Statutory interpretation

Criminal law – practice and procedure – bail – statutory interpretation – whether court should have regard to applicant's circumstances in fixing bail – Bail Act, 1997, *section 5*

The applicant made an application seeking bail. Kearns J held that the court in fixing bail at a nominal amount pursuant to section 5 of the *Bail Act, 1997* should be satisfied that the applicant and surety have the requisite funds. In uncontested cases, the sum should be not be such so as to preclude the applicant's release. Once an order is made fixing bail which is directed to a bank, building society, credit union or post office, notice of the order should be communicated to the relevant institution by the chief state solicitor's office.

***DPP v Russell*, High Court, Mr Justice Kearns 15/05/2000** [FL2760]

Security and sentencing

Explosive offences – whether sentences imposed unduly lenient – Explosive Substances Act 1883, *section 3* – Criminal Law (Jurisdiction) Act, 1976, *section 4* – Criminal Justice Act, 1993, *section 2*

Each defendant had been arrested, convicted and sentenced to six years' imprisonment. At the trial, both defendants had pleaded guilty. The

cars which the defendants had been driving contained considerable quantities of explosive substances. In this application, the director of public prosecutions sought to have the sentences reviewed. On behalf of the defendants, it was submitted that there had been clear evidence of remorse. Barron J, delivering judgment, held that the sentences were unduly lenient and would be amended to one of ten years in each case.
***DPP v McDonagh*, Court of Criminal Appeal, 19/05/2000** [FL2741]

Sentencing

Appeal – separation of powers – impact of probation and welfare reports – victim impact statement – whether court gave proper weight to mitigating factors in passing sentence – whether court should suspend remaining balance of sentence – whether court should consider updated reports – whether application for remission should be made to the executive – Criminal Law (Rape) Act, 1981, *section 2* – Criminal Law (Rape) (Amendment) Act, 1990 – Courts of Justice Act, 1924, *sections 30, 32, 33, 34* – Courts (Supplemental Provisions) Act, 1961, *sections 12, 48*

The applicant was convicted of a charge of rape contrary to section 2 of the *Criminal Law (Rape) Act, 1981*. The applicant was sentenced to six years' imprisonment. The applicant appealed against the sentence on a number of grounds. The applicant had availed of the sex offender programme while in prison. On behalf of the director of public prosecutions, it was argued that the court should not interfere with the sentence imposed and to do so would amount to a rehearing of the case. In addition, it was submitted that the Court of Criminal Appeal was restricted to deciding whether the original trial judge erred in principle. Denham J, delivering judgment, held that the court was satisfied that it had jurisdiction to suspend the latter part of the sentence and to consider up-to-date reports. The court would adjourn the application pending the furnishing of further reports, including a detailed programme of release.
***DPP v MS*, Court of Criminal Appeal, 01/02/2000** [FL2910]

DAMAGES

Medical negligence

Tort – medical negligence – adequacy of damages – practice and procedure – interpretation of evidence – causation – whether trauma of accident exacerbated plaintiff's multiple sclerosis – whether trial judge's erroneous interpretation of evidence had materially influenced decision – whether retrial should be ordered

The High Court found the defendant entirely responsible for a fall the plaintiff had suffered in the defendant's shop premises. Damages were assessed at £100,000. A year before the accident, the plaintiff had developed multiple sclerosis and following the accident that condition had deteriorated greatly. The plaintiff had claimed that the accident had exacerbated and progressed her multiple sclerosis. In the High Court, the trial judge held that the trauma of the accident had not progressed the plaintiff's condition and that damages should not be awarded for the progression of her multiple sclerosis. The plaintiff appealed the decision of the trial judge and sought to have damages assessed on the grounds that the trauma of the accident had caused the progression of her condition. The Supreme Court in a majority decision, Murphy J and Lynch J, held that the trial judge had clearly misinterpreted medical notes and attributed symptoms to the plaintiff which she did not have. The judgment should be set aside and remitted to the High Court for an assessment of damages. Keane J delivered a dissenting judgment and stated that the appeal should not be allowed.
***Curran v Finn*, Supreme Court, 20/05/99** [FL1480]

Loss of dependency and undeclared income

Revenue – taxation – family law – practice and procedure – damages for future loss – loss of dependency – undeclared income – appropriate method for assessing claim – whether contrary to public policy to include undeclared income in assessing claim – Civil Liability Act, 1961

The case concerned a claim for the loss of dependency. The plaintiff was the administrator of the estate of the deceased. The deceased had been killed in a car accident while a passenger in the defendant's car. As a result, awards were made both to the family of the deceased and to a dependent child. The deceased ran a business and had no formal accounts. The defendant appealed the awards made on the grounds that they did not correspond with the declared income of the deceased. The defendant claimed that the inclusion of undeclared income in assessing the awards was contrary to public policy. In the alternative, it was suggested that compensation should be based on the net income the deceased would have received had tax been paid. Denham J held that in assessing a loss of dependency claim the actual income, declared or otherwise, should be considered. The undeclared amount should be taxed to achieve a figure net of tax for the purposes of assessment. The awards made would stand and the appeal of the defendant would be dismissed. Geoghegan J and Murray J agreed with the approach taken by Denham J.
***Downing v O'Flynn*, Supreme Court, 14/04/2000** [FL2915]

EMPLOYMENT

Statutory interpretation

Industrial dispute – tort – statutory interpretation – trade union recognition – whether tort of actionable conspiracy or procuring breach of contract made out – whether trade union entitled to negotiate on behalf of its members – whether trade union an 'excepted body' within meaning of Trade Union Acts – Trade Union Act, 1941, *sections 3(3)6* – Trade Union Act, 1942 – Railways Act, 1924, *section 55*

The defendants were members of a recently-formed trade union, the Irish Locomotive Drivers' Association. The plaintiffs initiated proceedings against the defendants seeking damages arising out of certain stoppages. The plaintiffs claimed that the defendants had induced workers to breach their contracts of employment. The defendants denied such a responsibility and sought declarations that the ILDA was an excepted body within the meaning of the *Trade Union Acts* and was representative of railway employees. O'Neill J was not satisfied on the balance of probabilities that the defendants were liable for the losses suffered by the plaintiffs arising out of the stoppages that had occurred. The ILDA was not an excepted body within the meaning of the *Trade Union Acts* and was not a representative union within the meaning of the *Railways Act, 1924*. The plaintiffs were granted declarations to that effect.
***Irish Rail v Locomotive Drivers' Association*, High Court, Mr Justice O'Neill, 14/04/2000** [FL2882]

EUROPEAN

Insurance

Whether gardaí entitled to demand particulars of insurance of vehicle based in another member state – Road Traffic Act, 1961

The defendant was stopped while driving a vehicle and particulars of insurance were demanded by a member of An Garda Síochána. As particulars of insurance were not produced, the appellant was prosecuted pursuant to the provisions of the *Road Traffic Act, 1961*. A case was stated to the High Court as to whether gardaí could demand particulars of insurance of a vehicle based in another member state of the EU. In the High

Court, Morris P held that gardaí were entitled to make those demands. The appellant appealed. Barrington J held that while the purpose of the European legislation was to place foreign-registered cars in the same position as domestically-registered cars, it was not the intention to confer upon foreign-registered cars any form of privileged position. To confer a privileged position on foreign-registered cars and their drivers would be contrary to the whole concept of the EU. The appeal would be dismissed.
***DPP v O'Connor*, Supreme Court, 17/11/99** [FL2009]

FAMILY

Pension rights

Practice and procedure – property adjustment order – period of recognisable service applicable – taxation issues – director's loan account – Judicial Separation and Family Law Reform Act, 1989 – Family Law Act, 1995 – Family Law (Divorce) Act, 1996

The case concerned matrimonial proceedings in which a decree of divorce had already been issued. Further issues now fell to be determined. McCracken J held that the husband be responsible for the discharge of the expenses of his wife under the director's loan account up until the date the maintenance payments began, after which the wife would become liable. A shop premises would be transferred to the wife. A property adjustment order would be made transferring shares held by the wife to the husband, the purchase price being a net sum of £1,200,000 after the payment of the relevant capital gains tax. The period of recognisable service in regard to the pension trust of the husband would be from the date of its setting up to the present date. 75% of the benefit accrued from the private pension trust would be paid to the wife. The benefit of certain life assurance policies would also be assigned to the wife.

***M v M*, High Court, Mr Justice McCracken, 23/05/2000** [FL2774]

Children and young persons

Child abduction – delay – international law – wrongful removal and detention of child by mother outside country of habitual residence – delay in applying for child's return under Hague convention *– whether delay in itself defence to child's return – whether father culpable in respect of delay – whether child had settled into new environment – whether court was entitled to look beyond wrongful behaviour of mother* – Child Abduction and Enforcement of Custody Orders Act, 1991 – Hague convention on the civil aspects of international child abduction 1980, *articles 12, 18*

The child at the centre of the present application was born in Spain. The mother of the child was Irish and the father was Spanish. The mother removed the child to Ireland in 1993 and the father then instituted proceedings under the *Hague convention*. The Supreme Court ultimately directed the return of the child to Spain and both the child and her mother returned to Spain in 1995. In 1996, the mother once more removed the child to this jurisdiction. The father instituted proceedings under the *Child Abduction and Enforcement of Custody Orders Act, 1991* and the *Hague convention* in 1998. On 6 November 1998, Laffoy J directed the return of the child to Spain. The mother appealed on the grounds that the delay in instituting these proceedings was such that the child should not now be returned to Spain. The Supreme Court, Denham J delivering judgment, held that the significant delay in instituting proceedings under the convention was neither adequately explained by the father nor was it appropriate. The evidence established that the child had formed a close relationship with the mother's extended family in the community. In addition, it was established that the child had settled in her new environment, both from the physical and psychological point of view. The appeal would therefore be allowed.
***P v B*, Supreme Court, 26/02/99** [FL1486]

Children and young persons

Constitutional law – children – practice and procedure – international law – custody – residential care – attachment and committal – obligations of state – judicial review – whether applicant entitled to seek relief under Guardianship of Infants Act, 1964, *sections 2 and 11* – Age of Majority Act, 1985, *sections 2 and 6* – Hague convention on the civil aspects of international child abduction

The applicant's son had been brought by his father to England. The applicant had subsequently sought and had been granted orders by the Supreme Court on 6 December 1993 relating to the care and welfare of her son. Proceedings initiated in England by the applicant under the *Hague convention* had been dismissed. In 1998, the applicant's son, who was 18 at this stage, returned from England. The applicant brought proceedings seeking to have the original proceedings re-entered and sought an order compelling certain persons to enforce the terms of the Supreme Court order. In a judgment delivered on 22 February 1999, Quirke J ordered that proceedings be re-entered and dismissed the motion for attachment and committal against certain persons whom the applicant claimed had neglected the terms of the original Supreme Court order. Both parties appealed against the judgment. Keane CJ, delivering judgment, held that the original order of the Supreme Court had only been made in the event that the English courts had directed the return of the child to Ireland. As they had not done so, this order was of no effect. The motion for attachment and committal was properly dismissed. The existing proceedings were not properly within the terms of the *Guardianship of Infants Act, 1964*. The proceedings should not have been re-entered. The appeal by the respondents was allowed.
***Herron v Ireland*, Supreme Court, 03/12/99** [FL2907]

Children and young persons

International law – custody – whether removal of children was wrongful within meaning of Hague convention *– whether right of access implies prohibition on removal by one parent without consent of other parent* – Child Abduction and Enforcement of Custody Orders Act, 1991 – Hague convention on the civil aspects of international child abduction, *articles 3, 12, 21*

The parties had been married to one another but the marriage had been dissolved in the United States. The defendant had subsequently been granted sole legal and physical custody of the children. The defendant had also been granted child support and, due to arrears of child support being outstanding, an attachment of earnings order had been granted. The defendant eventually left for Ireland taking the children with her. The plaintiff instituted proceedings seeking the return of the children to the United States. Kearns J in the High Court had refused to make the orders sought and the plaintiff appealed. The defendant argued that, as she was the person entitled to legal and physical custody of the children, then she was entitled to determine where they should reside and accordingly their removal was not wrongful. Keane CJ held that to order the return of the children and their custodial parent to the jurisdiction in which they were formerly resident merely so as to entitle the non-custodial parent exercise his rights of access was not warranted under the terms of the *Hague convention*. The defendant should have notified the plaintiff that she intended to bring the children to Ireland. However, the removal of the children was not wrongful

within the meaning of the *Hague convention*. The appeal would accordingly be dismissed.

***WPP v SRW*, Supreme Court, 14/04/2000** [FL2908]

LITIGATION

Medical negligence

Practice and procedure – litigation – delay – dismissal for want of prosecution – inherent jurisdiction of court – whether delay inordinate and inexcusable – whether delay prejudiced defendant in conduct of its defence

The plaintiff had been born in 1981 and had suffered cerebral palsy with mental retardation. The plenary summons was not issued until January 2000. Certain documents relating to the birth had never been discovered and neo-natal notes had only been discovered in 1998. The defendant sought to have the case dismissed for want of prosecution. The defendant claimed the delay had prejudiced its defence and claimed that certain witnesses were no longer available or could not recall the events in question. O'Sullivan J held that while much of the delay was inordinate and inexcusable, the plaintiff was in her minority during this period. O'Sullivan J was not satisfied that allowing the case to proceed would lead to an unjust trial and an unjust result. The plaintiff's case should continue and the application of the defendant would be dismissed.

***Glynn v The Coombe*, High Court, Mr Justice O'Sullivan, 06/04/2000** [FL2580]

Statute of Limitations

Practice and procedure – litigation – Statute of Limitations – *proceedings issued in name of incorrect plaintiff – amendment of proceedings – order of substitution – whether court should amend pleadings –* Rules of the Superior Courts, 1986, *order 15, rules 2 and 13*

A dispute had arisen between the plaintiff and the defendants who had been engaged by the plaintiff as their solicitors. The dispute concerned the payment of monies which the plaintiff claimed was for the purpose of new litigation which had not occurred. The defendants disputed this claim. In this application, the plaintiff sought to amend the proceedings to reflect the correct name of the plaintiff. The defendants contended that the application should not succeed as it was claimed that the action at the suit of the new party was in any event statute barred. Geoghegan J was satisfied that the interests of justice required that the order of substitution be made. The defendants would have the opportunity of pleading and raising issues relating to the *Statute of Limitations* in due course.

***Kennemerland Groep v Montgomery & Sons*, High Court, Mr Justice Geoghegan, 10/12/99** [FL2028]

PLANNING

Telecommunications antenna

Telecommunications – planning – revocation of planning permission – whether change of circumstances justified revocation of planning permission – whether respondent obliged to give applicant opportunity to make submissions – whether applicant entitled to receive prior notification of revocation – Local Government (Planning and Development) Act, 1963, *section 30* – Local Government (Planning and Development) Act, 1976, *section 39*

The county manager of the respondent had granted the applicant planning permission for the erection of a telecommunications antenna. Subsequently, the respondent passed a resolution revoking the planning permission and served a notice to this effect. The respondent cited a change of circumstances, including fear and apprehension among the local community as a basis for its decision. The applicant took judicial review proceedings claiming that the respondent should have afforded it an opportunity to make submissions regarding the intended revocation. The applicant also claimed that the requirements of constitutional justice and fair procedures had not been observed. O'Donovan J held that the respondent had not sufficiently investigated the issue of whether there had been a change of circumstances. The applicant should have been informed of the intention to revoke the planning permission and afforded an opportunity to make submissions. The decision of the respondent to revoke the planning permission was accordingly invalid.

***Eircell v Leitrim County Council*, High Court, Mr Justice O'Donovan, 29/10/99** [FL1924]

Bias

Allegations of bias – revocation of planning permission by planning authority – judicial review – contents of statutory notice of revocation – statutory notice served three times due to deficiencies – appeals against all three notices – whether applicant had locus standi *to challenge validity of revocation procedure – whether notices valid – whether revocation procedure* ultra vires *or contrary to natural and constitutional justice – whether An Bord Pleanála entitled to hear appeals against notices* – Local Government (Planning and Development) Act, 1963, *section 30(8) as amended*

The first notice party applied to the third respondent (the planning authority) for planning permission for a development on lands owned by the second respondent. Permission was granted by the planning authority but was subsequently revoked pursuant to section 30 of the *Local Government (Planning and Development) Act, 1963*, as amended. The resolution in respect of the revocation was not accompanied by a statement of the change in circumstances as required by the legislation. Due to various deficiencies, the statutory notice specifying the reasons for the decision had to be served three times on the affected parties. Both the first notice party and the second respondent appealed to An Bord Pleanála against all three notices. An Bord Pleanála rejected the appeal against the first notice for being out of time and ruled that the second notice was invalid. The applicant, although against the development, was concerned that the appeals could not properly be heard by An Bord Pleanála and initiated judicial review proceedings, seeking orders of *certiorari* in respect of each notice and an order of prohibition restraining An Bord Pleanála from hearing and the appeal. Geoghegan J held the applicant was a concerned resident who had made observations to An Bord Pleanála and had *locus standi* in the proceedings. Both the first and second notices were invalid due to the errors contained therein. Despite not specifying a particular date by which an appeal had to be lodged with An Bord Pleanála, the third notice was valid. Although it was undesirable that the second and third respondents had the same solicitor in these proceedings, the applicant's allegations of bias against the county manager were not sustainable. The appeal against the third notice could now proceed in the normal manner to An Bord Pleanála.

***Hughes v An Bord Pleanála (& Others)*, High Court, Mr Justice Geoghegan, 30/07/99** [FL1462]

Heritage and the arts

Public right of access – application for leave to apply for judicial review – retention of planning permission – whether grounds in support of application substantial – Local Government (Planning and Development) Act, 1963, *sections 26, 82* – Local Government (Planning and Development) Act, 1992, *section 19* – Rules of the Superior Courts, 1986, *order 84*

The proceedings concerned an application for leave to apply for judicial review. The applicant had been granted planning permission in respect of a golf development. The applicant had developed certain facilities on the land in question and had applied for retention planning permission in respect of same. The first-named respondent had granted permission subject to a number of conditions, some of which related to rights of public access. The applicant initiated judicial review proceedings disputing the right of the first-named respondent to impose conditions relating to public access. The public access was in relation to the ruins of a castle on the Old Head of Kinsale. McCracken J was satisfied that the applicant had raised arguments which were substantial and had fulfilled the necessary criteria for the grant of leave to seek judicial review. Accordingly, the relief sought would be granted. In addition, there were further controversies relating to the ownership of the castle ruins. This would also add to the arguments for granting the relief sought.

***Ashbourne Holdings Ltd v An Bord Pleanála*, High Court, Mr Justice McCracken, 23/03/2000** [FL2522]

Unauthorised advertising hoarding

Planning – advertising – injunction – delay – established use – unauthorised use – whether advertising board required planning permission – whether removal by owner of previous sign destroyed prior existing established use rights – abandonment of rights – Local Government (Planning and Development) Act, 1976, *section 27* – Local Government (Planning and Development) Act, 1992 – Local Government (Planning and Development) Regulations 1994

The applicant sought an order directing that an advertising board owned by the second respondent erected on premises owned by the first respondent be removed. The applicant contended that the board required planning permission and that the continued display of the sign was in breach of the planning code. The respondents argued that delay on the part of the applicant and the use of the building for advertising purposes prior to 1963, thereby establishing established user rights, should defeat the application. The High Court rejected these arguments holding that the respondents should forthwith discontinue the unauthorised use of the premises in question.

***Lord Mayor of Dublin v Signways Ltd*, High Court, Mr Justice Morris, 04/02/2000** [FL2383]

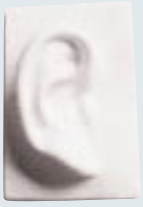
Practice and procedure

Local government – administrative law – planning – practice and procedure – applicant's planning permission overturned on appeal – whether judicial review proceedings served on relevant parties within applicable time limits – Local Government (Planning and Development) Act, 1992 – Rules of the Superior Courts, 1986, *order 84*

The applicant had originally received planning permission to build a house. The notice parties appealed to An Bord Pleanála in respect of the permission granted and the appeal was granted. The applicant sought to challenge the decision of the respondent by way of judicial review. A preliminary issue arose as to whether the notice of motion had been served within the time limits on the relevant parties as set out in section 19(3) of the *Local Government (Planning and Development) Act, 1992*. The applicant had conceded that Donegal County Council had not been served with the necessary documentation but that a letter from the county council's solicitors indicated that the county council did not wish to be involved in the judicial review proceedings. Quirke J held that the county council was a relevant party to the proceedings. The proceedings had consequently not been properly served and the applicant was therefore barred from seeking the relief in question.

***Murray v An Bord Pleanála*, High Court, Mr Justice Quirke, 28/01/2000** [FL2300] G

The information contained here is taken from FirstLaw's Legal Current Awareness Service, published every day on the Internet at www.firstlaw.ie. *For more information, contact bartdaly@firstlaw.ie or FirstLaw, Merchants Court, Merchants Quay, Dublin 8, tel: 01 679 0370, fax: 01 679 0057.*



Practice note

STAMP DUTY: TRANSITIONAL ARRANGEMENTS (*FINANCE NO 2 ACT, 2000*)

The Conveyancing Committee would like to bring to the attention of the profession the text of a letter received from the department of finance clarifying the transitional arrangements for stamp duty contained in the *Finance No 2 Act, 2000.*

'27 July 2000
Mr Brian Gallagher,
Chairman of the Conveyancing Committee,
Law Society of Ireland

Dear Mr Gallagher,
I have been asked by the Minister for Finance, Mr Charlie McCreevy TD, to refer to your recent letter concerning the new stamp duty regime on the purchase of residential properties.

The Finance No 2 Act, 2000, *which provides for the new stamp duty regime, contains transitional arrangements. These cater for persons who were in the process of purchasing a residential property and who would be disadvantaged by the new stamp duty rates. Such persons can have the duty assessed under the previous rate structure provided they had a contract evidenced in writing before 15 June 2000 and provided that contract is executed on or before 31 January 2001. It is only necessary that a contract exists and that it is evidenced in writing prior to 15 June 2000. It is not necessary that the contract be signed or that it be unconditional. In this respect, the provisions are similar to those put in place in the* Finance No 2 Act *of 1998 which also changed the stamp duty regime for housing.*

I trust that this clarifies the position for you.

Yours sincerely,
Hannah O'Riordan
Private Secretary'

The above may be of assistance to practitioners.

The Conveyancing Committee

Eurlegal

News from the EU and International Law Committee
Edited by TP Kennedy, director of education, Law Society of Ireland

EU directive on electronic commerce

The recently adopted EU directive on electronic commerce entered into force on 17 July 2000 (Directive 2000/31/EC). EU member states, including Ireland, have until 17 January 2002 to implement it into domestic law. However, many member states are expected to implement it far sooner than this in order to position themselves as leading centres of e-commerce and thereby attract Internet-related investment. Ireland is no exception in this respect and has already implemented certain aspects of the directive through the recently-signed *Electronic Commerce Act, 2000*. It is rumoured that the government will introduce legislation later this year to implement the remainder of the directive into Irish law.

The directive is intended to ensure legal certainty and consumer confidence in electronic commerce by laying down a clear and general framework to cover certain legal aspects of electronic commerce in the EU's internal market. In particular, it is intended to ensure the free movement of what are referred to in the directive as 'information society services' (ISSs) through the harmonisation of national rules in a number of specific areas.

Information society services

ISSs are defined under EU law as any service normally provided for remuneration, at a distance, by electronic equipment at the individual request of a recipient of such a service. ISSs therefore cover a wide range of economic activities that take place on-line, both business-to-business and business-to-consumer, such as selling goods on-line (although the delivery of goods is not covered by the directive), the provision of on-line information or commercial communication services. Accordingly, on-line newspapers, on-line databases, on-line financial services and on-line professional services, such as those provided by lawyers and accountants, are covered. While the directive does not extend to television and radio broadcasting (as these are not provided at the request of an individual recipient), services such as video on demand are covered. Obviously, any activities such as medical advice, which by its very nature cannot be carried out at a distance and by electronic means, are outside the directive's scope.

A number of activities are excluded, including gambling activities such as lotteries, betting and games of chance. However, promotional competitions and games are not excluded where they are intended to promote the sale of goods or services.

Place of establishment

The directive applies only to ISS providers established within the EU. The place of establishment is defined as the place where an operator actually pursues an economic activity through a fixed establishment. Consequently, the location of the operator's technology, such as websites or servers or its mailbox, is irrelevant. The place of establishment is important as the EU member state responsible for supervising the ISS provider is the member state in which it is established.

Information requirements

ISS providers are required under the directive to provide certain general information which is accessible to the recipient of the service. Such information includes name and geographical address, contact details, company registration number, VAT number, if applicable, and details of any relevant supervisory authority or professional body.

Commercial communications

Commercial communications must also contain information identifying the information service provider. In particular, unsolicited e-mail messages, commonly known as 'spam', must be clearly identifiable as such and member states are obliged to take measures to ensure that service providers regularly undertaking such activities respect 'opt-out' registers of persons not wishing to receive such messages.

Electronic contracts

The directive also affords legal recognition to electronic contracts and obliges member states to remove any prohibitions or restrictions on the use of electronic contracts. However, member states may exclude certain classes of agreement concerning real property, family law and the law of succession. Ireland has already implemented this aspect of the directive through section 19 of the new *Electronic Commerce Act*.

The directive also confers protection for customers of information service providers by obliging the service provider to provide specific information prior to the placing of an order on-line in a format that is clear, comprehensive and unambiguous. This information must include the technical steps necessary to conclude the contract, procedures for identifying and rectifying input errors before executing the order and the languages in which the contract may be concluded. This rule does not apply to contracts concluded exclusively by the exchange of e-mail or other such forms of individual communication.

Liability of Internet intermediaries

In a welcome move that should provide greater legal certainty, the directive establishes rules on the liability of Internet intermediaries, such as Internet service providers (ISPs). A lot of confusion has arisen following the recent *Demon* case in which a UK service provider, Demon, paid compensation to a university professor for allegedly defamatory remarks that appeared on a chat board that it hosted. The directive establishes an exemption from liability for intermediaries where they play a passive role as a 'mere conduit' of information from third parties and limits service providers' liability for other 'intermediary' activities such as the storage of information or hosting of websites. Generally, such intermediaries shall not be liable for the content and information so long as they have no actual knowledge of illegal activity or information. Where such an intermediary receives notice of such knowledge or awareness, it must act expeditiously to remove or disable access to the information.

Member state supervision

ISS providers are governed, as noted earlier, by the 'home' member state in which they are established. Other member states will be allowed to impose restrictions on ISSs supplied from another member state if necessary to protect the public interest, public health, public security or consumers. Member states must, however, notify the European Commission of such measures and may only adopt such measures where the home member state has been asked to take adequate measures and has failed to do so.

The directive represents only one of a wide range of measures taken by the EU as part of its *eEurope action plan*. Other legal measures include the recent adoption of the *Electronic signatures directive*, the commission's work towards establishing a '.eu' domain name and its launch of an extra-judicial network intended to deal with on-line consumer disputes. Although these measures are very welcome, they are unlikely to achieve the commission's stated aim of placing the EU at the forefront of the new economy unless complemented by an increased uptake of the Internet and greater innovation and entrepreneurship in Europe, such as that evidenced in the United States. G

John Gaffney is an associate at solicitors William Fry.

Eurolaw seeking Irish partners

Eurolaw is a young, dynamic and rapidly-expanding European economic interest group (EEIG), which has a presence in most of the major cities of Europe. It offers expert legal advice and representation to clients in, among others areas, euro-auditing, partnership law, competition law, litigation, intellectual property, real estate and construction law, banking and financing, tax planning, company/commercial, media, entertainment, sports and employment law.

At the moment, Eurolaw has no representation in Ireland. Member law firms of Eurolaw have worked sporadically with their Irish counterparts but are currently actively looking for a medium-sized law firm whose activities are in the business law sector. The first step would be to come along as an observer at the next conference, which takes place in Hanover from 21 to 23 September.

Further details can be found on Eurolaw's Internet site at *www.eurolaw.org* and those interested in Eurolaw's next conference, Hanover 2000, can contact Maître Jean-Jacques Zander, Eurolaw GEI, on tel: 0046 708 145713, fax: 0033 1 45 006099 or e-mail: jjzander@eurolawyers.net. G

Recent developments in European law

COMPETITION

Case C-22/98 *Jean Claude Becu, Annie Verweire, Smeg NV, Adia Interim NV*, judgment of 16 September 1999. Smeg is a Belgian company that operates a grain warehousing business in Ghent. For dock work (loading and unloading of ships), Smeg uses recognised dockers. For other work, it uses workers employed by it or temporary workers. Smeg was prosecuted by the Belgian authorities for causing work to be carried out in the port of Ghent by non-recognised dockers. The European Court of Justice was asked to consider the compatibility of the Belgian law with articles 12, 81, 82 and 86 of the *EC treaty*. The ECJ ruled that the dockers are 'workers' within the meaning of article 39. While working for undertakings, they are incorporated into them and thus form an economic unit with them. Therefore, they cannot be considered as 'undertakings' themselves. Even taken collectively, the dockers could not be considered as an undertaking. Articles 81, 82 and 86 are concerned with undertakings. Furthermore, there was nothing in the Belgian legislation showing any discrimination on grounds of nationality as regards the right to take up and pursue the activity of recognised dockers. Thus, article 12 had not been breached.

EMPLOYMENT

Gender discrimination

Case C-236/98 *Jämställdhestsombudsmannen v Örebro läns landsting*, judgment of 30 March 2000. Two midwives were paid lower wages than clinical technicians. The equal opportunity ombudsman brought an action on their behalf, arguing that their work was of equal value to a clinical technician. The midwives received an inconvenient hours supplement which, if taken into account, raised their wage to an equivalent level to that of a technician. The ECJ held that 'pay' covers any consideration paid in cash or in kind to a worker. The supplement at issue is a form of pay. However, it need not be taken into account in comparing the pay of midwives and technicians. If all the various kinds of consideration had to be taken into account in carrying out such a review, it would make it very difficult to do. Thus, the basic monthly salary should be compared. In order to determine whether it is contrary to article 141 for midwives to be paid less, the national court must determine whether a considerably higher percentage of women than men work as midwives. If so, there is indirect sex discrimination unless the measure can be justified by objective factors. It is for the employer to show that there are objective reasons to justify the difference in pay and for the national court to examine these objective reasons.

FAMILY LAW

The *Brussels II* regulation on jurisdiction and the enforcement of judgments in matrimonial matters has been adopted by the council. The regulation will enter into force on 1 March 2001.

FREE MOVEMENT OF WORKERS

Case C-356/98 *Arben Kaba v Secretary of State for the Home Department*, judgment of 11 April 2000. Kaba was a Yugoslav national who arrived in the UK in 1991. In 1994, he married a French national. She obtained a five-year residence permit in the UK. Kaba was given leave to remain in the UK for the same period as the spouse of an EU national exercising her rights under the treaty. In 1996, he applied for indefinite leave to remain in the UK. He was refused leave. Kaba argued that the UK immigration rules were more favourable to persons 'present and settled' in the UK than to himself and his wife. The rules required a spouse of an EU national to have been resident in the UK for four years before an application for indefinite leave would be considered; for spouses of UK nationals or those 'present and settled' in the UK the period is 12 months. He argued that this was unlawful discrimination contrary to Article 7(2) of Regulation 1612/68. The ECJ held against Kaba. It held that the right of nationals of a member state to reside in another member state is conditional. Member states are entitled to rely on any objective difference there may be between their own nationals and those of other member states when they lay down the conditions under which leave to remain indefinitely in their territory is to be granted to the spouses of such persons. In particular, states can require spouses of persons who do not themselves enjoy an unconditional right of resi-

dence to be resident for a longer period than that required for the spouses of persons who already enjoy such a right, before granting the same right to them.

FREEDOM TO PROVIDE SERVICES

Case C-124/97 *Läärä, CMS and TAS v District Prosecutor and Finnish State*, judgment of 21 September 1999. In Finland, a single public body is legally authorised to organise lotteries and betting, to manage casinos and to run the operation of slot machines. The holder of this authorisation is obliged to collect funds for non-profit making causes. CMS is an English company. CMS agreed with a Finnish company, TAS, that TAS would have the exclusive right to install and operate in Finland slot machines manufactured and supplied at reasonable prices by CMS. The chairman of TAS was fined for infringement of Finnish legislation on gaming. He argued that the legislation was contrary to the treaty provisions on the freedom to provide services. The ECJ held that the Finnish legislation did not discriminate on grounds of nationality. It applies to all economic operators, irrespective of whether they are established in Finland. The legislation is an obstacle to the freedom to provide services as it directly or indirectly prevents operators from making slot machines available to the public. However, the court held that the restriction was justified as it was designed to protect consumers. The regulation of gaming by means of a limited authorisation is to prevent the risk of crime and fraud involved in this activity. The court held that the Finnish law was proportionate to the objective pursued.

INSOLVENCY

The council has adopted a regulation on jurisdictional rules in cross-border insolvency proceedings. Insolvency is not included in the *Brussels convention on jurisdiction and enforcement of judgments in civil and commercial matters*. The drafters of the convention intended signing a separate treaty on insolvency. However, two draft treaties in 1972 and 1995 were not adopted. The regulation defines common rules on cross-border insolvency proceedings. Insurance undertakings, credit institutions, investment undertakings holding funds or securities for third parties and collective investment undertakings are excluded. These matters are excluded as they are subject to special arrangements and national supervisory authorities have in these cases very wide-ranging powers of intervention. The main insolvency proceedings are to be opened in the member state where the debtor has the centre of his main interests. These proceedings have universal scope and are aimed at encompassing all the debtor's assets. Secondary proceedings can be opened to run in parallel in a member state where the debtor has an establishment but their effect is limited to assets located in that state. The scope of its application can be modified by the council by a qualified majority vote. The regulation will enter into force on 31 May 2002.

LITIGATION

Brussels convention

Case C-7/98 *Dieter Krombach v André Bamberski*, judgment of 28 March 2000. Mr Bamberski is a French man and Mr Krombach is German. Krombach had been the subject of a preliminary investigation in Germany following the death in Germany of a 14-year-old French girl. The investigation was discontinued. Bamberski was the girl's father. At his request, the French courts opened an investigation. They then committed Krombach for trial. Krombach did not appear to defend the proceedings. The French court held him in contempt and ordered him to pay 350,000 francs compensation to Bamberski. Bamberski applied to enforce the judgment in Germany. Krombach appealed the German enforcement order. His first defence was that the judgment ran counter to German public policy and thus should not be enforced (article 27(1) of the *Brussels convention*). He based this argument on the grounds that the French courts could base their jurisdiction on the nationality of the victim of an offence. The ECJ rejected this argument. It pointed that out that, under the convention, the court before which enforcement is sought cannot review the jurisdiction of the state of origin.

Krombach had also argued that he had not been allowed defend the proceedings in France unless he appeared in person and that this was contrary to public policy. The ECJ referred to articles 29 and 34(3), which establish that a foreign judgment cannot be reviewed as to its substance. Thus, a discrepancy between the rules of the forum where the judgment was given and the enforcing forum cannot be taken into account nor can any alleged inaccuracies in findings of law or fact. To successfully invoke article 27(1), there must be a manifest breach of a rule of law regarded as essential in the legal order of the state in which enforcement is seised. The right to be defended is a fundamental right deriving from the constitutional traditions common to the member states. The European Court of Human Rights has ruled that in criminal cases the right of the accused to be defended by a lawyer is one of the fundamental elements in a fair trial and that a person does not forfeit entitlement to such a right simply because he is not present at the hearing. Thus, an enforcing court is entitled to invoke article 27 and hold that a refusal to hear the defence of an accused not present at a hearing is a manifest breach of a fundamental right.

Case 240/97 *Leathertex Divisions Sintetici SpA v Bodetex BVBA*, judgment of 5 October 1999. Leathertex is an Italian company and Bodetex is Belgian. Bodetex was the agent of Leathertex in Belgium and the Netherlands for a number of years. A commission of 5% was paid. In 1987, no commission was paid. Bodetex then decided that the agency agreement had come to an end. It gave Leathertex formal notice of termination and sought commission and damages in lieu of notice. It then issued proceedings in the Belgian courts. The court asked the ECJ whether article 5(1) meant that the same court could have jurisdiction to hear an action founded on two equally ranking obligations arising from the same contract, although according to national private international law rules one of the obligations was to be carried out in one state and one in another. The ECJ held that the purpose of the convention was to make recognition and enforcement of foreign judgments easier. Thus, courts should avoid creating situations in which more than one court has jurisdiction over the same contract. The place of performance is determined by the national private international law rules of the state of the obligation in question. In this case, the Belgian court had identified two separate obligations. The obligation to pay compensation in lieu of damages was to be carried out in Belgium and the obligation to pay commission was to be carried out in Italy. There was no basis for arguing that the same court should hear both claims as they were linked. The claimant could avoid issuing proceedings in two separate states by issuing proceedings on all aspects of his claim in the state where the defendant was domiciled in accordance with article 2.

Case C-440/97 *GIE Groupe Concorde v Master of the Vessel Suhadiwarno Panjan*, judgment of 28 September 1999. A cargo of bottles of wine was discovered to be damaged upon delivery. The wine had been loaded into containers in France and was unloaded in Brazil where the damage was discovered. The insurers paid compensation to the consignee and brought an action in the French courts. The French courts declined jurisdiction, as France was not where the contract of carriage was to be performed. The ECJ reaffirmed its earlier rulings on article 5(1) of the convention. It held that 'the place of performance of the obligation in question' should be interpreted as referring to the law, which governed the obligation according to the national private international law rules of the court hearing the case.

Regulation on service of judicial and extra-judicial documents

The *Regulation on service of judicial and extra-judicial documents* has been endorsed by the Council of Ministers. This regulation (which was examined in the last issue of *Eurlegal*, page 50) provides the legal regime for the service of judicial documents (such as summonses) in other member states in the EU. Ireland has an opt-out under the treaty on matters relating to civil co-operation. It has indicated that it will apply the regulation, which will enter into force on 31 May 2002. G

CONFERENCE ON LITIGATION BEFORE THE EUROPEAN COURTS

Project carried out with the support of the European Commission under the Robert Schuman Project of the EU

The enforcement of Community law by means of legal proceedings in the courts of the European Union in Luxembourg plays a key role in achieving the economic integration envisaged by the *EC treaty*.

The purpose of this course will be to describe the various types of proceedings and how such proceedings are dealt with when they reach the courts of the European Union (the Court of Justice of the European Communities and European Court of First Instance). Both general aspects and details concerning the various types of actions will be explained by means of practical examples. One of the main topics discussed in the course will be procedural aspects of preliminary rulings and direct speakers. Course participants will have an opportunity to attend a hearing at the Court of Justice of the European Communities.

The course aims to acquaint solicitors and barristers with litigation and the different types of proceedings at the European courts so that they can use them the same way as national proceedings.

As this seminar is funded by the European Commission, no fee will be charged for attendance. Participants will have to make their own travel arrangements and will be expected to meet the cost of accommodation in the conference hotel. For further information, contact abaginski@era.int. Participants may benefit from special conditions for direct flights to Luxembourg. Please contact Luxtours on tel: +49(0) 651 41091 or fax: +49(0) 651 40446.

CONFERENCE PROGRAMME

WEDNESDAY 20 SEPTEMBER 2000

09.00 Arrival and registration

09.30 Welcome
Dr Wolfgang Heusel, Director, ERA

Part 1 ***Invoking EC law in the member states***
Chair: TP Kennedy, Law Society of Ireland

The relationship between Community law and national laws
Tony Collins

10.30 **Community law and the private client**
Vincent Power

11.00 Discussion

11.15 Coffee/tea break

11.45 **Community law and companies**
Vincent Power

12.20 Discussion

12.30 Lunch in the Mercure Hotel, Trier

Part 2 ***Procedure of the European Court of Justice***
Chair: Vincent Power

The role of the European Court of Justice
The different types of proceeding; the basic structure, composition and working methods; the division of jurisdiction between the Court of First Instance and the Court of Justice
Leo Flynn

15.30 Coffee/tea break

16.00 The procedure in direct actions, including the appeal procedure; limitations on *locus standi;* some advice on the drafting of written pleadings and on the presentation of oral argument
Leo Flynn

17.00 Discussion

19.00 Beginning of the evening programme

THURSDAY 21 SEPTEMBER

Part 3 ***Visit to the European Court of Justice in Luxembourg***
Meeting point: 07.30 in front of the Mercure Hotel

08.30 Opportunity to speak with members of the European Court of Justice

13.00 Lunch in the Mercure Hotel, Trier

Part 4 ***The preliminary ruling procedure***
Chair: TP Kennedy

14.15 **The preliminary ruling procedure**
Its function as a means of ensuring uniform application of Community law and effective enforcement of Community rights; the division of labour between the national court and the Court of Justice
Tony Collins

15.30 Coffee/tea break

16.00 **The preliminary ruling procedure (continued)**
When to refer; when a reference is compulsory; some advice on the drafting of a reference and the formulation of preliminary questions; the court's recent case law on the admissibility of references
Tony Collins

16.45 Discussion

FRIDAY 22 SEPTEMBER

Part 5 ***ECJ's case law in selected areas of Community law***
Chair: Vincent Power

09.30 **Working with interpreters**
Ellen Ruth Moerman

10.15 Discussion

10.30 Coffee/tea break

11.00 **Contracts and European Community law**
Conor Quigley

12.00 Discussion

12.15 Lunch in the Mercure Hotel

Part 6 ***Workshop***
Conor Quigley, Anthony Whelan and Kieran Bradley

13.30 **Workshop I**

14.30 Coffee/tea break

15.00 **Workshop II**

16.00 **End of the conference**

The bald truth about education
Professional Practice Course Co-ordinator Padraic Courtney (*third from left*) chats with students at a recent information evening and reception in Blackhall Place. Attendees were briefed on such topics as course content, the mentoring system and Law Society examinations

Ascending order
Mr Justice Feargus Flood, Mr Justice Hugh Geoghegan, Attorney General Michael McDowell SC and author Michael Twomey celebrate the launch of his book *Partnership law*

Talking heads
Law Society Director of Education TP Kennedy and Round Hall's Catherine Dolan flank the winners of the publishing company's award for best performance in its apprentice moot court competition. Nora Staunton of Holmes O'Malley Sexton *(second from left)* and McCann FitzGerald's Madeleina Loughrey-Grant tied for best speaker

Split decisions
Pictured at the launch of *The Divorce Act in practice* were (*left to right*) the book's editor, Geoffrey Shannon, the Law Society's deputy director of education; Mrs Justice Catherine McGuinness; and solicitor Stephanie Coggans, who contributed to the book

Diplomatic relations
Alan Dukes TD *(centre)* congratulates graduates of the Law Society's diploma in applied European law and legal French

Show me the money
Fr Peter MacVerry (*third from left*) and GOAL's Lisa O'Shea (*third from right*) with A&L Goodbody's Eoin MacNeill and other organisers of this year's Calcutta Run, which raised £90,000 to fund projects supporting homeless and deprived children in Dublin and Calcutta

Legal line-up
Pictured at the recent UMKC apprentice moot court competition reception were Judge Bryan McMahon; Education Committee chairman Michael Peart; Judge Alison Lindsay; Law Society President Anthony Ensor; Mr Justice Frederick Morris; Edwin Hood, director of the UMKC Summer Law Academy; Law Society Director General Ken Murphy; and UCD's Dermot Cahill, co-director of the UMKC Summer Law Academy

NEW APPOINTMENTS

Dr Mary Redmond (*above*), a leading authority on employment and industrial relations law, has been named a partner in the Dublin firm Arthur Cox

LK Shields has made two new appointments recently: David Williams, who has been named partner in the banking and financial services department; and Nicola Palmer, who is now an associate solicitor at the Dublin firm

Beating the guards
Law Society President Anthony Ensor accepts the *President's Perpetual Golf Trophy* from Garda Commissioner Pat Byrne after the Law Society team triumphed at the annual Law Society/Garda Síochána golf match

Tuxedo junction
Pictured at the recent Meath Solicitors' Bar Association dinner dance were *(back row, left to right)* Circuit Court judges Raymond Groarke and John O'Hagan; High Court judge Patrick Smith; Chynel Phelan, secretary, Meath Solicitors' Bar Association; High Court judge Nicholas Kearns; Barry Lysaght, president, Meath Solicitors' Bar Association; Michael Keaveney, treasurer, and *(front row, left to right)* Mrs Groarke, Mrs O'Hagan, Mrs Smith, Mrs Kearns and Mrs Lysaght

SADSI
Solicitors Apprentices Debating Society of Ireland

Time to polish up your debating skills!

It was the intention at the outset of this SADSI committee's term to 'revive and rejuvenate' the advocacy sphere of the society and thanks to a lot of input by committee members and advice and support from the Law School and various sponsors, the fruits of our efforts are finally visible. The calendar for debating competitions and the encouragement of advocacy among apprentices is possibly the most exciting in years and will appeal to every apprentice – even if you quake at the thought of public speaking!

Court etiquette/advocacy evening (27 September)
Focusing on the basics of court procedure, this seminar-style delivery will cover everything from reading the legal diary to addressing a judge, making an application in court and attending a barrister. Details of the evening will be made available to all apprentices in the coming weeks.

Gold medal oratory competition (5 October, Education Centre)
This is undoubtedly the most prestigious award for apprentice advocates. The competition this year will involve an impromptu motion on a current topic and will require speakers to deliver a five-minute oratorial spectacular in order to determine the best apprentice advocate in the country. If you are interested in speaking in this event, please forward your name to any member of the SADSI committee or e-mail *cberesford@actons.ie*.

John Edmund Doyle SADSI/King's Inns memorial debate (18 October, King's Inns)
This is a debate not to be missed. The SADSI team will comprise three of the society's best speakers (yet to be chosen) who will oppose King's Inns' student barristers. Details of the motion for debate and a history of the inter-institution debating rivalry will be available in next month's *Gazette* and on our website.

Moot court competition: SADSI/King's Inns (22 November, Blackhall Place)
The selection of a SADSI team will take place in early September, so interested parties should submit their names as soon as possible.

In addition to these events, SADSI will also be attempting to continue the success of Louise Rouse's victory in last year's *Irish Times* debates. Any apprentices wishing to put their names forward for the SADSI *Irish Times* team should do so as soon as possible.

The annual world debating championship takes place in Glasgow from 27 December to 3 January next. Sponsorship for the SADSI team is, as ever, always welcome!

Clodagh Beresford, SADSI Debating Convenor

Career development day

The first SADSI career development day was held on 14 July in the Presidents' Hall in Blackhall Place, attracting up to 200 apprentices. The event was organised by SADSI's Ann Brennan, Rachel Minch and Eva Lalor with the aim of providing apprentice solicitors with some insight into the variety of opportunities that now exist for newly-qualified solicitors. Sharon Scally from A&L Goodbody started the day off with a talk on how best to approach your first interview. ZMB, the event sponsors, discussed opportunities in the UK, while Niamh Connery of Rowe and Maw gave a lively talk on the pros and the apparently very few cons of working in Brussels. Not forgetting that most apprentices aim to stay in Ireland, Peter McDonnell delivered an energetic and witty discussion on setting up your own practice. He also sponsored a prize of a champagne dinner for two in Brownes, which was won by Keenan Furlong. The day ended with a debate headed by Tim Scanlon from Matheson Ormsby Prentice on the merits of practising for a large firm in Ireland. SADSI wishes to thank its sponsors, ZMB, the speakers, chairmen TP Kennedy and Director General Ken Murphy, and all those who helped in organising what is hoped will become an annual event.

Ann Brennan, PRO, SADSI

The cast of Arthur Miller's *The crucible*, which was staged by the SADSI Players in June. *Back row:* Dave McCoy, Mark Loftus, Ian Dillon, Domhnaill Forde; *middle row:* Ronan O'Brien, Jenny Prendergast, Sean Toomey, Una Gately; *front row:* Selma Ryan, Olivia Traynor, Rachel Staunton, Edel McCormack, Olivia Broderick, Carla Bannon, Sarah Conroy, and Ann Brennan

New group health schemes for apprentice solicitors

SADSI is pleased to announce that new group health insurance schemes have been set up in conjunction with the VHI and BUPA. These will offer a 10% discount to members on each premium and offer a vast amount of medical services to the apprentice for unexpected illness or accident, both here and abroad. Further details will be given in future issues of the *Gazette*. For more information, call VHI on 1850 444 844 or BUPA on 1890 700 890.

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 September 2000)

Regd owner: Bernard Fitzpatrick, Corr, Loughduff, Co Cavan; Folio: 11726, 22183; Lands: Corr, Brusky; Area: 15.388 acres; **Co Cavan**

Regd owner: Patrick Joseph Considine, Kilconnell, Liscannor, Co Clare; Folio: 27402; Lands: Townland of (1) Kilconnell and (2) Kilconnell (one undivided sixth part) and Barony of Corcomroe; Area: (1) 27a 2r 33p, (2) 2a 2r 20p; **Co Clare**

Regd owner: Jack and Siobhan Keane, 34 Glendora Avenue, Caherdavin, Limerick; Folio: 19120F; Lands: Townland of Cappateemore East and Barony of Bunratty Lower; Area: 0.370 hectares; **Co Clare**

Regd owner: Seamus Keane, Mount Ivers, Sixmilebridge, Co Clare; Folio: 24676F; Lands: Townland of Mountrivers and Barony of Bunratty Lower; Area: 0.91 hectares; **Co Clare**

Regd owner: Finbarr and Pauline O'Driscoll, Trinnaderry, Barefield, Ennis, Co Clare; Folio: 3344; Lands: Trinaderry, Barefield, Ennis; Area: 1 acre; **Co Clare**

Regd owner: Rudolf Bauer; Folio: 52884; Lands: Known as a plot of ground situate in the Townland of Clashadoo, the Barony of Carbery East (West Division), and the County of Cork; **Co Cork**

Regd owner: John Donovan; Folio: 17251; Lands: Known as a plot of ground situate in the Townland of Reagh, the Barony of Carberry West (West Division), and the County of Cork; **Co Cork**

Regd owner: John Dorgan; Folio: 34882; Lands: Known as a plot of ground situate in the Townland of Gortnaskehy and the Barony of Condons and Clangibbon, and County of Cork; **Co Cork**

Regd owner: Veronica Flanagan (deceased); Folio: 28832; Lands: Known as an plot of ground situate in the Townland of Ballylongane, the Barony of Imokilly, and the County of Cork; **Co Cork**

Regd owner: Eleanor O'Donovan; Folio: 4238L; Lands: Known as an plot of ground situate in the Townland of Ballydahin, the Barony of Fermoy, and the County of Cork; **Co Cork**

Regd owner: Timothy O'Callaghan; Folio: 1127; Lands: Known as an plot of ground situate in the Townland of Liscahane, the Barony of Muskerry West, and County of Cork; **Co Cork**

Regd owner: Denis L O'Sullivan; Folio: 11165F; Lands: Property situate in the Townland of Knockroe West and Barony of Bear, Co Cork; **Co Cork**

Regd owner: Margaret Pople; Folio: 27364; Lands: Known as a plot of ground situate in the Townland of Crumpane, the Barony of Bear, and County of Cork; **Co Cork**

Regd owner: Matthew Twomey; Folio: 24226R; Lands: Known as a plot of ground situate in the Townland of Kilmeedy East and West, the Barony of Muskerry West, and the County of Cork; **Co Cork**

Regd owner: Patrick Callaghan, formerly of Ballylar PO, Letterkenny, Co Donegal, now of Killavee, Portsalon, Letterkenny, Co Donegal; Folio: 14180F; Lands: Gortnatraw South and Barony of Kilmacrenan, Co Donegal; **Co Donegal**

Regd owner: John Joseph Doherty, Gleneely, Killygordon, Co Donegal; Folio: 6338; Lands: Mounthall; Area: 9.313 acres; **Co Donegal**

Regd owner: Peter Gallagher, Ard Connell, Ardara, Co Donegal; Folio: 39707; Lands: Ardara; **Co Donegal**

Regd owner: William John Graham, Summerhill, Co Donegal; Folio: 4979; Lands: Summerhill; Area: 25.044 acres; **Co Donegal**

Regd owner: Patrick McAteer, Seedagh, Ballyheerin, Co Donegal; Folio: 28819; Lands: Seedagh; Area: 15.0 acres; **Co Donegal**

Regd owner: Alphonsus McCrea, Billary, Pettigo, Co Donegal; Folio: 26951; Lands: Prop 1 – Tullycarn, prop 2 – Drumchrin; Area: Prop 1 – 20a 0r 30p, prop 2 – 5a 0r 20p; **Co Donegal**

Regd owner: William John Simmons, Tievemore PO, Pettigo, Co Donegal; Folio: 8215; Lands: Tievemore; Area: 15.15 acres; **Co Donegal**

Regd owner: Dermot Lawlor and Maura Butler; Folio: DN75201F; Lands: Townland of Kingstown and Barony of Rathdown, known as 5 The Hill, Woodpark, Ballinteer; **Co Dublin**

Regd owner: Mark and Orla Cullen; Folio: DN100622F; Lands: Property situate in the Townland of Murphystown and Barony of Rathdown; **Co Dublin**

Regd owner: Paul and Linda Doyle; Folio: DN87377F; Lands: Property known as 95 Dromard Road, Drimnagh, situate in the Parish and District of Drimnagh; **Co Dublin**

Regd owner: John Hayward (deceased); Folio: DN43238F; Lands: Property known as 513 Pearse Villas, situate in the Townland of Thomastown and Barony of Rathdown; **Co Dublin**

Regd owner: Sean McGuigan; Folio: DN194; Lands: Townland of Causetown and Barony of Balrothery East; **Co Dublin**

Regd owner: McMullan Bros Limited; Folio: DN11229F; Lands: Lands situate in the Parish and Town of Swords; **Co Dublin**

Regd owner: Pierce Reilly; Folio: 6271; Lands: Townland of Ballisk Common and Barony of Nethercross; **Co Dublin**

Regd owner: Joseph and Irene Molloy, A4, Ballybane Mor, Galway; Folio: 11310F; Lands: Townland of Terryland and Barony of Galway; **Co Galway**

Regd owner: Michael Ryan (deceased); Folio: 13225; Lands: Castlemarket and Barony of Fassadinin; **Co Kilkenny**

Regd owner: Windgap Co-op Dairy Society Ltd; Folio: 7359; Lands: Coolehill Upper and Barony of Kells; **Co Kilkenny**

Regd owner: William Barry (deceased); Folio: 5066F (Folio 463 Revised); Lands: Townland of Fanningstown and Barony of Smallcounty; **Co Limerick**

Regd owner: Daniel Fitzgerald and Anne Frost; Folio: 2783L; Lands: Townland of Shannabooly and Barony of North Liberties; **Co Limerick**

Regd owner: Patrick Lorrigan; Folio: 13651; Lands: Townland of Mongfune (part) and Barony of Owneybeg; **Co Limerick**

Regd owner: Frank McCann (Junior), Cloonaugh Lower, Drumlish, Co Longford; Folio: 7284; Lands: Cloonagh; Area: 20.813 acres; **Co Longford**

Regd owner: Mary Hearty and Maureen Brodigan, 33 Seafield Lawns, Avenue Road, Dundalk, Co Louth; Folio: 740L; Lands: Dundalk; **Co Louth**

Regd owner: Gerard McElarney, McSwiney Street, Dundalk, Co Louth; Folio: 426F; Lands: Haggardstown; Area: 1.103 hectares; **Co Louth**

Regd owner: Peter F Burke, Cornamona; Folio: Via Claremorris; Lands: Cornamona; **Co Mayo**

Regd owner: Gerard Concannon, Claremorris, Co Mayo; Folio: 13777F; Lands: Townland of Blackacre and Barony of Dunmore; **Co Mayo**

Regd owner: Edward Mary King, The Bungalow, Keel, Achill, Co Mayo; Folio: 16223; Lands: Townland of Slievemore and Barony of Burrishoole; Area: 5.2407 hectares; **Co Mayo**

Regd owner: Denis and Maria Patricia McCarthy, 173 Tudor Drive, Kingston on Thames, Surrey KT2 5NT, England, and formerly of Doogort, Achill, Co Mayo; Folio: 492F; Lands: Townland of Doogort and Barony of Burrishoole; Area: 0.1897 hectares; **Co Mayo**

Regd owner: John Mayock, Gortaroe, Westport, Co Mayo; Folio: 19779F; Lands: Townland of (1) Attireesh, (2) Attireesh, and Barony of Murrisk; Area: (1) 6.7680 hectares, (2) 0.215 hectares; **Co Mayo**

Regd owner: Thomas Tunney and Celia Tunney, Balla Road, Claremorris, Co Mayo; Folio: 4113F; Lands: Townland of Parkatleva and Barony of Clanmorris; Area: 0.1745 hectares; **Co Mayo**

Regd owner: Gerard Baker, Freffans, Trim, Co Meath; Folio: 3598F; Lands: Ardbraccan; Area: 0.919 acres; **Co Meath**

Regd owner: Christopher Murray, 12 Summerhill Road, Trim, Co Meath; Folio: 13244; Lands: Doolystown; Area: 0.494 acres; **Co Meath**

Regd owner: Glentstate Limited, Coolshannagh, Monaghan; Folio: 17762, 18492; Lands: Coolshannagh; Area: 2.081 acres; **Co Monaghan**

Regd owner: Molly Healy (deceased); Folio: 10543 and 7576; Lands: Bohernagrisna and Barony of Ballycowan; **Co Offaly**

Regd owner: Patrick McGuinness (deceased), Cloniff, Shannonbridge, Co Offaly; Folio: 6349; Lands: Cloniff, Shannonbridge; **Co Offaly**

Regd owner: John Yourell; Folio: 12026; Lands: Broughal and Barony of Ballyboy; **Co Offaly**

Regd owner: Anthony Gavin, Curraghmore, Kiltoom, Athlone, Co Roscommon; Folio: 37081; Lands: Townland of (1) Corramore, (2) Corramore, (3) Corramore and Barony of Athlone South; Area: (1) 0.7840 hectares, (2) 0.6270 hectares, (3) 4.1350 hectares; **Co Roscommon**

Regd owner: Patrick J Healy (deceased), Derroon Stud, Ballymote, Co Sligo; Folio: 24184; Lands: Townland of (1) Rathdooney Beg, (2) Clooncose, (3) Clooncose, (4) Rathdooney Beg and Barony of Corran; Area: (1) 9.1580 hectares, (2) 0.5560 hectares, (3) 0.1260 hectares, (4) 7.6200 hectares; **Co Sligo**

Regd owner: William Quigley; Folio: 17702; Lands: Kilbreedy and Barony of Middlethird; **Co Tipperary**

Regd owner: James Power; Folio: 3080F; Lands: Townland of Clonfadda and Barony of Middlethird; **Co Waterford**

Regd owner: James Fagan, Archerstown Little, Delvin, Co Westmeath; Folio: 9612; Lands: Archerstown; Area: 0.30 acres; **Co Westmeath**

Regd owner: James Grehan, 30 Ormond Road, Rathmines, Dublin 6; Folio: 13630; Lands: Aghyrassy; Area: 23.731 acres; **Co Westmeath**

Regd owner: Aidan Quinn, Bunnahinley, Athlone, Co Westmeath; Folio: 10163; Lands: Bunnahinley; Area: 26.388 acres; **Co Westmeath**

Regd owner: Anthony and Mary Baker; Folio: 21514; Lands: Enniscorthy and Barony of Scarawalsh; **Co Wexford**

Regd owner: Patrick Merriman (deceased); Folio: 14877; Lands: Haggard, Newtown and Bannow Moor and Barony of Bargy; **Co Wexford**

Regd owner: Patrick Redmond (deceased); Folio: 17153; Lands: Tacumshin and Barony of Forth; **Co Wexford**

Regd owner: Irish Shell Limited; Folio: 18234; Lands: Crosstown and Barony of Shelmaliere East; **Co Wexford**

WILLS

Cummins, Carol, in the estate of Mary/Maureen Cummins, late of 79 Kincora Road, Clontarf, Dublin 3. Would any person having knowledge of a will made by the above named deceased who died on 16 October 1999, please contact David Walley & Company, Solicitors, 54 Amiens Street, Dublin 1, tel: 01 836 3655, fax: 01 836 3610

Devaney, Emma (otherwise Emily), late of 9 Arm Road, Castlerea, County Roscommon. Would any person having knowledge of a will made by the above named deceased who died on 21 May 2000, please contact CE Callan & Company, Solicitors, Boyle, County Roscommon, tel: 079 62019, fax: 079 62869

Ennis, Anne (otherwise Annie) (deceased), late of Maynooth Road, Prosperous, Naas, Co Kildare. Would any person having knowledge of a will made by the above named deceased who died on 2 May 2000, please contact Wilkinson & Price, Solicitors, Main Street, Naas, Co Kildare, tel: 045 897551, fax: 045 876478

Fitzgerald, Jeremiah David (deceased), late of Mill Road, Ballincurrig, Co Cork. Would any person having knowledge of a will made by the above named deceased who died on 31 August 1997, please contact Eoin C Daly & Co, Solicitors, 38 South Mall, Co Cork, tel: 021 275244 (ref: G139(AD))

Flanagan, Patrick (deceased), late of 76 Celtic Park Avenue, Whitehall, Dublin 9. Would any person having knowledge of a will made by the above named deceased who died on 21 September 1999 at Maryfield Nursing Home, Chapelizod, please contact Messrs Gaffney Halligan & Co, Solicitors, 413 Howth Road, Raheny, Dublin 5, tel: 01 831 4133

Kane, Mary Josephine (deceased), late of 2 St Martin's Terrace, Hanover Street East, Dublin 2 (otherwise 2 St Martin's Terrace, Ringsend, Dublin 4). Would any person having knowledge of a will made by the above named deceased who died on 23 April 2000, please contact Messrs Malone & Potter, Solicitors, 7 Cope Street, Dublin 2 (ref: 1/AG), tel: 01 671 2073/671 2644, fax: 01 671 2735

McLoughlin, Eugene (deceased), late of 36 Park Road, Navan Road, Dublin 7. Would any person having knowledge of a will made by the above named deceased who died on 11 December 1998, please contact Sean M Kenny & Co, Solicitors, West End House, 134 James Street, Dublin 8, tel: 01 679 5048, fax: 01 679 2319

McShane, Richard (deceased), late of Carrowntreila, Co Mayo. Would any person having knowledge of a will made by the above named deceased who died on 16 June 2000, please contact Sheridan Quinn, Solicitors, 29 Upper Mount Street, Dublin 2, tel: 01 676 2810, fax: 01 661 0295

Murphy, Mary Teresa Philomena (deceased), late of 88 Dangan Heights, Newcastle, Galway. Would any person having knowledge of a will dated 3 November 1998 by the above named deceased, please contact T Mullan & Co, Solicitors, Ballinrobe, Co Mayo, tel: 092 41800, fax: 092 41802

Ryan, John (deceased), late of 16 St Mollerans, Carrick-Beg, Carrick-on-Suir, Co Tipperary. Would any person having knowledge of a will dated 11 April 1983 made by the above named deceased or of any will of the deceased who died on 25 March 1987, please contact Niall J Walsh & Co, Solicitors, 11 Greystone Street, Carrick-on-Suir, Co Tipperary, tel: 051 640773/640700, fax: 051 641397

Whaley, Noel (deceased), late of 4 St Anne's Terrace, Golf Links Road, Bettystown, Co Meath. Would any person having knowledge of a will made by the above named deceased who died on 27 March 2000, please contact McGovern, Solicitors, Unit 1, First Floor (over EBS Building Society), Kennedy Road, Navan, Co Meath, tel: 046 73617, fax: 046 73618, DX 36 014 NAVAN, e-mail: *bmcgovern@tinet.ie*

EMPLOYMENT

Solicitor available for full time or locum work in Munster area. Preference for counties Cork and Kerry but all areas considered. Tel: 026 42840

Recently-qualified solicitor (late-50s) seeks PQE in Dublin area. Practical experience in conveyancing, probate, litigation and family law in a smaller practice preferred. No remuneration required. **Reply to Box No 70**

Experienced solicitor, retired from general practice, willing to undertake conveyancing and probate work from own home, might suit firm unable or unwilling to engage additional staff, modern office facilities. **Reply to Box No 71**

Assistant solicitor required, for general practice in Co Limerick. Full time or part time. Apply with CV to **Box No 72**

Part-time solicitor required for friendly, expanding South West Dublin firm. Experience in conveyancing, family law and litigation. Salary neg. Tel: 01 464 1502

Solicitor required for busy Cork practice, work in a friendly environment, experience an advantage but not necessary. Applications will be treated in the strictest confidence. Apply with CV to **Box No 73**

Assistant solicitor with at least one year's PQE wanted for busy solicitors' practice in Killarney town. The appointee will be expected to deal with all aspects of legal work. Apply with CV and references to **Box No 74**

Navan, County Meath: solicitor required with post-qualification experience for practice with emphasis on child care, adoption and wardship law, family law, conveyancing and Circuit and High Court litigation. Must have full clean driving licence. Computer skills desirable. Full time or part time. **Locum also required**. Apply with CV to **Box No 75**

Solicitor: experienced, with a few personal clients he could bring to a firm, seeks position with a small or medium general practice in Dublin. **Reply to Box No 76**

Post-professional course apprentice with considerable experience seeks position in Galway city firm. (returning to Law Society for advanced course, April 2001). **Reply to Box No 77**

Qualified solicitor required for busy city centre practice dealing mainly in conveyancing, litigation, probate and family law. Could suit person looking for part-time work. Contact John Nolan, 11 Parliament Street, Dublin 2, tel: 01 677 0743, fax: 01 679 8420

Solicitor with excellent PQE seeks challenging part-time position in Dublin area, family/district court litigation preferred, tel: 074 58274

MISCELLANEOUS

LAW DIRECTORY 2000: CORRECTION

Page 624: Circuit Court section. County Kildare, Naas Courthouse

Telephone number of Naas Courthouse bar room.

Please delete the telephone number for the bar room (045) 866523.

This is the number of a private residence. There is no telephone in the bar room in Naas Courthouse.

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, employment, family, criminal and property law specialists in England and Wales. Offices in London (Wood Green, Camden Town and Stratford) 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 & Co at Ashley House, 235-239 High Road, Wood Green, London N22 8HF, England, tel: 0044 181 881 7777, or The McLaren Building, 35 Dale End, Birmingham B4 7LN, tel: 0044 121 212 0000. Alternatively, e-mail us on *info@davidlevene.co.uk* or visit our website at *www.davidlevene.co.uk*.

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

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

Full seven-day intoxicating liquor licence for sale. Please contact Mannion Aird & Company, Solicitors, Clifden, Co Galway, tel: 095 21044 or fax: 095 21756

Wanted: publican's ordinary seven-day licence (current). Replies to MJ O'Connor & Company, Solicitors, 2 George Street, Wexford. Ref: TK

Dictaphone straight-talk dictation machines required. Advertiser willing to purchase one to four machines. Please reply quoting price to **Box No 78**

Publican's licence (ordinary) for sale, and available as soon as required, without restrictions. Best offer, in writing, to Dermot M MacDermot & Company, Solicitors, Castlerea, Co Roscommon

Seven-day licence for sale. Particulars from P O'Connor & Son, Solicitors, Market Street, Swinford, County Mayo, tel: 094 541333; fax: 094 51833, e-mail: *law@poconsol.ie*

For sale: seven-day ordinary publican's licence. Tel: Denis Linehan, Solicitor, Charleville, Co Cork on 063 89667

Anyone who had any transactions of property or land, or anyone having knowledge of such, with Paul Antony Monks, who died on 15 February 1996, please contact Mrs MC Monks, 1 COB Tree Close, Chatham, Kent, England, or tel: Medway 01634 324392

Offices to let – Glasnevin. 60 square metres, plus extra if required. Ground floor – main thoroughfare. Close to M50 – two miles to city centre. To view, tel: 01 837 8551

TITLE DEEDS

In the matter of the *Landlord and Tenant Acts, 1976-1994* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978*, and in the matter of enlargement from leasehold interest to freehold interest of premises at 261 Crumlin Road, Dublin 12: an application by Patrick Treacy and Angela Treacy

Take notice: any person having any interest in the freehold estate of the following property: 261 Crumlin Road, Dublin 12. Take notice that Patrick Treacy and Angela Treacy intend to submit an application to the country registrar for the county/city of Dublin for the acquisition of the freehold interest in the aforesaid properties and any party asserting that they hold a superior interest in the aforesaid premises (or any of them) are called upon to furnish evidence of title to the aforementioned premises to the below-named within 21 days from the date of this notice.

In default of any such notice being received, Patrick and Angela Treacy intend to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for the county of Dublin for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in each of the aforesaid premises are unknown or unascertained.

Signed: Brendan Clarke (solicitor for Patrick and Angela Treacy), 1 Granby Row, Dublin 1
1 September 2000

In the matter of the *Landlord and Tenant Acts, 1967-1984* and *Landlord and Tenant (Ground Rents) (No 2) Act, 1978:* Dave Walsh (applicant), the right honourable lord mayor, aldermen and burgesses of Dublin and persons unknown (respondents)

Take notice that the applicant intends to submit an application to the county registrar for the county/city of Dublin for the acquisition of the freehold interest in the premises described in the schedule hereto (the property) and any person having any interest in the freehold estate or any intermediate estate between the freehold and the leasehold interests held by the applicant in the property are hereby called upon to furnish evidence of their title to the solicitors for the applicant within 21 days of this notice.

In default of any such notice being received, the applicant intends to proceed with the application before the said county registrar at the end of 21 days from the date of this notice and will apply to the said county registrar for directions as might be appropriate on the basis that the person or persons beneficially entitled to the superior interests including the freehold reversions of the property are unknown and unascertained.

Schedule

All that and those that part of the estate of the said corporation situate at North Cumberland Street and Britain Place in the Parish of St Thomas and City of Dublin containing on the north east to North Cumberland Street 38 feet, 6 inches; on the north west to Britain Place 187 feet, 7 inches; to the south west 38 feet, 6 inches; and on the south east along the rear of premises in Upper Sean McDermott Street 187 feet, 7 inches; be all or any of the said several admeasurements more or less being the premises and more particularly comprised in and demised by the lease set out hereunder and shown coloured red on the map annexed thereto.

Particulars of lease

Lease dated 28 December 1950 made between the right honourable lord mayor, aldermen and burgesses of Dublin of the first part the minister for local government of the second part and David Smith of the third part, held thereunder for the term of 99 years from 29 September 1950 subject to the yearly rent of £60, thereby reserved and the covenants and conditions therein contained.

Take notice that Dave Walsh, being a person entitled under sections 8, 9, 10 of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978*, proposes to purchase the fee simple in the land described above
Signed: Gerard W Butler & Company, 61 Lower Baggot Street, Dublin 2
1 September 2000

Ellen Frances (otherwise known as Eileen) O'Flaherty (deceased), late of 4 Cathedral Street, Cork. Will any person having knowledge of the whereabouts of the title documents of the above-mentioned property, please contact Messrs Denis O'Sullivan & Co, Solicitors, Library House, 18 Dyke Parade, Cork, tel: 021 4271985, ref: P2115/TPW/COM

John Rush (deceased), 3 Greenhills Road, Walkinstown, Dublin 12. Will any person having knowledge of the whereabouts of the title documents of the above mentioned property, please contact Thomas Byrne & Company, Solicitors, 5 Greenhills Road, Walkinstown, Dublin 12, tel: 01 450 3633/456 6221.