Law Society Gazette

Regulars

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Special thanks to Sherry's Solicitors, Palmerstown, for supplying the scales

Cover Story

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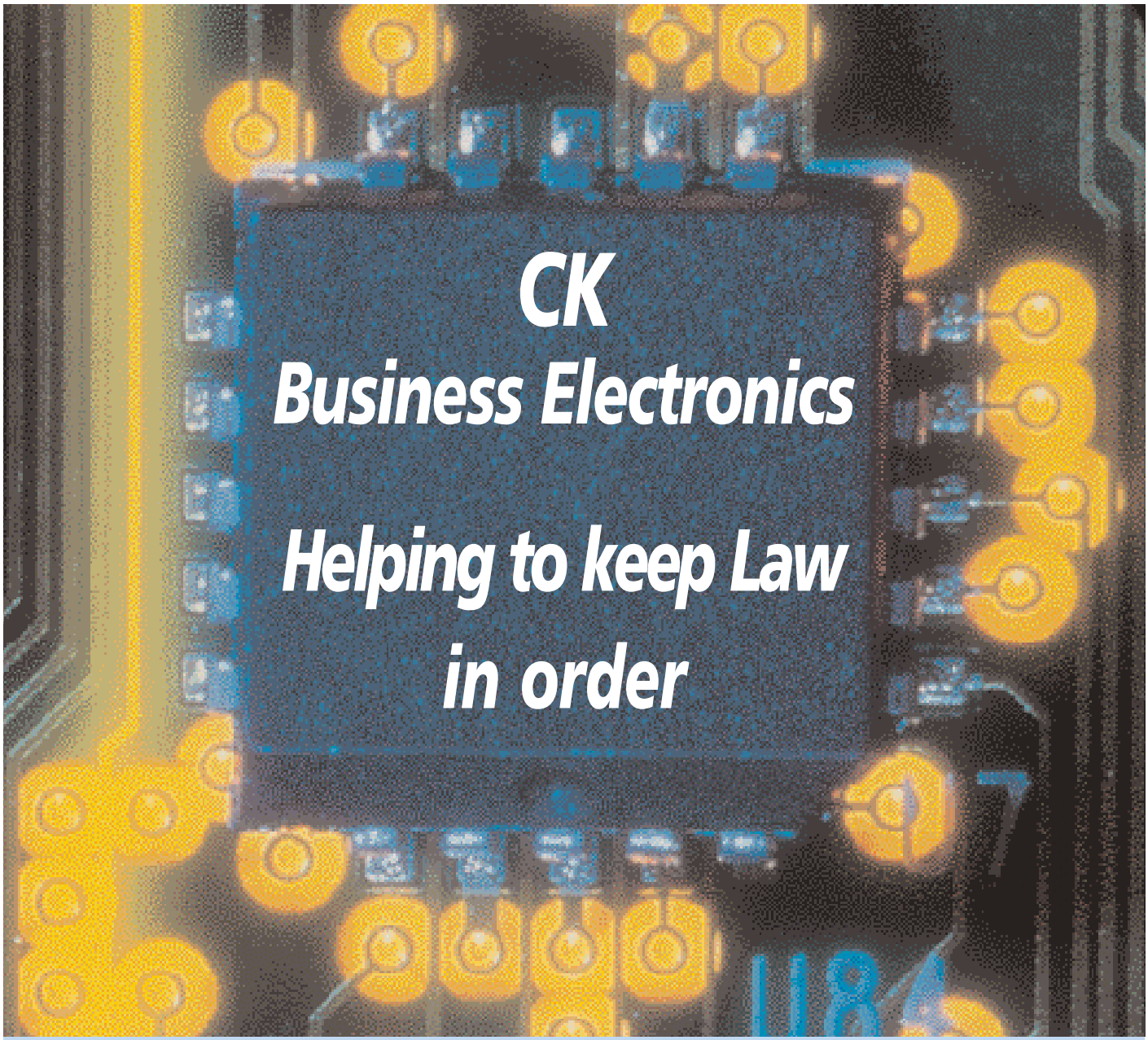

Problem

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Letting off steam

By now, I don't think there's a solicitor in the country who hasn't heard of the goings-on down in Cork, where members of the Southern Law Association withdrew their services from a number of court districts following a dispute with a district judge. As I write, the matter seems to be going to the High Court for judicial review so it would obviously be inappropriate for me to comment on the specifics of this particular case. However, it does throw into stark relief a number of issues that we in the Law Society have been somewhat concerned about.

All of us who work in the courts on a daily basis know that they can be pressure cookers of emotion. Given the nature of the issues that must be considered and decided there, it is utterly understandable that occasionally feelings boil over. That is only human nature. Defendants become angry or upset, lawyers lose their tempers in the face of what appears to them to be a manifest injustice, and judges can stand on the dignity of their courtrooms at the expense of commonsense. Again, I stress that I am not talking about any particular case but rather drawing on my years of courtroom experience. These things happen. It is a fact. We are all human beings with the human flaws that that implies, and occasionally we let our feelings run out of control.

Passion for the law

That is not necessarily something to be ashamed of. If any of us ever loses our passion for the law or the justice of the case at hand, then we are doing a disservice to our clients and to the law. A good lawyer loves the law – loves the idea of it – and understands the fundamental relationship between the law and the rights (and obligations) of the citizen. And if we ever stop loving what we do, then we should pack our bags and seek some other career. But in a sense, that is neither here nor there.

There is a fundamental (and proper) imbalance in the nature of the relationships in play in a courtroom. The lawyer is there as an officer of the court to represent the interests of his client, but the judge is there to, well, judge. If we dislike the decision that a judge reaches in a particular case, we can appeal to a higher court. But how do we deal with situations where we feel that the conduct of the judge is wrong? When we feel that the judge is bullying, condescending or just plain rude? Up to now, there has been no formal means of having judges' conduct reviewed.

In the wake of the recent Sheedy affair, an Oireachtas committee recommended the establishment of a Judicial Council, consisting of current and retired members of the judiciary (and some, as yet, undefined lay element), to review the conduct of judges. The Law Society has warmly welcomed this development – with one caveat: we feel that such a body should include representatives of the solicitors' and barristers' professions. We fully realise that some members of the judiciary may be uncomfortable with this, but we firmly believe that it is in the best interests of all concerned. It is the only way to ensure that the new watchdog body enjoys the full confidence of both branches of the legal profession.

'All of us who work in the courts on a daily basis know that they can be pressure cookers of emotion'

Only our rivers run free

On an entirely different note, I think we can all agree that in this country only our rivers run free – everyone else pays cash. That is why I am encouraging you to put on your running shoes and to join in this year's Calcutta Run, which will take place on Sunday 21 May, starting off from Blackhall Place. Last year we saw over 500 runners and walkers take part in this 10-kilometre event which raised more than £60,000 for charity, including GOAL's project for street children in Calcutta and Fr Peter McVerry's Aruppe Society.

It's not only a good thing to do – it's a fun thing to do, as anyone who attended the post-run barbecue will testify. We want more participants and we want more sponsorship for those game enough to take part.

This event is well on its way to becoming one of the biggest charity runs in the country, so don't miss out. Call Alan Roberts on 01 649 200 (e-mail: run@algoodbody.ie) to get involved.

Come on: it won't kill you!

Anthony Ensor,
President

FLAC URGES RETHINK ON IMMIGRATION BILL

The Free Legal Advice Centres (FLAC) has called on the Minister for Justice to withdraw proposed amendments to the *Immigration (Trafficking) Bill* that would restrict the time limit within which immigrants and asylum seekers can seek a judicial review of a decision to refuse them asylum or permission to remain in the state. The new Bill gives such people only ten working days from the date of the refusal to apply for judicial review. FLAC described the proposed legislation as 'coming dangerously close to undermining the separation of powers between the executive, legislature and judiciary'.

LECTURES ON LEGAL INFORMATION

The first of a series of lectures on legal information and legal publishing will be held at the Law Society's Blackhall Place headquarters on Thursday 13 April at 7.30pm. Dr David Ibbetson, Fellow in Law at Magdalen College, Oxford, will speak on *Legal printing and legal doctrine*, while UCD's Professor Niall Osborough will discuss *The history of Irish legal publishing: a challenge unmet.* The lectures are the first in the *Hugh M Fitzpatrick lectures in legal bibliography* series. A wine reception will follow the event. For further information, contact Library and Information Consultant, Hugh M Fitzpatrick, on tel: 01 269 2202 or fax: 01 284 3186.

COMPENSATION FUND PAYOUTS

The following claim amounts were admitted by the Compensation Fund Committee and approved for payment by the Law Society Council at its meeting in January: Michael Dunne, 63/65 Main Street, Blackrock, Co Dublin – £1,150; Conor McGahon, 19 Jocelyn Street, Dundalk, Co Louth – £4,337.

Canadian rulings may strike chord with Irish lawyers

Two recent decisions from the Supreme Court of Canada, handed down on 9 July last year, may be of some direct interest to lawyers in this country.

In the first case, *Mavis Baker v The Minister of Citizenship and Immigration* (Ont 25823), the appellant was a woman with Canadian-born dependant children who was ordered to be deported. She applied for an exemption, based on humanitarian and compassionate considerations under the Canadian *Immigration Act*, from the requirement that an application for permanent residence be made from outside the country. The application was based on the effect of her deportation on her Canadian-born children. An immigration officer replied by letter stating that there were insufficient reasons to warrant processing the application in Canada.

The Federal Court Trial Division dismissed her application for judicial review but certified a question under a section of the *Immigration Act* of whether the best interests of the child are a primary consideration in assessing an application for an exemption. The Federal

Court of Appeal thought not and ordered her to be deported.

The appeal was allowed by the Supreme Court, which ruled that a reasonable exercise of the power conferred by the Act required close attention to the interests and needs of children since children's rights, and attention to their interests, were central humanitarian and compassionate values in Canadian society. Because the reasons for the decision did not indicate that it was made in a manner sensitive to the interests of the appellant's children, and did not consider them an important factor in making the decision, the court held that it was an unreasonable exercise of the power conferred by the legislation. It also noted that statements in the immigration officer's notes gave rise to a reasonable apprehension of bias.

In the second case, *Dobson (Litigation Guardian of) v Dobson* (NB 26152), the appellant was involved in a motor accident while pregnant. This resulted in pre-natal injuries to her foetus, which resulted in its birth by Caesarean section later that day. The child suffered permanent mental and physical impairment, and brought an action in damages against his mother, alleging that the accident was caused by her negligent driving.

The motion judge found that the respondent had the legal capacity to sue for injuries caused by his mother's alleged pre-natal negligence. The Court of Appeal dismissed the appeal from that decision. At issue was whether the mother should be liable in tort for damages to the child.

The Supreme Court allowed the appeal, saying that the judicial recognition of a legal duty of care owed by a pregnant woman towards her foetus or subsequently-born child required that a two-step test be satisfied: 1) the establishment of a relationship sufficient to establish a duty of care, and 2) the existence of no public policy considerations negating this duty of care.

The public policy concerns raised by this case were of such a nature and magnitude that they clearly indicated that a legal duty of care could not, and should not, be imposed by the courts on a pregnant woman towards her foetus or subsequently-born child, the court concluded.

• *This information was culled from the* Supreme Court of Canada Brief *(July/August 1999 issue), published by Lang Michener, Barristers and Solicitors, Ottawa, Canada.*

Revenue phone service off limits to practitioners

The Revenue Commissioners have said that they are restricting their Central Telephone Information Office (CTIO) service to individual taxpayer queries 'for the foreseeable future'. According to the Revenue, the CTIO was set up primarily to provide a better telephone service to individual taxpayers, but in recent times has become increasingly used by tax practitioners seeking help on complex technical tax issues.

Last month, the Revenue began its PAYE bulk issue of notices of tax-free allowances for 2000/01, affecting 1.8 million taxpayers, and says that it needs to confine the CTIO service to provide a meaningful service to these customers. Use of the service will be reviewed after the peak PAYE period is over, it adds.

Law Society concerned about 'unsatisfactory' contempt law

The law of contempt is unsatisfactory because it 'requires a judge to be not merely a judge, but also a prosecutor and a witness in his own case', according to Law Society Director General Ken Murphy. He was speaking in the wake the Southern Law Association's decision to withdraw *en masse* from the court of District Judge Michael Pattwell following the judge's committal to custody and subsequent fining for contempt of solicitor Marguerite Fennell.

'The power to commit anyone, including a lawyer, for contempt is a great power', Murphy said. 'It is the power to send someone to jail without trial and it should only be exercised in really extreme cases. Of course a judge has to maintain order in court – we fully accept that – but the power must be used very sparingly. The real question here is whether the conduct complained of was sufficient to warrant somebody being sent to prison, convicted and fined. Clearly there is a dispute on that which the High Court may have to resolve.

Ken Murphy: contempt powers should be used sparingly

'Solicitors, indeed any advocate in a court, have to tread a very wary line between on the one hand not being intimidated or bullied by a judge and yet on the other hand not transgressing what are appropriate standards', Murphy continued. 'This is a very unusual situation. Occasionally a row will break out between a judge and a lawyer in court, but normally it can be smoothed over and the parties can reconcile themselves afterwards. It is very unusual and very disturbing that this hasn't happened here.

'We are deeply concerned. The Law Society has a great deal of sympathy with the solicitors concerned and we will be very interested to hear what the High Court has to say', he concluded.

• In a statement released to the media after being delivered in open court to District Judge Pattwell, the Southern Law Association's Simon Murphy said that 'an impasse has arisen as a result of an order made by you at Kanturk court yesterday, holding a solicitor to be in contempt of court and, as a result, the members of the Southern Law Association have no option but to withdraw their services from all courts presided over by you until such time as this impasse is resolved to their satisfaction'.

Army deafness discussions heading towards breakthrough deal

Discussions organised under the auspices of the Law Society, between representatives of plaintiffs' solicitors in the army deafness litigation and representatives of the Department of Defence, have proved constructive. Consideration is now at an advanced stage of an experiment to see whether, in the wake of the *quantum* levels being set by the Supreme Court in the *Hanly* case, a system may be devised for the speedy disposal of the 10,000 cases which are outstanding (*see last issue, page 5*).

It is proposed that on an experimental basis plaintiffs' solicitors will agree to adjourn cases in the list for hearing for a period of some four to six weeks in return for which the state's representatives will engage in realistic settlement negotiations designed to dispose of large numbers of these cases. The state's representatives maintain that it is impossible for them to deal with cases that are at trial at the same time as they engage in a systematic attempt to settle large numbers of these cases by negotiation. Plaintiffs' solicitors have in the past complained bitterly that no serious or realistic settlement offers have been made by the state in most of these cases until they were either at or beyond the door of the court. Settlements arrived at earlier than this could lead to substantial cost savings.

As the *Gazette* goes to press, the final details of this experiment are being discussed, although it was approved in principle at a meeting of representatives of the 20 solicitors firms who handle the majority of the outstanding cases. The idea for this experiment had emerged at a meeting which was organised by the Law Society following an approach to the Director General, Ken Murphy, from the Minister for Defence, Michael Smith.

SBA ANNUAL GENERAL MEETING

The 136th annual general meeting of the Solicitors' Benevolent Association will be held at the Law Society, Blackhall Place, Dublin 7, on Wednesday 5 April at 12.30pm to: consider the annual report and accounts for the year ended 30 November 1999, elect directors, and deal with matters appropriate to a general meeting. For more information, contact SBA Secretary Geraldine Pearse on 01 283 9528.

LEGAL FIRMS SOUGHT FOR E-BIZ DATABASE

Enterprise Ireland's new e-business website, which aims to give small and medium-sized companies the know-how and contacts they need to put their business on-line, is looking for law firms for its database of e-commerce experts. Those interested in being included should contact graham.okeeffe@.enterprise-ireland.com.

NI LAW SOC CONFERENCE

The Law Society of Northern Ireland will hold its annual conference at the Slieve Donard Hotel in Newcastle, Co Down, from 14-16 April. Weekend packages are available from £200. For further information, contact Clair Balmer on tel: 048703 53217 or e-mail: clair@cbpr.co.uk.

HIGH COURT PERSONAL INJURIES LIST

The Courts Service has pointed out that some practitioners seem to be unaware that when a shortfall arises in daily lists, this shortfall is filled up from the top of the personal injury list (see practice note in the May 1998 issue of the *Gazette*, page 36). The shortfall list currently extends to list number 37300 for the Hilary Term. The Courts Service adds that if there is no appearance, cases are likely to be struck out.

Letters

Shurely shome mishtake in that photograph?

From: Gerard Doherty, Dublin

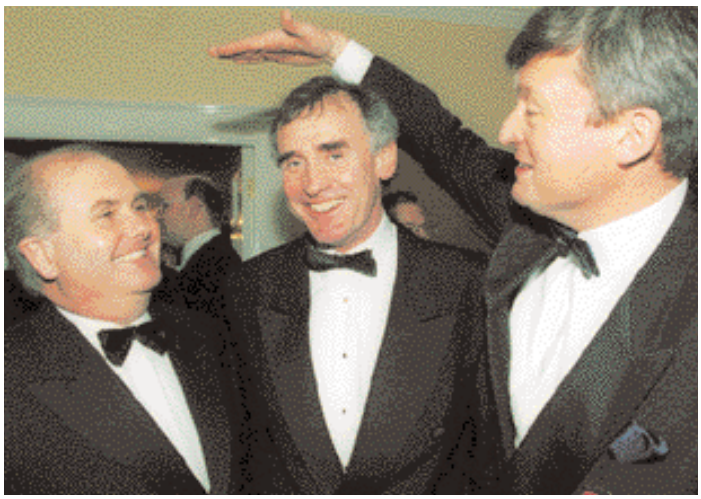
I am writing to you as Editor of the *Gazette*. With particular reference to the January/February issue, I note that it contains a photograph of the members of the Council of the Law Society for the current year. To my horror, I note that I am not included in same. I am aware that I was not available to attend the first meeting of the current Council and, presumably, the photograph was taken on that date. However, for the previous ten years I had been present and, given that record, I would have thought it was incumbent upon you to put back the taking of the photograph for a further month so as to facilitate me. However, this complaint pales to insignificance in relation to the photograph of me which you did publish on page 58.

It is quite clear that this photograph has, in some manner, been retouched so as to give the impression that I had swallowed a large volume of alcohol. I have no idea why this was done but I am satisfied that it was motivated by malice. I am further aware that it has the effect of lowering me in the esteem in which I am held by right-thinking members of the profession. Indeed, my colleagues who know me, and know me for what I am, have mentioned to me that the effect of the retouching was to give the impression of drunkenness, particularly when contrasted with the fresh and sober faces of Hugh O'Neill and Pat O'Connor on either side of me. They are satisfied that some low-down malicious little swine who must be either on the Editorial Board or close to members of the Editorial Board must be responsible. They, fortunately, have assured me that, should I seek re-election, they will do everything in their power to redress the damage done by this photograph.

The attitude of my colleagues who know me must be contrasted with those who do not. I have noticed people pointing at me in the Four Courts and clearly identifying me as the drunken member of Council whose photograph appears in the current edition of the *Gazette*. I am clearly being held up to ridicule.

In view of the above, I now wish to formally request you to identify the person responsible for retouching the photograph and the name of the person responsible for having same inserted in the *Gazette*.

I wish to formally put you on notice that unless I receive a clear and unambiguous undertaking that you will publish a full page photograph of me and of my choosing in the *Gazette* at some future date, probably in the month just prior to the next elections, together with a suitable and a generous offer of compensation, I would intend instituting proceedings against the Law Society, every individual Council member, the Editorial Board of the *Gazette* and, if identified, all parties who had any hand, act or part in respect of the retouching and publishing of this photograph.



The picture of rude health: so good we ran it twice

The Editor replies:
If what Mr Doherty suggests was really the case, that would truly be 'an appalling vista'. I can only refer him to the dicta *of Denning MR, who once said to me: 'Don't you realise it's two o'clock in the morning? If you don't stop calling me, I'll have the police on you'. I trust that clarifies matters.*

Your views

Your letters make your magazine and may influence your Society. Send your letters to the Editor, *Law Society Gazette*, Blackhall Place, Dublin 7, or e-mail us at c.oboyle@lawsociety.ie or you can fax us on 01 672 4801

Gratuitous sexism

From: Stephen Reel, Newry

We write to tell you about the recent dismay expressed by the staff of this office at the lack of any contributions to your *Dumb and dumber* section. Everyone here rushed to read the *Gazette* each month for their dosage of wit and humour, even if some had to have it read out for them.

It was therefore with great delight that we welcomed it back in the February edition, even if it was hard to find. Maybe you have started a 'find the *Dumb and dumber* competition' and I did not know, but after much searching I stumbled across it in the *People and places* section. It read **'Lady** Solicitors **Golf** Society'. Priceless.

The Editor replies:
Look: don't you think I'm in enough trouble as it is?

DUMB AND DUMBER

The following was obtained from the Internet and purports to be genuine exchanges between attorneys and witnesses in court.

Q. What is your brother-in-law's name?
A. Borofkin.
Q. What's his first name?
A. I can't remember.
Q. He's been your brother-in-law for years, and you can't remember his first name?
A. No. I tell you I'm too excited. *(Rising from the witness chair and pointing to Mr Borofkin)* Nathan, for God's sake, tell them your first name!

Q. Doctor, did you say he was shot in the woods?
A. No, I said he was shot in the lumbar region.

Q. Are you married?
A. No, I'm divorced.
Q. And what did your husband do before you divorced him?
A. A lot of things I didn't know about.

Q. Mrs Smith, do you believe that you are emotionally unstable?
A. I should be.
Q. How many times have you committed suicide?
A. Four times.

Q. Officer, what led you to believe the defendant was under the influence?
A. Because he was argumentary and he couldn't pronunciate his words.

Q. What happened then?
A. He told me, he says, 'I have to kill you because you can identify me'.
Q. Did he kill you?
A. No.

Q. Did he pick the dog up by the ears?
A. No.
Q. What was he doing with the dog's ears?
A. Picking them up in the air.
Q. Where was the dog at this time?
A. Attached to the ears.

Q. When he went, had you gone and had she, if she wanted to and were able, for the time being excluding all the restraints on her not to go, gone also, would he have brought you, meaning you and she, with him to the station?
Mr. Brooks: Objection. That question should be taken out and shot.

Q. And what did he do then?
A. He came home, and next morning he was dead.
Q. So when he woke up the next morning he was dead?

Q. Did you tell your lawyer that your husband had offered you indignities?
A. He didn't offer me nothing; he just said I could have the furniture.

Q. So, after the anaesthesia, when you came out of it, what did you observe with respect to your scalp?
A. I didn't see my scalp the whole time I was in the hospital.
Q. It was covered?
A. Yes, bandaged.
Q. Then, later on, what did you see?
A. I had a skin graft. My whole buttocks and leg were removed and put on top of my head.

Q. Could you see him from where you were standing?
A. I could see his head.
Q. And where was his head?
A. Just above his shoulders.

Q. What can you tell us about the truthfulness and veracity of this defendant?
A. Oh, she will tell the truth. She said she'd kill that sonofabitch – and she did!

Q. Do you drink when you're on duty?
A. I don't drink when I'm on duty, unless I come on duty drunk.

Q. Any suggestions as to what prevented this from being a murder trial instead of an attempted murder trial?
A. The victim lived.

Q. Are you sexually active?
A. No, I just lie there.

Q. Have you lived in this town all your life?
A. Not yet.

DUMB AND DUMBER
You know that you can do better than this! Let's have some real-life legal stories. You have them, we want them. 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.

Should the European Union int

Is it right for European governments to blackball the democratically-elected government of another EU state because it disapproves of its politics? Conor Quigley argues that the issue is not as black and white as it might first appear

Recent events in Austria, where the entry of the Freedom Party into government caused uproar among certain other European governments, raises the question of what right, if any, the European Union has to demand that the government of a Member State should not include certain parties which the majority in the Union finds distasteful.

The *Maastricht treaty* of 1992, which established the European Union, developed the concept of the European Community away from a solely economic identity by giving it a broader political dimension. The European Union, founded on the European Community and supplemented by provisions concerning common foreign and security policy and police and judicial co-operation in criminal matters, was then the latest stage in creating an ever-closer union among the peoples of Europe. That treaty emphasised that the Union respected the national identities of its Member States whose systems of government are founded on the principles of democracy.

Jörg Haider: At the centre of the greatest diplomatic storm in EU history

However, the *Amsterdam treaty* of 1998 took matters a stage further. In anticipation of the accession of new Member States from central and eastern Europe, many of which (not just during the Soviet era) had a rather different political history from that of the west European democracies, the democratic foundations of the Union were somewhat strengthened. It is now stated that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. The fear was (and is) that some of the applicant states might not have the structures in place to ensure long-term democracy. Thus, if there were a reversion to dictatorship (whether of the left or the right), the other Member States would be able to suspend a country from the Union.

Ironically, it is not the applicant states that have caused any problems to date. Rather, mild-mannered, conservative and unexciting Austria has been at the centre of the greatest diplomatic storm the European Union has known. Why should

Shining a light into the murky

The European Committee for the Prevention of Torture recently paid Ireland a visit. Michael Farrell explains what the CPT is and what it was doing here

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (or CPT for short) is a Council of Europe body set up to monitor conditions in prisons, police stations, mental hospitals or anywhere else that people are detained against their will. It does not shy away from investigating allegations of torture, but it spends most of its time examining much more humdrum but still disturbing examples of ill-treatment in otherwise enlightened European countries.

The CPT has visited Ireland twice since we ratified the convention that set it up in 1988 and it has managed to shine a little light into some rather murky corners, as well as raising several issues of particular interest to solicitors. It deserves to be a lot better known than it is, especially among members of the legal profession.

The committee does not investigate and adjudicate on individual complaints; instead, it visits each state that has ratified the convention every five years and submits a report to the government, which decides when to publish it (usually when the authorities have prepared their reply and at a time that will attract the least attention). Was it pure chance that the Government published the CPT's latest report on Ireland on the Friday before Christmas week with the result that it got buried in the seasonal rush?

The report actually dealt with a visit here in August/September 1998 and was completed in March 1999, but the Government delayed publication for nine months and then published its response at the same time. Unsurprisingly, there had been little change in conditions of detention in the interim.

The CPT began with Garda stations. After its first visit in 1993, it claimed that people detained in certain Garda stations in Dublin 'ran a not inconsiderable risk of being physically ill-treated'. Since then, the committee says it has

terfere in Austria?

this be? Jörg Haider, the leader of the Freedom Party who doesn't even hold a seat in the new Austrian Government, is widely recognised as a rather bizarre politician who is said to hold some admiration for aspects of Nazi Germany.

There are legitimate concerns over some of the immigration policies which the Freedom Party is alleged to espouse. Yet Austria is not a country like Germany between the wars, rife with unemployment and defeatist bitterness. It is a substantial economy, asserting an individual identity, having long been under the shadow of Soviet aggression, and with a pivotal role to play in the soon-to-be-enlarged European Union. Vienna-Prague-Berlin will establish itself as an important new political axis in the next generation. There is no fear of Austria becoming an undemocratic, illiberal country.

How should threats to fundamental principles be dealt with? Is it right for European governments effectively to blackball another democratically-elected government, the membership of which it partially disapproves? In seeking to answer this question, some related issues need to be borne in mind. First, the ever-increasing size of the European Union means that the exercise of political power must be effectively devolved, with the Union itself playing an overarching, but not centralising, role. Indeed, the *Maastricht treaty* requires decisions to be taken as openly as possible and as closely as possible to the citizen. Second, respect for democracy requires respect for the choices of the people expressed at the ballot box.

Fundamental principles

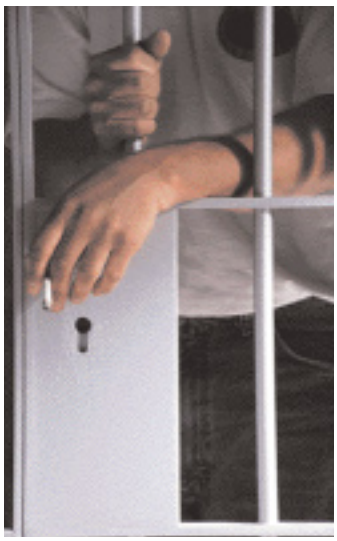
In the absence of any measures being taken by a particular government, it is difficulty to see the justification in isolating that government from all political activity. Yet the political system must ensure that fundamental principles are upheld throughout the Union. Partially that is achieved by the rule of law, but it must also be achieved at a political level. That is why it is correct for the other governments to make known their disapproval of any hint of reversion to policies and actions that might stir up racial hatred.

Not for the first time, immigration policy plays a major role in this problem. If countries such as Romania join the Union in ten years' time, its citizens will have the legal right to move throughout the territory of the Union to seek work. The present small numbers of immigrants from the east will likely increase substantially, especially if the present economic trends in the west continue. If immigration is not to become divisive, it will need to be handled carefully and sympathetically by all concerned.

Xenophobia will always occur, and effective legal and political structures need to be in place to deal with it. G

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

corners of detention



CPT report: strong criticism of prison overcrowding

continued to receive allegations of ill-treatment and it comments: 'the persistence of such allegations regarding the use of excessive force by police officers highlights the need for the Irish authorities to remain particularly vigilant in this area'.

To guard against ill-treatment, the CPT urges the introduction of a number of measures that solicitors have long called for. It stresses the importance of electronic recording of interrogations as a safeguard for detainees (and the Gardai themselves) and invites the Irish authorities to introduce a right to have a lawyer present during questioning in Garda stations.

Panel of solicitors

The committee also says the authorities should act on a Law Society proposal to create panels of solicitors willing to attend at Garda stations and stresses that 'if the right of access to a lawyer is to be fully effective in practice, appropriate provision must be made for those who are not in a position to pay for legal services'. In other words, solicitors should be paid for attending at Garda stations.

VOX POP

Do you think that televised trials would be a good or bad thing for the administration of justice?

'I would be utterly and completely opposed to trials being televised, particularly if they ended up being run on a *Judge Judy* basis. I certainly think they would have very high ratings, though that might depend on the nature of the case, but I don't see how it could be an appropriate way of administering justice. It's abundantly clear that unless you've been involved in the entirety of a case you can't form a realistic opinion on it'.
Kieran Madigan, Claffey Gannon & Co, Co Roscommon

'It would be great television, great entertainment and there might be an educational element to it because it could inform the public, so I can see a positive aspect to it – but does it really help the administration of justice? I would have questions about that because you could end up with lawyers playing to the gallery. 20 years ago I would have said it was a good thing, but as you get older you get a bit more conservative!'
Pol O Murchu, Dublin

'TV trials could develop into a route to opportunism, which may be good for business but fatal in the administration of justice'.
Michelle O'Boyle, O'Boyle Solicitors, Sligo

The Government had told the CPT delegation that this was being considered as part of a review of the criminal legal aid scheme and that a report on it was due by early 1999, but we – and they – are still waiting for it. Meanwhile, the introduction of longer detention periods – three days under the *Offences Against the State Act* and seven days under the *Drug Trafficking Act* – and the recent threat of a further extension for ordinary crime will necessitate still more visits to clients in custody.

As for electronic recording of interviews, the Government's response to the CPT report refers to a decision last July to introduce a generalised scheme of audio/video recording of interviews, but there is still no date for when this will come into effect.

Garda Complaints Board

After its first visit in 1993, the CPT had criticised the Garda Complaints Board as not being sufficiently independent, a view shared by many solicitors. The Government responded by saying that the operation of the board would be reviewed 'shortly'. This was repeated during the committee's visit in 1998, but the CPT members have clearly grown tired of promises on this issue. Their report asks for 'further and better particulars' of any reforms proposed and the timetable for implementing them.

Michael Farrell: Solicitors should be making more use of the CPT

No timescale is given in the Government's response and the only concrete proposal for change is a call from the Garda representative associations to make the submission of false complaints a specific criminal offence, something hardly calculated to increase confidence in the effectiveness of the complaints board.

The CPT report also repeats a recommendation from its earlier report that there should be a system of independent inspection of Garda stations – again, nothing has been done about this – and criticises the cells in some stations visited as dirty or dilapidated.

There is plenty more in the report, including strong criticism of prison overcrowding and a warning that providing more prison places will not solve the

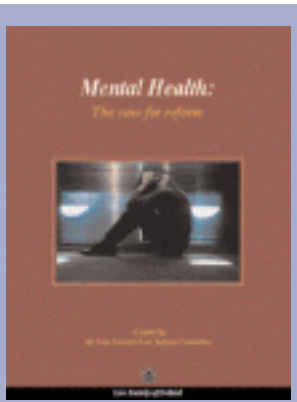
The *Mental Health Bill*: a lost

Mental patients are the only hospital patients on whom treatment is forced, occasionally coercively. Will the new *Mental Health Bill* improve conditions for some of our most vulnerable citizens? Probably not, writes Dara Robinson

Decades in the making, the new *Mental Health Bill* has finally been published. Its lengthy gestation period certainly allowed for a total review of the law relating to the care and treatment of the mentally ill, to take account of the social changes since 1945 (the date of the last major Act). To what extent will the Bill meet the needs and expectations of the critics and, more importantly, users of mental health services?

Explanatory notes accompanying the Bill describe it as an attempt to reform the procedures for involuntary committal, long a controversial aspect of the 1945 *Mental Treatment Act* – which it will replace – and which are presently occupying the minds of the European Court of Human Rights, in a case brought by an Irish psychiatric patient. It also purports to establish a system of monitoring standards in psychiatric institutions.

The proposed changes in the review of involuntary committal are certainly a substantial improvement, given the present complete absence of safeguards or review under the 1945 Act, but they are unlikely to satisfy the scrutiny of experienced campaigners. The Bill tidies up the criteria for committal into a single category, that of 'mental disorder', which includes mental illness, dementia and mental handicap, and defines the conditions that can ground committal. That is certainly a step forward. So also is the proposal that the actual decision to commit be taken by a consultant psychiatrist. Other than that, the actual committal process is, broadly speaking, similar to the present, although the Bill envisages an enhanced role for the Gardaí, which can only add to the coercive experience for the patient.



The Law Society's Law Reform Committee's 1999 report called for greater protection for the mentally ill

However, although the international trend is to import a broad requirement of 'dangerousness' into contemporary committal procedures, the Bill lacks that element. The possibility of causing serious harm to another is just one of a number of reasons grounding committal. Others grounds include the necessity to administer 'appropriate treatment'. Critics will continue to argue that the criteria are, in any event, too vague and subjective to afford adequate clinical protection against committal in many instances.

Psycho killers?

Perhaps we should reflect on the fact that there are very few axe murderers roaming the streets when we think about involuntary committal to a psychiatric institution. Committal, as practised now, and as envisaged by the Bill, is a gross invasion of human and civil rights. We would rightly not entertain the idea of imprisoning a person for one moment without proper judicial enquiry, access to a lawyer, a right to hear the evidence and challenge it, and the other constitutional safeguards which have emerged over the years. It is rare that a committal is so urgent that due process, however we define it, must be

problem without greatly increased use of alternatives to imprisonment. The committee is also very critical of the failure to introduce new prison rules to replace the 1947 rules which are still in use and of the inadequate medical provision in Mountjoy Prison in particular. And it condemns the proposal to hold prisoners three to a cell in the ultra-modern Cloverhill Remand Prison.

This time, the committee also looked at the Central Mental Hospital at Dundrum. While generally positive about the treatment of those detained there, it is critical of the physical condition of some of the buildings and of the lack of provision for regular and automatic reviews of the need for the continued detention of everyone held involuntarily in mental hospitals. It highlights the case of an 85-year-old man who had been detained at Dundrum for 61 years after being found unfit to plead in 1937.

All in all, the report is an important and worthwhile critique of all forms of involuntary detention in Ireland and the CPT itself could and should be a valuable resource for solicitors seeking to secure better protection for their clients during Garda questioning, or better treatment of clients held in prison or in the Central Mental Hospital. And if sufficient concern is expressed directly to the CPT, it might look at conditions in other mental hospitals on its next visit here in 2003.

Rules of confidentiality

It must be stressed again that the CPT does not investigate individual complaints and that its peculiar rules of confidentiality vis-à-vis the governments it deals with mean that it provides very little feedback about concerns expressed to it. However, I can confirm that, when contacted about detention issues, the CPT does seem to pursue them quite diligently with the Government.

The CPT is an institution more solicitors should know about and make use of. Its periodic visits and reports can influence Government policy on custody issues but it is only effective when it has the relevant information – and who better to supply that information than the members of the legal profession? G

Michael Farrell is Co-chairperson of the Irish Council for Civil Liberties and a solicitor in the firm of Michael E Hanahoe. The Committee for the Prevention of Torture can be contacted at the Human Rights Building, the Council of Europe, F-67075 Strasbourg Cedex, France, or at cptdoc@coe.fr. Its website address is http://www.cpt.coe.fr.

opportunity?

'Committal is a gross invasion of human and civil rights'

abandoned completely. Yet both old and new laws assume, without questioning this fundamental tenet, that it is appropriate. The Government certainly does not encourage the debate.

The *United Nations principles* stress the concept of the psychiatric patient as a temporarily incapacitated citizen, overwhelmingly likely to make a full recovery and resume normal activity. That, surely, is the theoretical basis on which to proceed. The reality is very different.

Nor has there been any encouragement of discussion on the issue of patient consent. Mental patients are the only substantial body of hospital patients on whom treatment is forced, occasionally very coercively. This is done on a paternalistic basis, and presumably on the assumption of minimum interference with the rights of the patient. Yet the right of any citizen to refuse medical treatment, for whatever reason, is properly the subject of a complex ethical debate. This is particularly significant given the latest report from the inspector of mental hospitals, with its criticisms of dubious drug-prescribing practices.

The Bill also sets up a mechanism for judicial-type review of decisions to commit. This is entirely novel, long overdue and extremely welcome. Under a supervisory Mental Health Commission, tribunals will be assigned to look at each decision to commit a person, and a solicitor will be assigned to the patient. An independent consultant psychiatrist will be appointed to examine and report on the patient. There is provision for the holding of an oral hearing to determine the merits of the committal. These are substantial improvements and are likely to find favour with the European Court of Human Rights.

Finding the solicitors

Quite where the solicitors will come from is another matter. The 1995 White Paper suggested that solicitors from the Legal Aid Board be appointed to represent the patient. Very few Legal Aid Board solicitors have the appropriate experience; many may not relish the work; all of them already have substantial case loads, mainly of family law work. The waiting lists for the Legal Aid Board in many areas are fearsome. The new Bill is silent on this question. If not from the Legal Aid Board, then where will the solicitors come from?

However, in most cases the new provisions may be illusory safeguards. The White Paper proposed a review within seven days. The Bill sets out to review within 28 days, but 1997 statistics suggest that some 70%

of patients or more are actually discharged within that time. So, in practice, on current trends, no effective review will take place in most cases.

In relation to standards, there is a welcome appearance in the Bill of a framework of inspection, registration and monitoring. In theory, approved centres can be closed down, fined or made subject to a range of sanctions. But given the fact that many of the worst offenders are in the public sector, and that the present inspector has repeatedly condemned a number of hospitals without action being taken, the jury will be out for a while on this proposed reform.

A number of areas of long-standing contention are notable only by their absence from the Bill. There is no provision for anti-discrimination against former mental patients. In many ways, the stigma of a psychiatric history is as destructive as a criminal record. There are no provisions in the Bill to safeguard the reputations of people who have passed through the services. Campaigners will see this as a serious flaw.

'Perhaps we should reflect on the fact that there are very few axe murderers roaming the streets when we think about involuntary committal to a psychiatric institution'

Nor is there any measure to outlaw the transfer of civilly-committed patients to the Central Mental Hospital in Dundrum. This was legitimised by the Supreme Court in 1994. The CMH exists to receive patients through the criminal process. Nobody should be sent there who has not, at a minimum, been charged with a criminal offence.

The Bill proposes to re-enact, in amended form, the controversial section 260 of the 1945 Act. This requires special permission to be obtained from the High Court to sue doctors or health boards for perceived wrongs in the course of treatment under the Act. Critics say this is discriminatory and wrong. There is no evidence of a clamour of patients waiting to sue their doctors, who are in any event protected both by their insurers and their employers' vicarious liability. Those few section 260 cases that have come before the courts have tended to manifest a genuine grievance. Most have failed at the initial hurdle. Any citizen in a modern democracy should be entitled to sue for a perceived wrong in a judicial forum where only the standard burden of proof exists.

The narrow focus of the new Bill, concentrating as it does on the area of involuntary committal, has ignored the many other concerns of campaigners in this field. Clearly designed to meet the exigency of an embarrassment in Strasbourg, the Bill is unlikely to satisfy those who hoped that our current presidency of the Council of Europe would be marked by the setting of a new benchmark for the humane treatment of our most vulnerable citizens.

An opportunity was there to make a full overhaul of the entire statutory basis for the care and treatment of all patients within the mental health system, voluntary and involuntary, private or public, in- or out-patient. It has not been taken.

Patient care and, more importantly, rights are still on the agenda, if not in the Bill. This urgent contemporary debate is not over yet. G

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

Show me

So you've been working long and hard on a case and now you'd like to get paid for it. But how much should you charge, and how can you be sure that your bill of costs will get past a taxation? That's where a legal costs accountant can help. Stephen Daly gives you some tips on how to get your money's worth

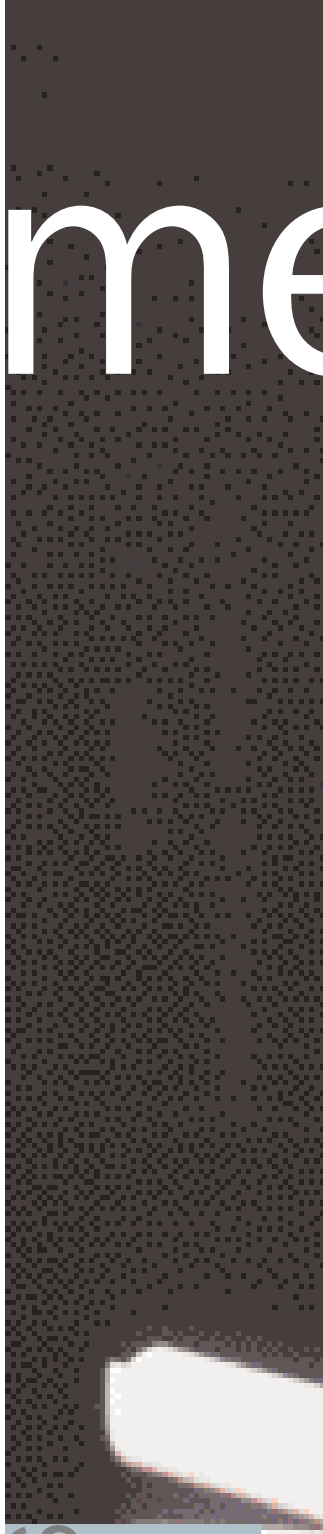
Solicitors' fees are calculated unlike any other professional fees which, in the main, are based on time input or percentages. The former can be a factor in computing legal fees whereas the latter, in certain respects, is prohibited by statute (section 68(2) of the *Solicitors (Amendment) Act, 1994*).

Bearing in mind these simple distinctions, one might ask: should a lawyer charge more for successfully negotiating the settlement of a £1 million commercial claim in the High Court in a short space of time, compared to unsuccessful negotiations revolving around a neighbour's dispute over a dividing wall which may have involved twice the time but falls within the jurisdiction of the local District Court? The answer to this question may be obvious to most readers, but is the fact that the first example resulted in a successful outcome the deciding factor? Would it have a bearing if the second example was dealt with by a senior partner within the firm and a senior counsel, while in the first example the settlement was accomplished by a bright assistant solicitor and junior counsel?

Employing a legal costs accountant does not imply a desire to recover exorbitant fees but merely ensures that a reasonable and proper fee, commensurate with the work and responsibility undertaken, will be obtained. A simple analogy can be drawn with a potential litigant who might consider making a personal injuries claim without the assistance of a solicitor and counsel – hardly a course to be recommended.

The origins of the legal costs accountancy profession are nearly as old as those of the solicitor and barrister. And just as solicitors are no longer paid for their penmanship and verbosity in preparing hand-written deeds, legal costs accountants are not merely called on to extract seemingly paltry sums from the appendices of rules and schedules of obscure enactments or the tedious counting of folios of written documents. While many of the old tasks remain, the real focus is geared to the successful economic running and profitability of law firms, while maintaining the due rights and entitlements of the client.

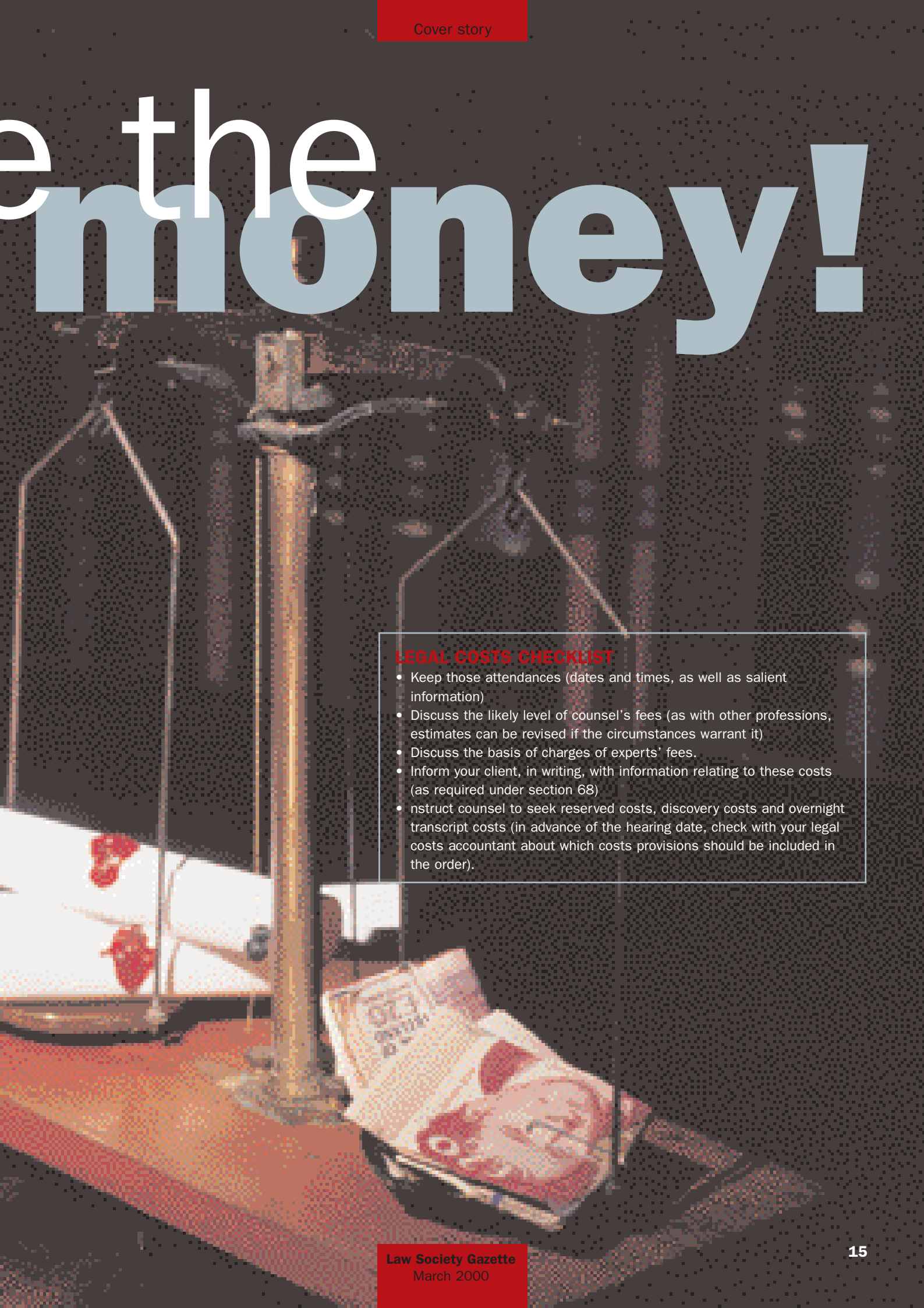
Anyway, here are a number of points that could help you and your legal costs accountant maximise the recovery of your costs.



MAIN POINTS

- Complete attendance notes are vital
- Remember to ask the court to make an order for all reserved costs and the costs of discovery
- Counsel's fees should be agreed in advance and the client informed

e the money!



LEGAL COSTS CHECKLIST

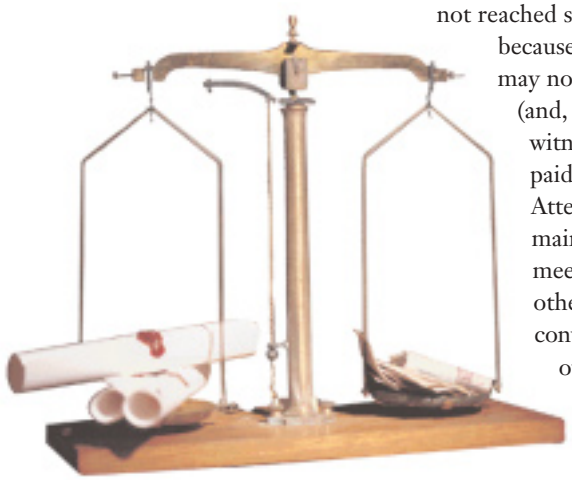
- Keep those attendances (dates and times, as well as salient information)
- Discuss the likely level of counsel's fees (as with other professions, estimates can be revised if the circumstances warrant it)
- Discuss the basis of charges of experts' fees.
- Inform your client, in writing, with information relating to these costs (as required under section 68)
- nstruct counsel to seek reserved costs, discovery costs and overnight transcript costs (in advance of the hearing date, check with your legal costs accountant about which costs provisions should be included in the order).

Attendances

You should not be put off from looking for your appropriate fees or sending papers to a legal costs accountant merely because your file is in some disarray. The difficulties of a particular case often have a way of transposing themselves onto files: the more pressing the business, the less time is available to record the detail. But the importance of maintaining an attendance note cannot be over-stressed (see also *Taxing times*, last issue, page 22).

Attendances do not have to be elaborate but should obviously contain the date and preferably the time engaged. Where this is an attendance in court, merely noting that the matter has gone into the afternoon can be extremely important and, for example, can determine whether a witness is entitled to be allowed a fee appropriate to a full day or a half day. Ideally, the attendance should record who was actually present, for example, the client, counsel and any witnesses.

If counsel gives directions which are supplemental to an earlier written direction on proofs, the attendance should record what those directions are. This information can be vital in establishing the need to engage a particular witness or expert. A day not actually spent in court but waiting around the Round Hall or local courthouse when a case is listed but not reached should also be recorded because, even though a great deal may not be achieved, the solicitor (and, where appropriate, witnesses) are entitled to be paid for the time spent. Attendances should also be maintained in respect of meetings with clients or others, including phone conversations, with a brief outline of what transpired.



When sending your file to a legal costs accountant, a brief résumé, while helpful, is not necessary, since all that is generally needed is a correspondence file (hopefully containing those attendances) and a pleadings/documents file which should include any counsel's opinions or written advices, and, where applicable, counsel's returned brief. A separate bundle of witnesses's expenses, counsel's fees and vouchers in respect of disbursements is naturally very helpful, too.

COSTS OF THE DAY

Adjournments of cases are often necessary for a variety of reasons. Where the justice of the situation requires it, the court may grant an adjournment but allow the *'costs of the day'* to the other party. Order 99, rule 37(33) of the *Rules of the superior courts* contains strict limits on the fees recoverable by both solicitor and counsel (ranging between £70 and £180) which almost certainly would not amount to adequate remuneration for either for the preparations that would have been carried out if the case was expected to be heard on that date.

In this situation, the party in whose favour the order for costs is to be made should request that the order provides for *'costs thrown away'* or alternatively *'costs incurred as a result of the adjournment'*.

Reserved costs

In the majority of interim and interlocutory applications made to the courts, by motion or otherwise, the costs of those applications are reserved for the decision of the trial judge. Generally speaking, the judge dealing with the interim application is adopting the approach that those costs should follow the final event, but that is not axiomatic as it is still open to the judge to decide that a particular interim application was without merit. The critical point here, however, is that it is essential that the judge be asked to uplift any earlier costs reservation. Usually this falls to the solicitor to do, since the same counsel may not have been involved in the earlier applications.

In spite of their discretionary powers, and regardless of the rightness of the issue, taxing masters cannot themselves uplift costs that have been reserved by the court. A long-running piece of litigation may have involved several interim applications, some of which may have arisen many years earlier, and it is not usually necessary for the solicitor to have all of these details to hand. The simplest and safest way of dealing with the matter is to request the court in making an order for costs to include the words *'to include all reserved costs'*.

Discovery costs

Discovery is now a feature in most litigation and is not confined merely to the larger commercial actions. A vast amount of the business before the Master of the High Court is now taken up with discovery applications and they occur in virtually all types of cases. In the main, the costs of these applications are dealt with under order 31, rule 25 of the *Rules of the superior courts*.

Readers will be aware that applications for discovery are usually brought pursuant to order 31, rule 12(1), which specifically states that an application for discovery may be made 'without filing any affidavit'. Almost invariably, a grounding affidavit is used, but the cost of the affidavit is rarely allowed on taxation. Order 31, rule 12(4)(1) (inserted by SI 265/1993) provides that, with certain exceptions, a written request for voluntary discovery must first be made and that a copy of this letter should be filed with the notice of motion.

Returning to order 31, rule 25, the critical point to be noted here is that the costs of the party seeking discovery shall be allowed *'where, and only where, such discovery shall be certified by the court at the trial, or, if there is no trial, shall appear to the court, or to the taxing*

master, upon special grounds to be certified by such taxing master, to have been reasonably asked for'.

The first point to be noted is that the limitation applies only to the party seeking discovery. Second, if the case goes to a hearing, it is clearly necessary to ask the court to certify for the costs of discovery at that time. If the case is settled before hearing, it is usually not difficult to demonstrate to the taxing master that discovery was reasonably asked for, but practitioners should consider, when agreeing settlement terms, that the order for costs should also provide for *'all reserved costs and the costs of discovery'*.

Third-party/non-party discovery

Order 31, rule 29 enables a party to a proceeding to obtain discovery from someone who is not an actual party to the proceedings. To obtain this discovery, it is necessary to indemnify that party in respect of all costs reasonably incurred (see *Dunne v Fox*, unreported, High Court, Laffoy J, 3 April 1998). By virtue of the rule, the party that bears the costs of the third-party or non-party costs of discovery is entitled to treat such costs as part of their costs. Where non-party discovery may have been obtained quite late in the proceedings and the matter is settled shortly thereafter, it clearly becomes necessary to ascertain the costs that are due to the non-party so that these may, in turn, be included in the costs of the party who sought the discovery.

Counsel's fees

Unlike solicitors, counsel do not normally have a contractual relationship with the client, and while solicitors are often considered to depend on the services which counsel can provide, counsel depend on solicitors to recover their fees.

The former practice of engaging counsel involved the solicitor in marking or nominating a brief fee which counsel could either accept or reject. If accepted, the solicitor was liable to counsel for the fee, whether or not this was allowed on taxation. Before offering the fee, the solicitor would normally discuss these fees with the client who, in the normal course, would be liable to the solicitor for those fees on taxation of a solicitor-and-own-client bill.

Although the practice has fallen into disuse, it is important for a solicitor to discuss (preferably in advance) the level of counsel's fees and, indeed, to inform his client. Apart from any other consideration, these details would have to be given to the client under section 68 of the *Solicitors (Amendment) Act, 1994*. Moreover, under the present rules, counsel's fee will appear in the solicitor's bill of costs (whether solicitor-and-client or party-and-party) as a disbursement, and it is clearly prudent and sensible that prior consideration be given to the fee before it is incurred. Here, again, a simple analogy can be drawn with a situation where, for example, one enters into a contract where the total cost cannot be ascertained in advance. If the main contractor subsequently decides it is necessary to engage a sub-contractor or to purchase a particularly expensive item, one would naturally expect to be consulted beforehand.

Witnesses and expert advisors

Although the services provided are completely different, from a costs point of view the situation with experts' fees is very similar to counsel discussed above. Similar problems can arise and, once again, apart from the statutory considerations, it is clearly unacceptable for a solicitor to expose his client – quite apart from himself – to potentially large fees without careful prior consideration of the extent and basis of those charges.

Quite often counsel and certain experts will agree to accept the fees which are ultimately allowed to them on a party-and-party taxation. While this arrangement has benefits to both solicitor and client, the chances of recovering reasonable fees is greatly increased where it can be shown that prior discussion and consideration of the fees had taken place. It must also be borne in mind that part of the criteria necessary for the recovery of fees (both professional fees and disbursements) on a party-and-party basis is that the client has a liability in the first instance (see *AG (McGarry) v Sligo CC* ([1989] ILRM 785).

VAT issues

The ubiquitous VAT has, of course, long since applied to both solicitors' and counsel's fees and queries appear to crop up in this area time and again. Covering all aspects would require much greater space than permitted here. However, it is important for practitioners to remember that under the rules (order 99, rule 1(6)) in order to recover VAT in party-and-party costs, the onus is on the party for the costs to establish that the VAT cannot otherwise be recovered. Generally speaking, this means that where a client is a business entity which is registered for VAT, there is an onus to show that that client cannot reclaim or offset the VAT charges. G

Stephen Daly is a partner in the Dublin legal costs accountancy firm Connolly Lowe, whose new 'instant web service' allows legal costs bills to be prepared quickly (www.legalcosts.net).

OVERNIGHT AND GENERAL TRANSCRIPTS

The amount of the fees payable to shorthand writers and the cost of transcripts of evidence are at the discretion of the taxing master. However, in the absence of a specific order, these costs can only be allowed on party-and-party taxation where there has been an appeal (order 99, rule 36).

In larger, more complex cases, it is now quite common for overnight transcripts to be obtained for use during the currency of the case which, after all, may not be the subject of any appeal. However, if the trial judge is satisfied that it was expedient that the proceedings – or any part of them – should be reported, the rules do provide that the costs of such transcripts can be recovered (order 123, rule 3). Here again, you must ask the judge to include these costs: *'to include the costs of overnight transcripts'* would be sufficient.

In the second of their series of articles on the taxation of costs, Tony Halpin and Taxing Master James Flynn look at the factors that influence the assessment of the instruction fee and suggest ways to calculate the hidden costs of a case

Starter's or

Before a solicitor starts work for a client, he must receive instructions. These must be followed in accordance with the client's directions and must be treated like any other contract or agreement. The Master of the Rolls, Lord Jessel, discussing the instruction fee, introduced what may be termed the 'cobbler's restraint' in *In re Hall and Barker* ([1878] 9 Ch D 538), where he remarked that: 'If a shoemaker agrees to make a pair of shoes, he cannot deliver one to you and ask for half the price'.

The contract between the client and the solicitor is known as the retainer because the client retains the solicitor to act on his behalf. The professional fee included in the bill of costs that the solicitor gives to the client is called the 'instruction fee'.

The nature of a retainer

A solicitor must be retained before he is entitled to furnish a bill of costs: if a retainer does not exist, the relationship of solicitor and client cannot exist (see *Oswald Hickson Collier & Co v Carter-Ruck* [1984] AC 720). Once a contract between a solicitor and client can be either inferred or implied, then the solicitor can act on behalf of that client. Where no express agreement to pay a solicitor a retaining fee is proved, an agreement is not implied to pay a retainer for services which are never performed. The retainer is confined to the proceedings that the solicitor has been requested to prosecute.

Retainers may be oral, implied or written. In Britain, if the solicitor neglects the precaution of having a written retainer, and his retainer is questioned later on, there is nothing but assertion against assertion: he must bear the costs of the risk he undertook.

The scope of the instruction fee

What is an 'instruction fee'? You would be amazed at the number of different definitions that might be proposed by both lawyers and the general public, ranging from the sublime to the ridiculous. In its simplest form, the instruction fee is the remuneration that a solicitor receives for providing a legal service to his client. The taxing master in the taxation of costs of Messrs Rabbitte and MacGiolla

ders

MAIN POINTS

- Retainers may be oral, implied or written
- The instruction fee is the remuneration that a solicitor receives for providing a legal service to a client
- Calculating the instruction fee is not an exact science
- How to determine the hidden costs of a case

in the Beef Tribunal stated in relation to the solicitor's bill that:

'The size of the legal bill which the client eventually receives depends in no small measure on a number of factors; the amount of time spent in doing the work is only one. Other significant factors which affect the ultimate size of the bill are the skill, knowledge and effort involved. Furthermore, collateral factors affecting the size of the bill would be the importance of the matter to the client and the complexity and magnitude of the case. The amount of time spent on a case is not the yardstick to use in measuring the appropriate cost of the service'.

The taxing master in his ruling on the objections to the taxation of the costs of Larry Goodman and his companies indicated that:

'In essence, the calculation of an instruction fee is not an exact science and accordingly one should not try to apply too rigid an approach to its calculation nor seek a scientific method of calculation. The approach would seem to be an open-minded one; realistically, a totally objective approach'.

OBLIGATIONS ARISING FROM A RETAINER

- Those expressly agreed upon when the retainer was created (or as subsequently varied by mutual consent)
- Those which are implied by law in circumstances where the parties have not reached express agreement
- Those expressly imposed by law which are applicable to the particular retainer, and
- Those imposed by the Law Society and other rules of conduct which govern the solicitor's professional relationship with his client.

Playing a vital role

The solicitor's work runs from the initial taking of instructions to the gathering and collating of evidence, proceeding on to the preparation of the case, to its ultimate presentation with or without the help of counsel. The solicitor is the litigant's first port of call and must play the dual role of counsellor and lawyer. He does not know the type of case he will have to deal with nor the extent of the work involved. The work performed cannot be appreciated without taking into account the entire proceedings.

The greater the difficulty of the case, the greater the effort and energy that is demanded of the solicitor. In fact, all too often personal injury actions are considered run-of-the-mill, that is, standard normal actions that do little to burden the professional mind. However, Barron J seems to disagree: in *Best v Wellcome* ([1996] 3 IR 378), he stated:

'There is no doubt that the facts giving rise to the original cause of action were unique and that the case was an extremely difficult one ... The substance of the assessment of damages in a personal injuries

'One should not try to apply too rigid an approach to the calculation of the instruction fee nor seek a scientific method of calculation'

FACTORS INFLUENCING SOLICITORS' REMUNERATION

In *Crotty v An Taoiseach* ([1990] ILRM 617), Barr J suggested some factors that influenced the remuneration of solicitors for work performed:

- The unique and complex nature of the case
- Its importance
- Its urgency
- The expert assistance of the client
- The pressure placed on the solicitor
- The nature and volume of paper involved, and
- The exclusive devotion of time in the case.

action is the nature of the injury sustained by the plaintiff. The more complicated the injuries and the greater the divergence of the views of the doctors in relation thereto, the more difficult the case'.

This echoes the opinions long held by the superior courts in relation to the scope of the instruction fee and the particular features that should be rewarded when assessing the appropriate amount. In the *Attorney General v Simpson* ([1963] IR 329), O'Dalaigh J identified characteristics which place a premium on the instruction fee which a solicitor ought to have remunerated. The magnitude of the case, the difficulties and complexities involved, the importance of the case and the questions involved all deserve attention when considering the ultimate allowance of the instruction fee. In the *Simpson* case, he said that:

'The difficulty and complexity of these points is probably best measured ... by a perusal of the judgments ... The magnitude of a case ... will depend on its being looked at from the viewpoint of both parties; and if the importance of a case is looked at from one side only, a distorted and untrue picture may be presented'.

Whether the solicitor is acting for a client in the High Court or at a tribunal, there is little (if any) difference in the effort and energy required. In fact, in *Minister for Finance v Goodman & Ors* (unreported, High Ct, 8 October 1999), Laffoy J did not see any difference between a lawyer acting for his client in seeking the attainment of justice or for enforcing or defending the rights of his client before a court of law or before a tribunal of inquiry. The understanding was that the function of lawyers acting for witnesses before a tribunal was merely to help the tribunal and consequently the arguments of the Minister for Finance in the *Goodman* case were that this functionality in some measure lessened the work or effort involved and the costs so incurred.

However, this Rabelaisian understanding has fallen from grace. According to Ms Justice Laffoy:

'The role of the lawyers appearing for them [the Goodman group] was to ensure that their rights were protected and vindicated and that they were properly apprised of their obligations under the law. The role of the lawyers in representing their clients before the tribunal was no different to the role they would perform in representing their clients before a court. In my view, it is a misconception to perceive a lawyer representing a party before a tribunal as having some particular function of assisting a tribunal in carrying out its remit'.

Factors of calculation

The assessment of the instruction fee is indeed a complex process involving many factors. The instruction fee is based on the overall work involved in a case, together with a consideration of its complexity, magnitude and nature, particularly in a case of novel or unique character.

Again, Ms Justice Laffoy stated that 'having regard to the authorities, in my view, the appropriate instruction fee, if it is to be quantified on the basis of

CALCULATING THE HIDDEN COSTS OF A CASE

Alfred Anderson, CBE, in *Legal costs in Northern Ireland* (1990) suggests the following procedure, using A as the time amount and B as the masked amount.

'The approach approved of in *Re Eastwood* ([1974] 3 All ER 603) is to estimate a reasonable rate per hour for the reasonable time spent on the matter. By multiplying the number of hours reasonably spent by the rate per hour, the so-called (A) figure is ascertained. This figure represents the direct cost of the matter to the solicitor. Next, all the relevant circumstances ... other than time spent are considered in so far as they are applicable. The (A) figure is then increased by an appropriate percentage called the (B) figure, which represents profit and what has been called the "imponderables".

'The (A) and (B) figures are added together and finally to that total is added the cost of travelling and waiting time, calculated by multiplying the hourly rate by the time spent. In *Re Eastwood*, the (B) figure was 75% of the (A) figure. The normal starting point in assessing an appropriate (B) figure is 50% of the (A) figure, except where the solicitor has been incompetent or unreasonable, when it could be much less or even nothing.

'Apart from the time factor, it is the normal practice to reflect the other factors, where they are significant, in the computation of the (B) figure. In one case (*Gallagher Ltd v Charles Brand & Son Ltd* ([1987] 2 NIJB 54), the taxing master allowed a (B) figure of 477% of the (A) figure, but on review the court reduced it to just

an hourly rate for allowable work, must be based on a fair and reasonable market rate for work of the type undertaken in representing the client, if there be such, for work of comparable urgency, complexity, difficulty, importance and responsibility at the time the work was performed'.

There is a direct relationship between the actual fee charged by the solicitor and the nature and extent of the work. The nature and extent of the work may be apparent by the number of hours consumed by the case, so Ms Justice Laffoy favoured a time-costing approach in quantifying this element of the instruction fee, but we will look at the specific elements of costing later.

The taxing master has been given a statutory power to examine the nature and extent of the work performed by lawyers in a case. The method of ascertaining the amount of the instruction fee is a complicated mechanism that takes account of a host of factors. Fundamentally, the fee represents the cost of the professional service that the solicitor renders, brings and contributes to the case.

Although not an exact science, the calculation is determined by the taxing master by applying principles that have evolved from the extensive case law and statutory regulations on this subject. The taxing masters are former solicitors of at least ten years' standing and, together with their experience in private practice, they accumulate a wide knowledge of every aspect of taxation from dealing with the many and varied cases that come before them.

The various items of the bill of costs are taxed on principles that may appear to differ –but essentially the difference is not one of principle but rather one of functionality in relation to the cost of the specific litigation. Accordingly, one should not try to apply too rigid an approach to the calculation of the instruction fee nor seek a scientific method of calculation. But it must be stressed that it is not beyond measurement.

over 192%. The judge dealt separately with the value factor and allowed 1% of the amount involved.

'In England and Wales, this approach is generally regarded as more suited to conveyancing and non-contentious probate matters, where value has always been a major factor in determining a reasonable fee. But in litigation, there are cases where it may be appropriate to segregate the "value" factor from the other relevant circumstances and to reflect its significance by including a percentage of it in the (B) figure.

'What cannot be over-stressed is that the final figure must be founded on a balanced and informed judgement; it cannot merely be the result of a mathematical exercise'.

Costello J in *Connolly v Kelly & Kelly* (unreported, High Ct, 15 June 1995) accepted that: 'the basis for the taxation of an instruction fee is fundamentally different to that for counsel's fee – the taxing master's task is to determine the appropriate fee in all the circumstances of the case'.

The solicitor's role and his function in a case is of paramount importance: consequently, the work he performs should not drown in the sea of adversarial navigation. In *Murphy v Dublin Corporation* (unreported, High Ct, 31 July 1979), Butler J remarked:

'The taxing master's view of the case is, in my opinion, mistaken in regarding the solicitor as merely a conduit ... In making up the presentation of a claim for compensation, although the evidence is to be given by expert professionals, a client's legal advisers play a very fundamental role that tends to be overlooked. It requires experience, judgement and expertise to select the most suitable professional witness for a particular case, to brief him properly so that his attention may be focused on proper lines to advance the client's claims'.

Calculating the instruction fee

The calculation of the instruction fee is based on two main elements. First, the total amount of time devoted to the case from the date of taking instructions to the date of receiving judgment. All the work performed should be gauged by some type of 'time-measurement'. Second, the 'uplift' or 'effort factors' should be assessed in light of the peculiarities of the case. The sum of the amounts that have been attributed to these two main elements make up the instruction fee which will be assessed by the taxing master at a taxation of costs.

Referring to the 'hourly cost rate', Donaldson J in *Property and Reversionary Investment Corporation Limited v Secretary of State for the Environment* ([1975] 2 All ER 436; [1975] 1 WLR 1504) said that it first:

'Informs a solicitor of the minimum figure which he must charge, if he is not to make an actual loss on the transaction. Second, gives him an idea of the relationship between the overheads attributable to the transaction and the profit accruing to him. This latter point is plainly relevant in the broad sense that the nature of some transactions will justify much larger profits than others of a more routine type. But we must stress that it is only one of a number of cross-checks on the fairness and reasonableness of the final figure. The final figure will result from an exercise in judgement, not arithmetic, whatever arithmetical cross-checks may be employed'.

Having taken instructions, the fee-earning solicitor should select the appropriate people to work on the case. Depending on the size of the firm, the main categories of fee-earners can probably be classified as:

- Partners and senior assistant solicitors with three years' post-qualification experience
- Assistant solicitors and senior managing clerks, and
- Legal executives, paralegals and trainee solicitors.

The appropriate hourly or daily rate should be applied to the work performed, and in order to achieve a reasonably accurate figure the solicitor should keep a record of the amount of time spent on any particular case. Firms not using any time-based rate might perhaps consider operating one that will suit their practice. Such a costing exercise improves efficiency and increases the remuneration of the firm because all labour is costed and there is little likelihood of unidentified hours.

Having completed the time costing and arrived at a sum which reflects the physical labour involved in a case, the solicitor should then consider the overall weight of the case. What the solicitor is seeking to accomplish is to value the hidden factors, and this can be a difficult exercise. It is worth emphasising that skill, knowledge, complexity, difficulty, responsibility and so on are factors that may be apparent in a case but do not lend themselves to precise measurement in the assessment of the overall instruction fee.

So what are the hidden or intangible factors which one is trying to value or even identify? Some of them have been unmasked by order 99, rule 37(22)(ii) of the *Rules of the superior courts 1986* (**see panel on page 25**). The component elements of this are intended to take into account the care, attention and conduct of a case. The more complex the case, the more it will be reasonable to apply an uplift which may be some multiple of the time factor amount. It must be remembered that the uplift is not applied to the instruction fee but to the time element of the instruction fee and is merely an amount allowed to reflect such things as the difficulties encountered by the solicitor.

In the taxation of *Keane & Anor v An Bord Pleanála & Anor* (ruling dated 18 December 1997), the taxing master stated:

'There is an onus on the taxing master to look at the complete, undivided and entire synergistic state of the proceedings in order to macrocosmically evaluate the work, effort, energy and responsibility undertaken and performed ... In the instant case, the lawyers were not faced merely with proving that the respondents were acting *ultra vires*; to do so would have exposed them to a serious hidden providence and placed the applicants in an enigmatic conundrum. This is obvious solely by the exercise of section 27 which highlighted the *lacuna* in the present proceedings ... The applicants' interest in this matter was to preserve the ecological security of the affected area (notwithstanding the ultimate grounds upon which the judicial review proceeded), whereas the respondents' interest was "the development is an important element of the Irish national infrastructure and is in the interests of the common good"'.

It is a difficult exercise to value the actual uplift that one may apply to a case. There are quite a number of factors to be considered in applying order 99, rule 37.

The uplift figure in the case of *Gallagher Ltd v Charles Brand & Son Ltd* ([1987] 2 NIJB 54) was permitted by the court to stand at nearly 200% of the amount in respect of the time factor. If the factors cannot be assessed by a multiple of the time factor, then it is necessary to go through each factor, determine its significance, and allow an appropriate figure to remunerate that factor.

The instruction fee in the bill of costs

What must a solicitor do before he can safely say that his bill in relation to costs incurred is 'taxation proof'? Even if he greatly under-charges, he still runs the risk that the level of the instruction fee in the bill of costs will fall foul of taxation proof. There is no such thing as 'taxation proof', but a few quick and simple chores will enhance the solicitor's chance in coming up to proof on his instruction fee and the amount claimed at taxation.

Much of the work in relation to preparing a bill must begin at the time of taking instructions. The category of solicitor should be documented on the cover sheet of the file, and it should briefly state the reasons why they have been chosen as opposed to a less experienced member of staff. Later on, if a higher calibre of personnel is drafted in because of the complexities or difficulties, then it presents no issue, as the solicitor would have shown an understandable choice at the outset in choosing a level of experience commensurate with the initial instructions as they were presented at that time.

The solicitor with overall charge of the case should keep a record as best he can of the time spent on it, including the hours put in by associates, secretaries and so on. Larger firms usually compile a database of the time worked by each fee-earner and staff, but smaller firms can just as easily pin a time-sheet on the file where each person dealing with that case may record their name, the time spent and the nature of the operation. Irrespective of the method of time costing, it is essential that the solicitor keeps a precise record of the time spent with witnesses, professionals, experts, as well as the time spent compiling the brief, assessing the case and evidence and so on.

The factors highlighted in order 99, rule 37(22)(ii) of the *Rules of the superior courts 1986* should be set out and a description of the work done should be given for each existing factor. The solicitor should also set out the difficulties encountered in preparing cases. The preparation of the brief for counsel may be difficult and lengthy, and the work involved here is another important factor. In supporting his claim for payment, the solicitor should not be shy in stating the enormity of the case and in furnishing documents and other materials to demonstrate its complexities.

The presentation of the instruction fee in the bill of costs is as important as the actual cost-gathering exercise. The aim of the solicitor should be to present a clear and understandable picture of what the case involved and the actual work undertaken. There are no strict rules or guidelines in relation to the presentation of the instruction fee. As an item in the bill, the instruction fee should be presented in sufficient detail to demonstrate to the taxing master that the work was necessary and proper, and to show the nature and extent of the work and the difficulties involved.

In difficult or lengthy cases, the solicitor should carefully prepare the narrative of the instruction fee, setting out the nature of the case. In preparing the narrative, the solicitor will find help in the pleadings, the advices on proofs, expert reports and so on. Furnishing a breakdown of the time expended is advisable.

Furthermore, the narrative should clearly highlight any peculiar difficulties in the case. Any features which involved an inordinate amount of time should be described and the particular efforts involved in performing that task should be set out in full. For example, the discovery process may have been difficult because of the volume of paper or the complexity of the subject matter or the nature of the case may have caused problems because it dealt with a novel legal issue.

Remember: the essence of the narrative in the bill of costs is the reproduction of the original principal facts and arguments in an abridged form so that the taxing master will be able to understand the work involved and form an overall view of its principal purpose. G

Tony Halpin BL and Taxing Master James Flynn are the authors of Taxation of costs *(Blackhall Publishing, 1999).*

'INTANGIBLE' FACTORS: WHAT THE *SUPERIOR COURT RULES* SAY

'In exercising his discretion in relation to any item, the taxing master shall have regard to all relevant circumstances, and in particular to:

a) The complexity of the item or the cause or matter in which it arises and the difficulty or novelty of the question involved
b) The skill, specialised knowledge and the responsibility required of, and the time and labour expended by, the solicitor
c) The number and importance of the documents (however brief) prepared or perused
d) The place and circumstances in which the business involved is transacted
e) The importance of the cause or matter to the client
f) Where money or property is involved, its amount or value
g) Any other fees and allowances payable to the solicitor in respect of other items in the same cause or matter but only where work done in relation to those items has reduced the work which would otherwise have been necessary in relation to the item in question'.

Rules of the superior courts 1986, order 99, rule 37(22)(ii)

'There is no such thing as "taxation proof", but a few quick and simple chores will enhance the solicitor's chance in coming up to proof at taxation'

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Designs on your business

You want to tell potential clients about the quality and professionalism of your law firm because you know that marketing is the key to your long-term success. But how do you get your message across to all those potential new customers? That's where design and corporate identity come in, as Claire O'Sullivan explains

MAIN POINTS

- A strong corporate identity can give you a competitive advantage
- The design process explained
- Law Society offering a tailored design service for members

Design, according to marketing guru Philip Kotler, 'is a potent strategic tool that businesses can use to gain a sustainable competitive advantage'. He goes on to say that 'most companies lack a design touch' and that 'their information literature is tedious'.

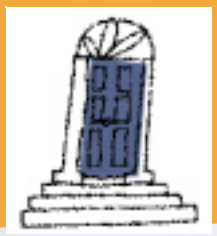
In today's world, these words have a particular resonance for the providers of professional services – none more so than the legal profession. The restrictions under which the solicitors' profession markets and promotes itself are well recognised but, given these restrictions, how can a legal practice compete in the cut-throat environment in which all businesses find themselves?

The client's perception of a law firm is derived from their initial contact with it through its signage, offices, stationery and, of course, staff. As the expression goes, 'you only get one chance to make a first impression'. These elements are part of the package of intangibles on which clients and potential clients will judge the quality of the firm's service and professionalism.

It may seem unfair that people should judge a business on the image it projects, but we live in a visual world, where our eyes are the filters through which we perceive and understand our surroundings and, more importantly, the messages we see. One of the real challenges facing the legal profession is the difficulty in promoting the intangibles of the service. For clients and potential clients, the dilemma is that they cannot judge the service and relationship until they have tried it. But turning these perceptions into positive outcomes for the practice can be achieved through a client-focused approach to the firm's visual identity.

According to David Aaker, author of *Building strong brands*: 'A strong symbol can provide cohesion and structure to an identity and can ensure recognition and recall. Its presence can be a key ingredient of brand development and its absence can be a substantial handicap. A strong symbol can be the cornerstone of a brand strategy'.

The symbol or visual metaphor used by a practice for its identity is a critical tool in its communications strategy. This is the tool which acts as a touchstone for all of the internal and external communications and is critical in bridging the 'visual perception gap'.



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This is the gap which exists between how the firm sees itself and how the target market perceives the practice and its services.

A well-managed, high-quality design offers several benefits:

- It can create distinctiveness in a marketplace not known for strong images
- It can create a personality for the firm so that it stands out from competitors, and
- It communicates value to clients and makes selection easier.

The process of the design and implementation of a new visual identity tends to fall into various stages, depending on the size and requirements of the firm. These are described below.

Design and communications audit. This requires an audit of all of the firm's visual and communications materials, such as stationery, literature, website, reports and so on.

Report and analysis. A report identifying the key findings of the audit should then be prepared, together with an analysis of these findings. This allows both the design consultants and the law firm to decide on an outline strategy for the project in terms of overall strategic objectives.

Design research. The marketplace in which the firm competes and the target audience are now researched in order to explore visual design solutions. These solutions are then benchmarked against the strategic objectives agreed between the practice and the designer.

Initial presentation. The designer then presents initial design concepts ('design roughs') to the firm and agreement is reached on which solution should be explored further for design development.

Design development. The agreed design roughs are then further developed and the core design idea is applied to the various communications materials, such as stationery (where appropriate). At this stage, various colour options are examined to determine which overall design solution will work most effectively.

Second presentation. The refined design route is presented to the firm to demonstrate how the design can be implemented across a broad range of communications materials.

Implementation. Following final approval by the firm, the design solution will then be applied across a range of agreed materials relevant to its needs. Where appropriate, arrangements can be made for the design company to procure printing on the firm's behalf or to liaise directly with the firm's own printers to ensure that the printed product matches the firm's expectations.

Project evaluation. As with all design projects, follow-up should be encouraged to quantify how the new identity is being received and to ensure there has been no slippage in the implementation of the identity.

The extent to which the application of a new identity can be implemented is entirely dependent on the requirements of the firm itself. It is a matter of horses for courses. Through working with a professional design practice and by focusing on the long-term strategic issues, as well as the more short-term tactical issues, your firm should notice positive benefits in terms of enhanced customer perceptions and lifetime client loyalty. G

Claire O'Sullivan is the Law Society's Member Services Executive.

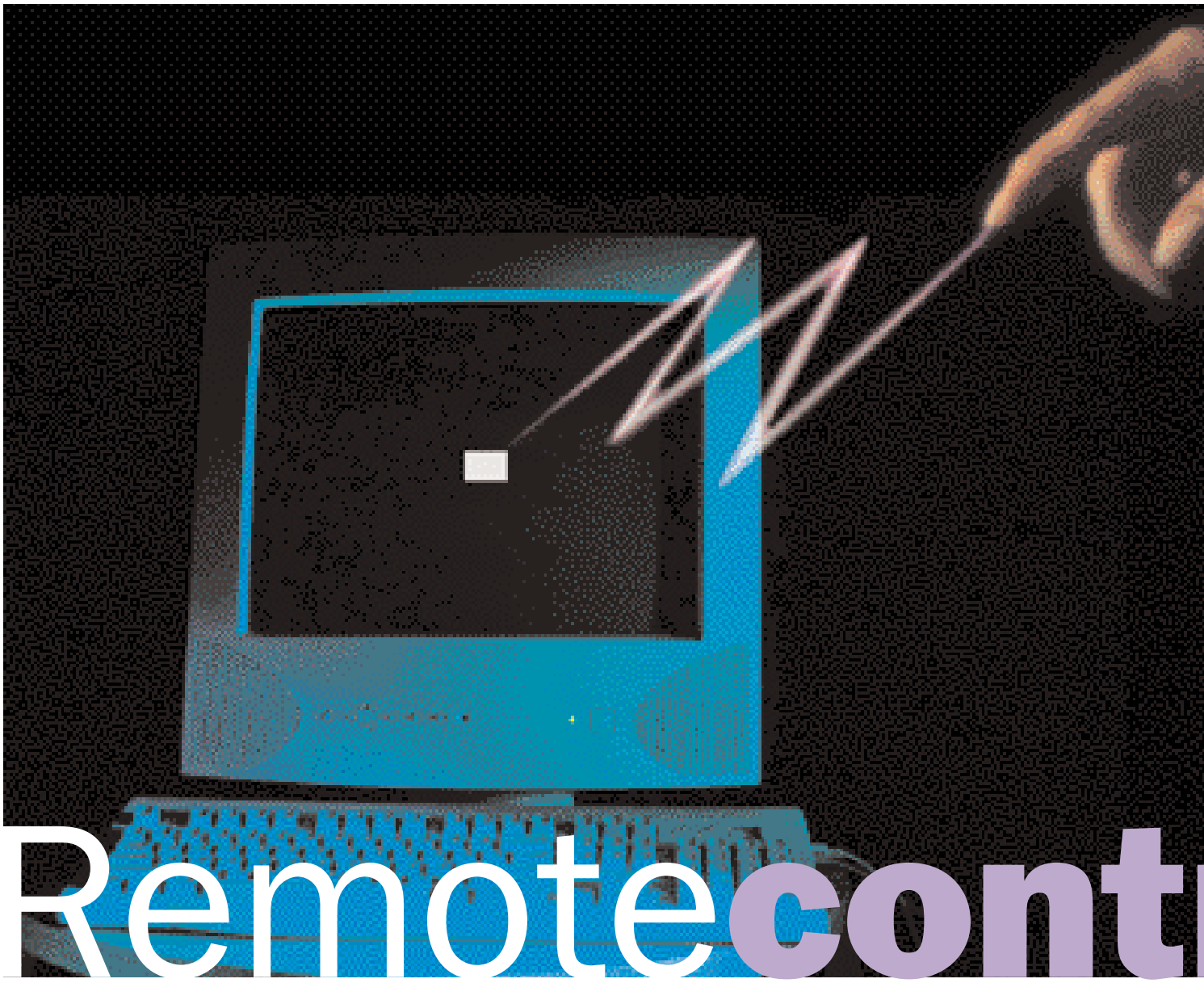
LAW SOCIETY DESIGN SERVICE FOR MEMBERS

The Law Society has appointed Baseline Creative Services to provide graphic design services to its members at specially-negotiated rates. Baseline recently received the Graphic Design Business Association's *Idea* award for effective design for its campaign for OSK Chartered Accountants.

Baseline will offer a number of specially-tailored packages exclusively to Law Society members, ranging from a basic entry-level package to an advanced-level design service for firms that require a more innovative approach to their identity. Services will include advice on design of stationery, signage and promotional literature, and advice and assistance on the creation of a corporate identity.

For further information, contact Alec Drew on tel: 01 855 7133, fax: 01 855 7626 or e-mail: info@baseline.net.

'Your firm should notice positive benefits in terms of enhanced customer perceptions and lifetime client loyalty'



Remote cont

How would you feel if your software supplier decided to remotely disable the programs running on your office computers because it felt you had breached the licensing agreement? Such a scenario could become a reality thanks to a new Act in the USA that may have far-reaching implications for European businesses. Zoe Ollerenshaw reports

A controversial new law, recently approved at federal level in the United States, means that some software vendors may have the right to remotely disable software if they believe that the software user is in breach of their licence. It is one of a number of rights included in the *Uniform Computer Information Transactions Act* (UCITA), which critics argue unfairly swings the law in favour of software vendors. If UCITA is ratified by the individual state legislatures in the US, companies that buy or sell software under agreements subject to US law may feel its impact in Europe.

UCITA is intended to provide a common set of licensing rules for all forms of digital media. The Act was introduced with the aim of providing certainty in software transactions. It came about as a result of increasing concerns that the growth of e-commerce and the numerous differences in state law were making it increasingly difficult to know where contracts were being made and business conducted and which law applied to particular transactions. But while supporters of UCITA claim it has extended the rights of end-users and contains protections for them, many believe that unscrupulous suppliers now hold the whip-hand.

The most controversial provision in the Act is the

MAIN POINTS

- New Act allows software vendors to electronically 'repossess' software on your computer
- Irish users should ensure software contracts are subject to Irish law

'self-help remedy' to enable a licensor to electronically 'repossess' software if the software licence is cancelled. Many see this electronic self-help remedy as a potential tool for blackmail. Although supplier organisations argue that the market will not tolerate vendors who have a reputation for shutting off software, others say that the fear of getting a bad reputation has never prevented unscrupulous vendors from exercising such powers in the past. However, while the self-help right may at first glance appear far-reaching, its effect may be more limited.

Protection for licensees

Safeguards are included in the Act in respect of the self-help remedy. The right is only available if the licensee expressly 'assents' to it in the licence agreement and certain notice provisions are included. It is not clear how far a licensor must go to bring the specific right to a customer's attention for it to prove a customer has 'assented' to the self-help remedy; merely accepting a licence is not sufficient. Nor is it clear whether an express statement in a licence agreement saying the customer agrees to the remedy would suffice. Whether or not customers assent to the right may ultimately depend upon their negotiating position. A potential customer in a weak position may not be able to have such clauses removed. Alternatively, customers may feel they have no option but to accept the provision because of the lack of substitute software at equivalent cost.

Further safeguards concerning the self-help remedy are built into the Act. The self-help right is not available if there is a foreseeable risk of personal injury or significant physical damage to property or information other than the licensed software. The right of repossession is not available to the extent that the licensed information has been legitimately altered or mixed with other information so much that it is no longer identifiable or separable. Notice of the licensor's intention to enforce the right must be given and either party can seek injunctive relief if a dispute arises as to whether or not the self-help remedy is available (for example, if a customer alleges wrongful termination of the licence).

The licensor is also prevented from exercising the self-help remedy if it would result in substantial injury or harm to public health or public interest. However, it is unlikely that in most normal business transactions public-health or public-interest concerns would arise. The Act also gives a licensee the right to recover damages (including consequential damages, subject to certain conditions) if a licensor wrongfully uses the right of electronic self-help.

Whether the electronic self-help remedy will have a significant effect in Europe remains to be seen. Most software licences provide that, on termination of the licence, all copies of the relevant software must either be returned to the licensor or a certificate of destruction given. Many software vendors may take the commercial decision to continue to rely on similar clauses rather than insert the seemingly draconian self-help remedy into their terms and conditions. It is also uncertain whether the self-help right would be available if that software has been resold by a value-added reseller and no licence has been entered into directly between the software vendor and the end-user.

The self-help remedy is only available electronically. The licensor must ensure the licensee has assented to the right and must give the appropriate notice of its intention to exercise it. If it does not have an express term in its licence, or if it does not give the relevant notice, not only will it be in breach of UCITA but may well be committing a criminal offence under the *Criminal Damage Act, 1991*.

Other rights included in the Act allow sellers to legally disclaim warranties for defective, 'buggy' or virus-infested software, provided certain wording is used. It is feared that the effect of UCITA will be to encourage software developers to rush poorer-quality products into the marketplace without running the risk of being sued by disgruntled customers. There are also concerns that UCITA could encourage vendors to include so-called 'gagging' clauses, preventing customers from commenting publicly on the quality or performance of defective software products.

Debate continues

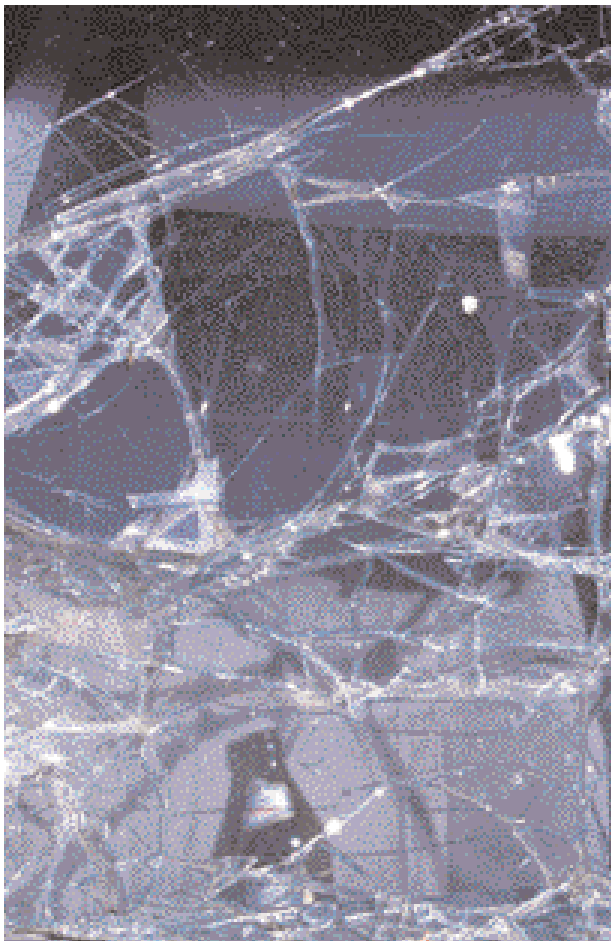
US commentators and critics argue that the net effect will be to significantly increase the cost of purchasing and negotiating software licences because users will be forced to enter into potentially lengthy and costly negotiations to overcome the default position set out in the Act. They believe this will be the case even for low-value (but very often critical) shrink-wrapped software.

The debate surrounding UCITA continues. The Act still has to be ratified by the relevant states to become law, and some are refusing to do so unless modifications are made. But fears persist that many states will simply rubber-stamp the legislation, thereby making it federal law in the near future.

European software suppliers and customers will follow the passage of UCITA with interest. As so little is currently known about how UCITA will operate in practice and whether or not some of its provisions are prohibited by Irish and European law, users and suppliers are strongly advised to ensure that for the time being their software contracts are subject to Irish law.

What is more interesting, perhaps, is that UCITA represents a concerted effort by the legislature in the USA to deal specifically with the peculiarities of software and digital media. It's reasonable to assume, then, that EU Member States will also have to start drafting legislation to cover this new and complex area. G

Zoe Ollerenshaw is a senior associate in the information and technology department of the solicitors' firm Masons in Leeds, England.



Solicitors acting in RTA cases are used to long delays before insurance companies will pay out on a judgment debt against negligent drivers, but, as Stephen Glanville points out, there is a shortcut which allows you to move against the insurer itself

Making motor

MAIN POINTS

- Section 76 of the RTA 1961 allows you to execute judgment against a motor insurer in lieu of its client
- Some amount must have been recovered from the owner/user of the vehicle
- Prior notification of the proceedings must be given to the insurer

The most frustrating delay is the one following judgment on a road traffic accident claim. Practitioners will be accustomed to waiting six months, or even a year, before a motor insurer pays out on a judgment debt (including interest and costs) which lies against its client, the negligent defendant. Unless the court allows you to proceed against the insurer in lieu of the defendant, the judgment can seldom be executed in an effective and immediate way.

But the *Road Traffic Act, 1961* does provide a short-cut. Section 76 says that you can apply for leave to issue execution against the insurer on a judgment recovered against the person insured under the policy (see also *Rules of the superior courts*, order 22, rule 10 and order 91).

In essence, where judgment for a sum has been recovered against the owner or user of a vehicle insured under a policy, you can serve notice of the claim or judgment on the insurance company. On the basis of this written notice, an application for leave to execute against the insurer may be brought in the court in which the judgment was recovered. Section 76 extends to the defendant's personal representative and also applies where there is a claim on which judgment is ultimately recovered.

Prior notification

Section 76 does not apply unless the insurance company had prior notification of the proceedings, regardless of service of the written statutory notice in respect of the claim or judgment. Under previous legislation, notification as soon as possible after the start of proceedings was enough to ground the application (see *Herlihy v Curley*, [1950] IR 15). An amendment to the legislation (whether precise or casual is open to argument) was subsequently made, excluding all proceedings from the benefit of section 76 except those 'of which the vehicle insurer … had prior notification'.

The question is whether the plaintiff will enjoy the benefit of section 76 if notification has not been given prior to the issue of the summons but rather at a subsequent time. The phrase 'prior notification' fails to point up the distinction made by the

insurers pay

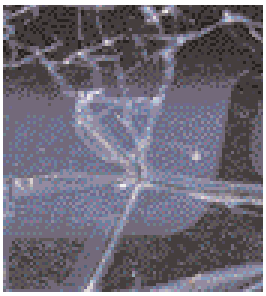
Supreme Court in *Herlihy* between notice of proceedings and notice of intention to institute proceedings: if the Oireachtas had intended the latter type of notice to be understood, then the proper course would have been to use those words. Furthermore, the phrase 'prior notification' can as readily be interpreted to refer to the time of service of proceedings (or even to the time at which it was decided to prepare proceedings and give instructions) as to the time at which the summons was issued. The statute is ambiguous in its phrasing and, given that the legislation is intended to protect the rights of insured people, it should be interpreted to allow the claimant the benefit of the latest permissible date.

In any case, it is prudent practice to notify the relevant insurers of proceedings by service of a copy

Section 76 of the *Road Traffic Act, 1961*

'1) Where a person (in this section referred to as the claimant) claims to be entitled to recover from the owner of a mechanically propelled vehicle or from a person (other than the owner) using a mechanically propelled vehicle (in this section referred to as the user), or has in any court of justice (in proceedings of which the vehicle insurer or vehicle guarantor hereinafter mentioned had prior notification) recovered judgment against the owner or user for a sum (whether liquidated or unliquidated) against the liability for which the owner or user is insured by an approved policy of insurance or the payment of which by the owner or user is guaranteed by an approved guarantee, the claimant may serve by registered post on the vehicle insurer by whom the policy was issued, or on the vehicle insurer or the vehicle guarantor by whom the guarantee was issued, a notice in writing of the claim or judgment for the sum, and upon the service of the notice such of the following provisions as are applicable shall, subject to sub-section (2) of this section, have effect: ... (c) where the claimant has so recovered judgment for the sum, or after service of the notice so recovers judgment for the sum or any part thereof, and has not recovered from the owner or user or such insurer or guarantor the whole amount of the judgment, the claimant may apply to the court in which he recovered the judgment for leave to execute the judgment against the insurer or guarantor, and thereupon the court may, if it thinks proper, grant the application either in respect of the whole amount of the judgment or in respect of any specified part of that amount.'

'3) Sub-sections (1) and (2) of this section apply only to claims against the liability for which an approved policy of insurance or an approved guarantee is required by this Act to be effected.'



of the summons before it is issued. Where the summons has already been issued, it may be worthwhile to notify in anticipation of making the above argument.[1]

Where the whole amount of the judgment has not been recovered from the owner or insurer, you can (after serving notice of the claim or judgment by registered post) apply to the court in which judgment was recovered for leave to execute the judgment against the insurance company. The court may grant the application either in respect of the whole or a specified part of the amount.

The application is by motion on notice grounded on affidavit and must be brought within six months of the date of judgment, or within such further time as the court may allow (*Rules of the superior courts*, order 91, rule 2). In the High Court, service must be effected on the insurer, which may be by registered post to the head or principal office within Ireland, and on the defendant, allowing four clear days. At the hearing, the court may dispense with service on the defendant or declare any service effected on that party sufficient. In proceedings in the Circuit Court, it is recommended that the High Court procedure be adopted by virtue of order 59, rule 14 of the *Rules of the lower court*.

In some cases, the matter can be dealt with on affidavit, without a hearing or oral evidence, but in the absence of examination it may be difficult to deal properly with the issues where the facts are not within the personal knowledge of the contending parties. In such cases, it would be proper to have a trial so that witnesses can be subpoenaed, examined and cross-examined. Ultimately, the claimant is entitled to have an issue directed by the court (see *Herlihy v Curley*).

Burden of proof

The claimant, under legislation replaced by section 76, had to establish that the judgment was for a sum against the liability for which the owner or driver was insured (see *Whelan v Dixon*, 97 [1964] ILTR 195). The onus then shifts to the insurance company (in a case where repudiation is alleged) to prove repudiation (*Kelleher v Christopherson*, [1957] 91 ILTR 191).

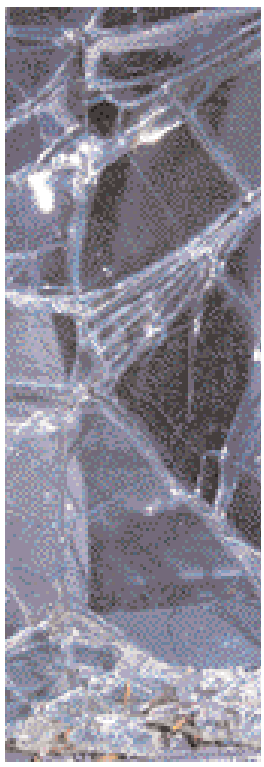
The absence of a valid policy will relieve the insurer of liability (see *O'Leary v Irish National Insurance Co*, [1958] Ir Jur Rep 1). In *Stanbridge v Healy* ([1985] ILRM 290), leave to enforce was denied because the liability in issue did not arise from use of the vehicle falling within the terms of section 56 of the 1961 Act. In *Brady v Brady* ([1938] IR 103), the insurer was relieved from liability by a valid exception under the express terms of the policy. And in *Kelleher v Christopherson*, the insurance company failed to discharge the onus of proving that the vehicle in question had been used in the course of a business or trade for which the defendant driver had not been covered, and so its plea of repudiation fell and leave to execute was granted.

A condition which is prohibited by legislation will trip up the insurer. In *McCarthy v Murphy* ([1938] IR 737), it was held that the insurer could not rely on the failure of the policyholder to fulfil an obligation under the policy which was a prohibited condition, and leave to execute was granted. By contrast, *Higgins v Feeney* ([1953] IR 45) is an example of a denial of leave where the plaintiff failed to show that the condition was prohibited.

Another difficulty for the insurance company is the restriction placed on it from pleading that the policy is invalid on the ground of fraud, misrepresentation or false statement (whether fraudulent or innocent) unless either the claimant was privy to the same or there had been a related conviction (section 76(1)(e)). This provision is slightly complex and merits closer examination than provided for here.

A judgment for the payment of money is payable upon its pronouncement and entry, without service or any further step having to be taken (although costs cannot be included on execution unless taxed, measured or agreed). In the case of an application under section 76, it is possible to issue execution as soon as leave is granted, unless the court stays execution (if indeed it can under section 76: see *Rules of the superior courts*, order 42, rule 17).

In a straightforward case, where delay is the only issue, it is likely that the insurance company would prefer to see a strike-out and bear the costs of the application, although care should be taken to ensure that this itself does not lead to further delay. G



Stephen Glanville BL is the author of The enforcement of judgments *(Round Hall Sweet & Maxwell, 1999).*

Footnote

1 Where the summons has been served, it is unlikely that any argument will prevail. An application under RSC O.122 for enlargement of time may be given tentative consideration, by analogy with the rules on service of a judgment or order to do an act within a certain time, but is not recommended. The practitioner should also consider whether or not the forwarding to the insurer by its insured of correspondence concerning the accident might constitute prior notification of proceedings. Discovery of documents not originating from the plaintiff would be difficult, but the issue of privilege is not necessarily the problem - proof of knowledge of the proceedings is essential. The author knows of no decision or practice relevant to these issues.

Book reviews

The *Civil Liability Acts*: An annotated guide (second edition)

Anthony Kerr. Round Hall Sweet & Maxwell (1999), 43 Fitzwilliam Place, Dublin 2. ISBN: 1-899738-92-4. Price: £19.95 (paperback).

'An "all-you-need-to-know" handbook which will certainly be a necessary and welcome addition to the library of any lawyer'

Anthony Kerr's recent edition presents an expansive and extensive overview of the *Civil Liability Act, 1961*. It is, in short, a definitive statement on the present state of law, with explanation, commentary and practical examples. It is basically an 'all-you-need-to-know' handbook which will certainly be a necessary and welcome addition to the library of any lawyer, especially a litigator.

By reviewing applicable case law and judicial pronouncements (both from this jurisdiction and from corresponding overseas common-law jurisdictions in Australia, New Zealand and Canada), the text provides a useful basis not only for definition and understanding of the present law but also offers comparative argument and reasoning. Identification and reference to initial parliamentary debates and subsequent published academic legal commentary provide a further source for locating information relating to particular provisions.

Comprehensive cross-referencing refers not only to case law and comparative legislation but also to EU legislation and European law authorities. This gives a further contemporary viewpoint, as issues and principles of civil liability are dealt with and determined throughout the increasingly-interlinked judicial framework of European jurisdictions.

The style and layout of the book provides a user-friendly format which incorporates the actual text of the legislation, commentary on its terms and interpretation, and guidance on the substantive legal issues involved and the procedures and formal requirements in proceedings. The reader's ease of reference to particular areas and authoritative case law is ensured by indexes dealing with judicial authorities referred to (with citations) and itemised headings specifying issues dealt with, corresponding provisions and cited legislation.

In addition to identification of the provisions of the *Rules of the superior courts*, the author has extracted the associated forms/precedents. Their inclusion (with commentary and cross-referencing) allows for immediate reference and use.

This book is likely to be invaluable not only to practising lawyers (solicitors and barristers alike) but also to commentators and students as a consolidated and authoritative text and source. Anthony Kerr has successfully distilled a complicated and technical area of Irish law into a compact and highly-readable edition which will undoubtedly assist not only on an everyday practical basis but, in the longer term, in the improvement of legal education and knowledge. G

Hannah Carney is a solicitor with the Dublin firm McCann FitzGerald.

Contract law in Ireland (fourth edition)

Robert Clark. Round Hall Sweet & Maxwell (1998), 43 Fitzwilliam Place, Dublin 2. ISBN: 1-899738-91-6. P

The great judge and jurist Oliver Wendell Holmes Jr noted that, in order to enter into most of life's relations, people have to give up some of their constitutional rights. Holmes observed that if a man makes a contract, he gives up the constitutional right that he previously had to be free from the hamper that he puts upon himself.

Professor Robert Clark's book is, in essence, the story of contract law in Ireland and the hampers placed on those who enter, or are deemed to enter, into contracts. In his preface, he notes that some Irish cases have provided quite a different slant on common law and equitable concepts. He cites Irish case law on unconscionable bargains and undue influence as the most obvious example of a different approach by the Irish judiciary, with the Irish judiciary 'more interventionist' than their English counterparts.

The book is divided into nine parts, with the following headings: formation of a binding contract, constitution of a contract, invalidity, equitable intervention, public policy, capacity to contract, third-party rights, discharge and, finally, remedies following a breach of contract.

Professor Clark's book

Landlord and tenant law (second edition)

JCW Wylie. Butterworths (1999), 26 Upper Ormond Quay, Dublin 7. ISBN:1-85475-8217. Price: £110.

Making the mouths of conveyancers water with references in his previous books to fee farm grants made under *Deasy's Act*, Professor Wylie seemed convinced of their merits. Dr Lyall illuminated the topic in his *Land law in Ireland* when he suggested that in these hermaphrodites 'the *estate* is freehold but the *tenure* (if one should still use the term) is leasehold'. With such advantages, it is not surprising that this species of fee farm grant is the largest group found in Ireland but, seemingly, few (if any) new grants are today made under *Deasy's Act*.

Imbued with a special interest in these grants, my first act on receiving the second edition of *Landlord and tenant law* was to search it for developments in this topic.

With some sense of disappointment, I discovered the following on page 33: 'the advantages of making a new fee farm grant in modern times must be doubted. Indeed, the making of such a grant at a ground rent ... would seem to run counter to the policy behind the *Landlord and Tenant (Ground Rents) Act, 1978*, which prohibited further creation of leases of dwellings at ground rents. That Act does not appear strictly to prohibit fee farm grants because s2(1) renders void only leases under which the lessee would otherwise have the right "to enlarge his interest into a fee simple"'.

And again on page 34: 'Nevertheless, though no doubt a fair number of fee farm grants created before 1978 will continue to be a feature of the law for some time to come, it is unlikely that many new ones will be created in respect of dwellings. As regards commercial or business premises, a fee farm grant is rarely, if ever, used because letting arrangements for such property tend to be for comparatively short terms, with provision for rent review, and granting a fee simple to the tenant is far beyond the contemplation of either party'.

And on page 114: 'Though the prohibition on the future creation of ground rents in respect of dwellinghouses imposed by the *Landlord and Tenant (Ground Rents) Act, 1978* would not appear to apply to fee farm grants, it is difficult to see what advantage would be secured by such a grant nowadays. They are rarely, if ever, used'.

All conveyancers owe a debt to the author, first of all for his enterprise in researching why *Deasy's Act* grants were, apparently, under a cloud and, second, for alerting the profession to the pitfall that applies since 1978. If one could be sure that the Bill is not left to lie dormant indefinitely, one might predict that the *Landlord and Tenant (Ground Rent Abolition) Bill, 1997* would be the greatest landlord and tenant event of the decade.

The purpose of the Bill is self-evident. The prospect of an effort to have the Bill, or some of it, declared to be unconstitutional is, at a guess, considerable. For those not familiar with Irish legal history, the significance of the ground rent will not be appreciated. It is an almost incredible story.

Most leases were building leases. That is to say, the freeholder granted a bare site and the tenant covenanted in the lease to erect a building on the site. Unbelievably, when the term of the lease ended, the landlord was entitled to receive back his plot and, not only that, he was entitled to the house as well!

What an extraordinary solution to a housing problem! And the surprising part of it was that there is, apparently, little trace of complaints by the tenants as to the obvious total lack of justice in the system. In fact, one of the excuses for the outrage was that the years the tenant and his family were in possession was roughly the life of the house (so that the tenant could not expect further use of the house). The tenant was expected to recoup his capital outlay by assigning or subletting his interest in the building. The mischievous reality was that the tenant and his successors, realising that their time in the house was limited, would neglect repairs, a habit responsible for the myriad of tumbledown houses then in the countryside.

At length the *Landlord and Tenant Act, 1931* removed the worst features of the Irish urban tenants' lot. These included for many such tenants the right to a new tenancy at a rent to be fixed, in default of agreement, by the Circuit Court. The most objectionable burden of the ground rent system having been removed, the remaining aspects are being gradually reformed.

This review has, so far, been confined to two themes. To mention but a few of the other topics covered in this edition of *Landlord and tenant law*: the substantial amendments that have been made by legislation such as the *Housing (Miscellaneous Provisions) Act, 1992* and the *Landlord and Tenant (Amendment) Act, 1994*. In addition, the book also discusses important judicial decisions on key issues such as the distinction between leases and licences and avoidance of the protection of the *Landlord and Tenant Act*, the enforcement of 'keep open' for trading covenants, user covenants and competition law, the forfeiture and rights to new tenancies, sporting leases and the acquisition of the fee simple.

Professor Wylie's book is characterised by the thoroughness for which he is renowned and his support for the *Deasy's Act* grants shows that he is a writer of great enterprise as well as a realist, unlike Goldsmith's clergyman, who 'e'en though vanquished, he could argue still'. I consider the subject of landlord and tenant so practical that one could not envisage an office of any size able to do without a copy. G

Professor JMG Sweeney is an emeritus professor of law at NUI Galway.

Price: £49 (paperback).

presents a comprehensive overview and analysis of the Irish law of contract and represents a masterful account of law that is central to the lives of every man and woman in Ireland. And the publication of a fourth edition of an Irish law book is always a cause for celebration. G

Dr Eamonn Hall is Company Solicitor of Eircom plc.

Tech trends

Compiled by Maria Behan

The word on the street

For solicitors who are too busy to let their fingers do the walking, the new Nokia 8210 boasts a voice-dialling feature – just press one button and say one of the eight names you've pre-programmed for instant dialling. The phone also has so-called 'predictive text input' which aims to cut the time it usually takes to send short text messages by calling on a built-in dictionary of 60,000 words to anticipate the one you're typing. If your network provider allows picture-messaging capability, you can even send and receive pictures. Finally, the infrared port allows you to link up with your laptop without any extra cables or software – ideal for those who think the firm will collapse if they're away from their desks for more than ten minutes.

Available at most mobile phone outlets; price: around £230.

Calling time on clients

According to Buytel, its new time-recording service allows you to use your telephone to record the amount of time spent on any particular job or with any client. All you have to do is ring a free-phone number and the Buytel 'Voicevault' confirms your identity through a voice-verification process that claims to take less than half a second. Once the system ascertains that it's really you, you're connected to the time-recording service and can input verbally, so to speak, the relevant details. The manufacturer claims this new solution replaces time-consuming paper-based time sheets or inefficient IT systems that tend to operate on a historical basis.

For further information, contact Purchasing Solutions on 01 230 1255.

Worth a thousand words

How many times have you said: 'I'd love to have seen his face when …'? Well, now you can put the fun back into breaking bad news with 3Com's HomeConnect PC Digital WebCam. This device makes it simple to send clear, high-quality still and moving images over the Internet. The camera can quickly be detached and reattached to your desktop or laptop computer, streamlining the process of making video calls, sending video e-mail, or posting video or still snapshots on your website. The software sets you up for image capture, video conferencing, video chat and other applications.

Available at all PC World stores; price: around £170.

Go Web, young man

If you fancy a bit of electronic DIY, then Internet service provider Indigo has the kit for you. Its Gosell package allows you to build an e-commerce enabled website in the comfort of your own office. You can configure the look and feel of the site to suit any corporate image without the need for those pesky programmers or designers. Ideal for your small business client?

Prices start from £495; for more information, call Indigo on 1850 730073.

Light but no lightweight

The streamlined Psion *Series 7* aims to give conventional laptops a run for their money. This powerful but ultra-mobile machine offers access to e-mail and the Internet and features a full-sized keyboard and colour screen. Capable of doing a day's work on a single battery charge, it runs office and e-mail applications that can be synchronised with desktop PCs. For those who care about such things, the machine uses a 133 Mhz processor and, although it lacks a hard drive, it has 16MB of memory (upgradeable to 32). Alternatively, users can opt to store data and files on a compact flash-memory card.

Available at computer and electronics outlets; price: around £850.

Sites to see

The Martindale-Hubbell Law Directory (*http://www.martindale.com/locator/home.html*). An international listing of law firms, including many in Ireland. Provides contact details, describes the practice, and lists information on the firm's members.

Openlaw (*http://eon.law.harvard.edu/openlaw*). This US experiment in crafting legal arguments in an open forum is run by the Beckman Center for Internet and Society, a network of teaching and research faculties from the Harvard Law School and other institutions. Using input from web-surfing lawyers and academics, the site is a collaborative experiment in developing legal arguments, drafting pleadings and editing briefs on-line.

Did You Know? (*www.didyouknow.com*). A cornucopia of interesting facts, fascinating stories and links to sites that provide additional information on your area of interest. The *What happened that year?* section details past discoveries and key events.

Euro Changeover Board of Ireland (*www.irlgov.ie/ecbi-euro*). This site offers a euro calculator, a timetable for changeover and a section devoted to frequently-asked questions (FAQs).

Jameson Whiskey

The Practice

CASE MANAGEMENT FOR THE NEW MILLENNIUM

The Old Jameson Distillery was the unique and well-chosen venue, in the pulse of the legal industry for the launch of Practice 2000. Our picture shows a number of clients who attended from all over the Country, for this great event.

Next week Practice 2000 will be launched in Cork for all their existing clients.

This Irish developed software has now become Europe's fastest growing Case Management System for Irish Solicitors.

Have you seen it yet?

CALL DECLAN BRANAGAN IN BBS NOW ON

Report on Council meeting held on 28 January

The Director General briefed the Council in relation to correspondence from the Minister for Defence seeking the co-operation of the Law Society in creating a channel of communication between the Minister and the solicitors representing plaintiffs involved in army deafness litigation. In response, the plaintiffs' solicitors had emphasised that they had always been anxious to settle the cases in the most speedy and cost-effective manner possible. However, they had also indicated that their goodwill was being diminished by the unhelpful and derogatory public statements being made by the Minister about their involvement in the cases. Nevertheless, they were willing to meet with the Minister's officials and the Society had agreed to facilitate discussions.

Proposed Judicial Council on judicial conduct and ethics

The President reported that, on 20 January 2000, he and the Director General had met with the Committee on Judicial Conduct and Ethics, which comprised six of the most senior members of the judiciary. The President and Director General had forcefully presented the Society's view that any body established for the purposes of handling complaints about judicial conduct should include representatives of the solicitors' and barristers' professions, together with lay members. The same view had been advanced by representatives of the Bar Council. The committee's deliberations continue and it plans to report later this year.

Establishment directive

Michael Irvine reported on discussions with the Department of Justice, Equality and Law Reform in relation to the regulations implementing the *Establishment directive*. Two lengthy meetings had taken place and amended draft regulations were being prepared. The directive required that the implementing regulations be in place by 15 March. Clearly, it was imperative that registered European lawyers would be subject to the same rules and regulations as Irish solicitors. This might require further regulations to be made by the Society. It was expected that the department would respond in the near future, following which the working group would meet to discuss any outstanding issues. The draft statutory instrument would be circulated for consideration at the March Council meeting.

Land Registry

Several Council members expressed concern regarding the recent increases in fees by the Land Registry, at a time when the services provided by the registry were being reduced. Concern was also expressed about the imposition of penalties where documentation was resubmitted. Philip Joyce said that the Land Registry had identified two areas which would attract penalties in the future:

a) Where papers were refused, rejected or withdrawn, and
b) Where excessive fees were submitted, on the basis that the registry staff would have to do the necessary calculations and issue the appropriate refund.

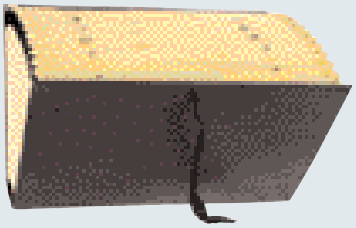
He confirmed that the Society had not been consulted by the Land Registry in relation to the proposed new fees and penalties and he noted that the registry had also introduced a new Form 17 which was causing difficulties for practitioners.

Orla Coyne said that a consumer group had been established by the Land Registry, comprising representatives from the Law Society, the DSBA, auctioneers and other users, all of whom had expressed their concerns. She clarified that the penalties for inaccurate documentation were intended to compensate for the time wasted in dealing with papers, rather than to operate as a penalty for incomplete forms. She said that the DSBA was encouraging its members to forward their views to the DSBA representatives so that they could be raised at the consumer group meetings. In addition, she noted that Land Registry fees had not been increased for many years.

Keenan Johnson said that the Land Registry was in crisis and the new fees order was inopportune. He urged that the Society should seek an urgent meeting with the registrar to express the depth of anger within the profession in relation to the service being provided. The Director General confirmed that he had written to the Minister and had spoken publicly about the annoyance and frustration of the profession with the current delays at the Land Registry. In relation to a solution to the difficulties, he hoped that this could be achieved by the Conveyancing Committee in meetings with both the Land Registry and the Minister. Orla Coyne confirmed that there was total uniformity between the Society and the DSBA on the issue. She also noted that the Land Registry had serious staff shortages. Patrick O'Connor said that, apparently, the Minister had authorised the assignment of 100 additional staff to the registry, but that the Minister for Finance had not yet approved the necessary funding. He suggested that the officers and the Director General should make approaches to both the Minister for Justice and the Minister for Finance on the matter.

Publications Committee

The Council approved the establishment of a Publications Committee, comprising Michael Carrigan (Chairman), Judge John F Buckley, Tom Courtney and Margaret Byrne. The committee would deal with applications to the Arthur Cox Foundation, together with outstanding publications in which the Society was involved. G



Committee reports

GUIDANCE AND ETHICS

Action plan 2000

Members may be interested to know that the Guidance and Ethics Committee has adopted the following action plan for the year.

On-going services

- Advice for individual members by way of the guidance and ethics telephone helpline and response to written queries
- The exercise of the good offices of the Law Society to assist the resolution of problems and disputes arising between solicitor colleagues and between solicitors and other professionals. This service includes the provision of a mediator to work directly with the parties if this is required
- Meetings with solicitors setting up as sole practitioners with their first practising certificate. Two members of the committee and an investigating accountant attend to discuss the solicitor's proposal for practice and to offer assistance
- PR initiatives, including supplying information to the website on an on-going basis, to ensure awareness among members of the services provided by the committee and of their projects
- Monitoring and developing policy on matters of practice and conduct not within the remit of other committees.

Current projects

- Publication of the second edition of *A guide to the professional conduct of solicitors in Ireland*
- Compilation of panel of solicitors to be available to assist other solicitors about whom complaints are made to the Law Society
- Monitoring legal expenses insurance schemes
- Drafting regulations relating to prohibition on loans to clients
- Obtaining feedback in relation to reference material in the *Law directory 2000* and reviewing material for publication in the *Law directory 2001*.

New projects

- Quality statement for solicitors' firms
- Regulation of e-mail call-signs
- Information for solicitors setting up in practice
- Updating all publications for which the committee is responsible.

The committee welcomes observations from members on any of the matters being considered or on any other matter within its remit. Members may telephone or write to the secretary to the committee, Therese Clarke, at the Law Society, 33 Manor Street, Dublin 7, tel: 01 868 1220, fax: 01 868 1232.

Law directory 2000

There is now a very much expanded *Professional and general information* section in the *Law directory* (section 10: page 695). Charts and tables in the following areas have been brought together to provide relevant information in an easy-to-access, quick-reference format for busy practitioners:

- Court fees and excise duty
- Capital gains tax
- District Court scale fees
- Costs and summary judgments in Circuit Court
- Criminal legal aid fees
- Disclosure of reports and statements in litigation
- *Road Traffic Acts* penalties
- Agencies covered by the *Freedom of Information Act, 1997*.

The material has been collated by the committee under the chairmanship of Keenan Johnson, who believes this section will be of very practical assistance for solicitors. In addition, the periods of limitation and other general information which appeared in earlier editions remains. The committee is also indebted to Mary Kinsella for involvement in the compilation and presentation of the material.

Suggestions for other items that might be included in the 2001 directory should be sent to Therese Clarke, Secretary, Guidance and Ethics Committee, at the Law Society, tel: 01 868 1220.

Guidance and Ethics Committee

EMPLOYMENT LAW

An approach has been made to the committee by representatives of the Social Welfare Services in Dun Laoghaire which operates a small business support scheme (SBSS). The committee was asked if solicitors in the South Dublin/North Wicklow area might be interested in joining a panel for referral from the SBSS.

The SBSS provides a consultancy service to start-up businesses. It has a special employer-support service for businesses taking on employees for the first time. The assistance it provides includes financial, management and general business advice.

It is not equipped to provide legal advice and so would like to be able to refer its clients to a panel of solicitors who would, in the first instance, provide certain basic legal services for a nominal fixed fee. The proposal is that solicitors joining the panel would agree to give an initial two-hour consultation for a fee of £100 plus VAT. The solicitor would give advice on employment and health and safety issues as well as basic company and/or partnership law.

Practitioners interested in this scheme should contact Geraldine Hynes, Employment Law Committee, Law Society, Blackhall Place, Dublin 7, tel: 01 672 4800, e-mail: g.hynes@lawsociety.ie.

Employment law wallchart

The committee has produced a *Guide to employment law* in the form of a wallchart. The chart provides an overview of current employment legislation and is aimed at those who are not specialist employment lawyers. A complimentary copy has been sent to every solicitor's office and further copies can be obtained from Maureen Prouse in the Law Society's Publications Department on tel: 01 672 4905. Extra copies cost £5 each, including postage and packing. The text of the wallchart is accessible on the Law Society's website at *www.lawsociety.ie*.

Employment Law Committee

CRIMINAL LAW

Criminal Justice (Legal Aid) (Amendment) Regulations, 1999

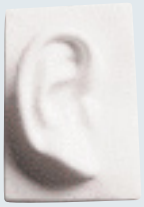
Number: SI 385/1999

Contents note: Provide for an increase of 1.5% with effect from 1/7/1999 and 1% with effect from 1/4/2000 in the fees payable under the criminal legal aid scheme to solicitors for attendance in the District Court and for appeals to the Circuit Court, and to solicitors and barristers in respect of essential visits to prisons and other custodial centres (other than Garda stations) and for certain bail applications

Prison visit fees

In the December 1999 issue of the *Gazette* (page 33), it was inadvertently stated that the new procedure for claiming prison fees had been introduced with effect from 1 October 1999. In fact, the new procedure was introduced with effect from **1 October 1998**.

Criminal Law Committee



Practice notes

NEW STAMPING SYSTEM

The Conveyancing Committee has been asked by the Revenue Commissioners to remind the profession that the new computerised system for stamping deeds will shortly be implemented by them. It is proposed to phase in the new system and for a while both the old and new systems will operate in parallel.

The Revenue Commissioners have asked us to remind solicitors that there will be some changes in practice including the following:

1. PD stamping may only take place at the same time as the deed is stamped. Solicitors must therefore now lodge a PD form in appropriate cases along with the deed. In cases where solicitors do not have the PD form available but there is a danger of the time limit running out for stamping the deed without penalty, it will be possible to pay the amount of the duty and obtain a receipt for payment. Note that the deed will not be stamped until it is produced at a later date, together with the receipt for payment and the PD form when available. The Revenue Commissioners have told the committee that this facility to pay stamp duty where the PD form is not yet available is being provided as a concession to the profession to alleviate difficulties which practitioners may initially encounter with the changeover to the new system. However, the Revenue have indicated to the Conveyancing Committee that this concession will be withdrawn if it is abused by the profession. The committee points out that the new requirement involves only one visit to the Stamping Office and may therefore be more cost-efficient for solicitors in any event.
2. Solicitors can still have deeds assessed for stamp duty. A printout will be given showing the assessment. However, the details of the deed will be entered in the system and the Revenue Commissioners will follow up with the solicitor thereafter for payment of the stamp duty on the deed.
3. Marking, stamping and PD stamping will now all take place at the same counter. The details of the deed are entered by the Revenue official into the computer there and then. The Revenue Commissioners estimate that the time taken to stamp a deed may now be a little longer. They asked for consideration and patience with staff while training on the new system in the initial stages.
4. Each solicitor will have a code number on the system. All deeds lodged by the solicitor (either personally or by a legal agent on behalf of the solicitor) will be entered using the solicitor's own code. The system records the solicitor of record as the taxpayer's agent. If solicitors wish (but it is not obligatory), they may include in their correspondence reference something to indicate in relevant cases that a town agent acted on their behalf. Note, however, that the maximum length of the correspondence reference is 30 characters, including spaces. Each document will now have a unique identification number which will be franked on the back of the cheque/draft used to pay the duty as well as on the deed itself. Therefore, if a deed is lost, it will be easier to ascertain that the stamp duty was paid. Solicitors should note that one cheque can be used to stamp a number of deeds.

The committee would refer practitioners to its previous practice note on the new system for stamping deeds which was published in the November 1999 issue of the *Gazette* for further information on the new stamp. In mid-February, the Revenue Commissioners also circulated an information leaflet to all solicitors (code SD 8) entitled *Stamp duty: new stamping system*. If any further information is required on the system itself, solicitors should contact the stamping branch of the Revenue Commissioners.

If solicitors encounter difficulties in practice with the new system, they should contact the Conveyancing Committee of the Law Society.

Conveyancing Committee

DISCHARGE OF PROBATE TAX

Following representations made by the committee on foot of difficulties encountered with bank facilities for the discharge of probate tax, the Bank of Ireland has agreed to issue the following instruction to branches:

'Where a solicitor produces a copy of the self-assessment probate tax return and a letter requesting issue of a draft payable to the Revenue Commissioners, branches can release up to £10,000 (2% of an estate valued at £500,000) where there are sufficient funds available in the deceased's accounts'.

Practitioners should note that the bank has made it clear that where the amount involved is in excess of £10,000, branches will have to refer the matter to their line management.

Probate, Administration and Taxation Committee

TAX CLEARANCE PROCEDURES FOR LEGAL AID PANEL APPLICANTS

Practitioners are advised that where assistant solicitors have obtained tax clearance certificates for the purposes of inclusion on the criminal legal aid scheme panel, it is also necessary for the principal of the firm, or, where there are a number of partners, each partner of the firm, to obtain a general tax clearance certificate. Members are referred to the provisions of the *Criminal Justice (Legal Aid) (Tax Clearance Certificate) Regulations, 1999* for full details.

Criminal Law Committee

NOTICES ISSUED BY THE SOCIETY PURSUANT TO SECTION 10 OF THE *SOLICITORS (AMENDMENT) ACT, 1994*

Solicitors are asked to comply promptly with notices issued pursuant to the provisions of section 10 of the *Solicitors (Amendment) Act, 1994*. These notices require a solicitor against whom a complaint has been made to furnish their file to the Law Society.

Failure to comply with the notice is *prima facie* misconduct as well as an offence under the Act. Section 11 of the Act provides that a solicitor can, within 21 days, appeal to the High Court against the service of a section 10 notice.

LEGISLATION UPDATE: ACTS PASSED IN 1999

This list was updated by the Law Society Library on 15 February

Appropriation Act, 1999
Number: Act 34/1999
Minister/Department: Minister for Finance
Date enacted: 16/12/1999
Commencement date: 16/12/1999
Explan-memo: No

Architectural Heritage (National Inventory) and Historic Monuments (Miscellaneous Provisions) Act, 1999
Number: Act 19/1999
Personal author: Senator D Cassidy
Date enacted: 6/7/1999
Commencement date: 6/7/1999
Explan-memo: Yes, with the *Architectural Heritage (National Inventory) and Historic Monuments (Miscellaneous Provisions) Bill, 1998*

Bretton Woods Agreements (Amendment) Act, 1999
Number: Act 4/1999
Minister/Department: Minister for Finance
Date enacted: 7/4/1999
Commencement date: 7/4/1999
Explan-memo: Yes, with the *Bretton Woods Agreements (Amendment) Bill, 1998*

British-Irish Agreement Act, 1999
Number: Act 1/1999
Minister/Department: Taoiseach
Date enacted: 22/3/1999
Commencement date: Commencement order/s to be made (per s1(2) of the Act). 2/12/1999 for all sections of the Act, except for ss11, 13 and 41 which will come into operation on 1/4/2000, and ss36, 37, 38(1) and 38(2) for which no commencement date has been appointed (per SI 377/1999)
Explan-memo: No

British-Irish Agreement (Amendment) Act, 1999
Number: Act 16/1999
Minister/Department: Minister for Finance
Date enacted: 25/6/1999
Commencement date: Commencement order to be made (per s3(3)). 2/12/1999 (per SI 378/1999)
Explan-memo: No

Broadcasting (Major Events Television Coverage) Act, 1999
Number: Act 28/1999
Minister/Department: Minister for Arts, Heritage, Gaeltacht and the Islands
Date enacted: 13/11/1999
Commencement date: 13/11/1999
Explan-memo: Yes, with the *Major Events Television Coverage Bill, 1999*

Companies (Amendment) Act, 1999
Number: Act 8/1999
Personal author: Senator D Cassidy
Date enacted: 19/5/1999
Commencement date: 24/5/1999 (per SI 144/1999)
Explan-memo: Yes, with the *Companies (Amendment) (No 3) Bill, 1999*

Companies (Amendment) (No 2) Act, 1999
Number: Act 30/1999
Minister/Department: Tánaiste and Minister for Enterprise, Trade and Employment
Date enacted: 15/12/1999
Commencement date: Commencement order/s to be made (per s1(4)). 21/12/1999 for part I of the Act (preliminary and general) and certain provisions of part III (ss33(2), 33(3) and 33(7)) (request not to avail of exemption from statutory audit requirements being provided for in this part) and certain provisions of part IV (ss40, 41, 52, 53 and s54 in part) (miscellaneous provisions); 1/2/2000 for part II of the Act (amending the law in relation to examiners) and the second schedule in so far as it relates to part II; 21/2/2000 for the remaining provisions of part III (removal of statutory audit requirements); 24/12/2000 for s54(1)(a) in so far as it is not already in operation (per SI 406/1999)
Explan-memo: Yes, with the *Companies (Amendment) (No 2) Bill, 1999*

Courts (Supplemental Provisions) (Amendment) Act, 1999
Number: Act 25/1999
Minister/Department: Minister for Justice, Equality and Law Reform
Date enacted: 13/7/1999
Commencement date: 13/7/1999
Explan-memo: Yes

Criminal Justice Act, 1999
Number: Act 10/1999
Personal author: Senator D Cassidy
Date enacted: 26/5/1999
Commencement date: 26/5/1999 for part VI; commencement order/s to be made for other sections (per s2(2)). 26/5/1999 for parts I and II (per SI 154/1999); 1/10/1999 for part IV (amendments relating to confiscation orders) and part V (guilty pleas and certificate evidence) (per SI 302/1999)
Explan-memo: Yes, with the *Criminal Justice (No 2) Bill, 1997*, and with the *Criminal Justice Act, 1999*.

Criminal Justice (Location of Victims' Remains) Act, 1999
Number: Act 9/1999
Minister/Department: Minister for Justice, Equality and Law Reform
Date enacted: 19/5/1999
Commencement date: 26/5/1999 (per SI 155/1999)
Explan-memo: Yes

Declaration under Article 29.7 of the Constitution (Extension of Time) Act, 1999
Number: Act 12/1999
Minister/Department: Taoiseach
Date enacted: 2/6/1999
Commencement date: 2/6/1999
Explan-memo: No

Electricity Regulation Act, 1999
Number: Act 23/1999
Minister/Department: Minister for Public Enterprise
Date enacted: 11/7/1999
Commencement date: 14/7/1999 (per SI 213/1999); 14/7/1999 appointed as the establishment day (per SI 214/1999)
Explan-memo: Yes, with the *Electricity Regulation Bill, 1998*

Finance Act, 1999
Number: Act 2/1999
Minister/Department: Minister for Finance
Date enacted: 25/3/1999
Commencement date: Various – see Act. 1/7/1999 for s117(1) (rate of excise duty on bets) (per SI 178/1999)
Explan-memo: Yes

Fisheries (Amendment) Act, 1999
Number: Act 35/1999
Minister/Department: Minister for the Marine and Natural Resources
Date enacted: 17/12/1999
Commencement date: Commencement order/s to be made (per s1(2)). 20/12/1999 for all sections of the Act, except s23 (per SI 419/1999); 24/1/2000 for s23 of the Act (per SI 21/2000)
Explan-memo: Yes

Health (Eastern Regional Health Authority) Act, 1999
Number: Act 13/1999
Minister/Department: Minister for Health and Children
Date enacted: 2/6/1999
Commencement date: 2/6/1999; establishment day order to be made (per s3(1))
Explan-memo: Yes, with the *Health (Eastern Regional Health Authority) Bill, 1998*

Horse and Greyhound Racing (Betting Charges and Levies) Act, 1999
Number: Act 24/1999
Minister/Department: Minister for Agriculture and Food
Date enacted: 11/6/1999
Commencement date: 25/7/1999 (per SI 211/1999)
Explan-memo: Yes

ICC Bank Act, 1999
Number: Act 29/1999
Minister/Department: Minister for Finance
Date enacted: 15/12/1999

Commencement date: Commencement order/s to be made per s10(3)
Explan-memo: Yes

Immigration Act, 1999
Number: Act 22/1999
Minister/Department: Minister for Justice, Equality and Law Reform
Date enacted: 7/7/1999
Commencement date: 7/7/1999 for all sections except s11 (amendment of *Refugee Act, 1996*), for which commencement order/s will be made (per s11(2)); 20/1/2000 for s11 (other than para 11(1)(p)) (per SI 9/2000)
Explan-memo: Yes

Intoxicating Liquor Act, 1999
Number: Act 32/1999
Minister/Department: Minister for Justice, Equality and Law Reform
Date enacted: 15/12/1999
Commencement date: 15/12/1999
Explan-memo: Yes

Irish Sports Council Act, 1999
Number: Act 6/1999
Minister/Department: Minister for Tourism, Sport and Recreation
Date enacted: 18/5/1999
Commencement date: 18/5/1999; 1/7/1999 appointed as the establishment day (per SI 173/1999)
Explan-memo: Yes, with the *Irish Sports Council Bill, 1998*

Local Elections (Disclosure of Donations and Expenditure) Act, 1999
Number: Act 7/1999
Minister/Department: Senator D Cassidy
Date enacted: 18/5/1999
Commencement date: 18/5/1999
Explan-memo: Yes, with Bill as introduced and with Bill as passed by Seanad Éireann

Local Government (Planning and Development) Act, 1999
Number: Act 17/1999
Personal author: Senator D Cassidy
Date enacted: 30/6/1999
Commencement date: 1/1/2000 (per s42(3))
Explan-memo: Yes, with the *Local Government (Planning and Development) Bill, 1998*

Minerals Development Act, 1999
Number: Act 21/1999
Personal author: Senator D Cassidy
Date enacted: 7/7/1999
Commencement date: 7/7/1999
Explan-memo: Yes

National Disability Authority Act, 1999
Number: Act 14/1999
Personal author: Senator D Cassidy
Date enacted: 8/6/1999
Commencement date: 8/6/1999; establishment day order to be made (per s3)
Explan-memo: Yes, with the *National Disability Authority Bill, 1998*

Postal and Telecommunications Services (Amendment) Act, 1999
Number: Act 5/1999
Minister/Department: Minister for Public Enterprise
Date enacted: 7/4/1999
Commencement date: Commencement order/s to be made (per s11(2) of the Act). 9/4/1999 for all provisions of the Act except for the repeal under ss3(1) and 3(2) of certain of the provisions listed in the first and second schedules respectively, and s10 concerning the non-application of certain Acts to Bord Telecom Éireann plc; 9/4/2000 for the repeal of s40(4) of the *Postal and Telecommunications Services Act, 1983*, under s3(1) (per SI 87/1999); 15/7/1999 for s10 of the Act and for the repeal of certain provisions under ss3(1) and 3(2) of the Act (per SI220/1999)
Explan-memo: Yes, with the *Postal and Telecommunications Services (Amendment) Bill, 1998*

Qualifications (Education and Training) Act, 1999
Number: Act 26/1999
Personal author: Senator D Cassidy
Date enacted: 13/7/1999
Commencement date: Commencement order/s to be made (per s1(2))
Explan-memo: Yes

Regional Technical Colleges (Amendment) Act, 1999
Number: Act 20/1999
Minister/Department: Minister for Education and Science
Date enacted: 6/7/1999
Commencement date: 6/7/1999; establishment day order to be made (per s2)
Explan-memo: Yes

Road Transport Act, 1999
Number: Act 15/1999
Minister/Department: Minister for Public Enterprise
Date enacted: 23/6/1999
Commencement date: Commencement order/s to be made (per s24(1)). 30/8/1999 for all sections of the Act, other than ss4 to 8, 11, 16 and 23 (per SI 264/1999)
Explan-memo: Yes, with the *Road Transport Bill, 1998*

Sea Pollution (Amendment) Act, 1999
Number: Act 18/1999
Minister/Department: Minister for the Marine and Natural Resources
Date enacted: 30/6/1999
Commencement date: Commencement order/s to be made (per s19(3)). 1/9/1999 (per SI 295/1999)
Explan-memo: Yes, with the *Sea Pollution (Amendment) Bill, 1998*

Social Welfare Act, 1999
Number: Act 3/1999
Minister/Department: Minister for Social, Community and Family Affairs
Date enacted: 1/4/1999
Commencement date: Various – see Act. 7/4/1999 for s22 (per SI 89/1999); 7/4/1999 for part IV (per SI 90/1999); 6/4/1999 for ss19, 21, 23 and 24 (per SI 91/1999); 3/6/1999 for s11 (per SI 160/1999); 5/8/1999 for ss10, 12, 13 (per SI 259/1999); 1/8/1999 for s20 (per SI 260/1999)
Explan-memo: Yes

Stamp Duties Consolidation Act, 1999
Number: Act 31/1999
Minister/Department: Minister for Finance
Date enacted: 15/12/1999
Commencement date: 15/12/1999
Explan-memo: Yes

Temporary Holding Fund for Superannuation Liabilities Act, 1999
Number: Act 33/1999
Minister/Department: Minister for Finance
Date enacted: 16/12/1999
Commencement date: 16/12/1999
Explan-memo: Yes

Twentieth Amendment of the Constitution Act, 1999
Minister/Department: Minister for the Environment and Local Government
Date enacted: 23/6/1999
Commencement date: 23/6/1999
Explan-memo: Yes, with the *Twentieth Amendment of the Constitution (No 2) Bill, 1999*

Údarás na Gaeltachta (Amendment) Act, 1999
Number: Act 11/1999
Minister/Department: Minister for Arts, Heritage, Gaeltacht and the Islands
Date enacted: 26/5/1999
Commencement date: 26/5/1999
Explan-memo: No

Údarás na Gaeltachta (Amendment) (No 2) Act, 1999
Number: Act 27/1999
Minister/Department: Minister for Arts, Heritage, Gaeltacht and the Islands
Date enacted: 26/10/1999
Commencement date: Commencement order/s to be made for ss5, 6, 7, 8, 17(c) and 18, insofar as it provides for the repeal of s10(3) of the principal Act (*Údarás na Gaeltachta Act, 1979*) (per s19(2)); 26/10/1999 for all other sections
Explan-memo: Yes, with the *Údarás na Gaeltachta (Amendment) (No 3) Bill, 1999*

Gazette case report

Professional negligence – medical doctor – 42-year-old married man becoming ill – headaches – should the doctor have questioned the patient more thoroughly? – wife telephoning doctor on several occasions – reliance to be placed on such telephone calls from relatives – duty of senior house officer for health board – death of patient – under what circumstances should a house officer be required to seek the advice of someone more senior?

CASE

***Carmel Collins v Mid-Western Health Board and O'Connor*, High Court, before Mr Justice Johnson, judgment of 14 May 1996; appeal to the Supreme Court, judgment delivered on 12 November 1999.**

THE FACTS

In 1991, James Collins was a 42-year-old man, married to Carmel, with three children. He was a fit, healthy man who worked in the building business with his brother, mainly as a blocklayer. He could not recollect being sick in his life and was generally reluctant to attend medical doctors.

On 20 February 1991, while at work, Mr Collins suffered a sudden blinding headache. He was unable to work for the remainder of the day and his brother brought him home. On arrival at his house, he indicated to his wife that he had suffered a headache and indicated that he wanted to go to see the doctor. He suggested he would go to see Dr Ray O'Connor who lived nearby and whose car he had seen outside the doctor's house when he was coming home. It was nearly 5pm and he asked his wife to telephone the doctor, who normally finished his surgery at that time, to ascertain whether he could wait to see him.

Mr Collins was examined by Dr O'Connor and found to be complaining of the symptoms of an upper respiratory tract infection, often described in general terms as a head cold. The doctor advised that it would take two to three days to run its course and it was not necessary to prescribe any medication. The headaches continued until the following Saturday, 23 February 1991. Carmel Collins was very anxious about her husband, who was getting no better. She asked Dr O'Connor whether he was absolutely sure that her husband had a viral flu, something which her husband had told her had been the doctor's diagnosis. She told the doctor that her husband had been in bed for three days, and that she really was concerned. The doctor said that the flu would take its course.

Mr Collins got up on Sunday morning and attempted to play golf but got a dizzy spell and returned home. The next day, Monday 25 February, Mrs Collins rang Dr O'Connor at 8am and said that her husband was 'very bad'. Dr O'Connor came around almost immediately and examined Mr Collins again. It would appear that Mr Collins had covered the window with a sleeping bag and this was removed as Dr O'Connor came into the room. Mr Collins's sole complaint appeared to have been a headache, which was made worse by television. Following his examination, Dr O'Connor was of the opinion that Mr Collins was probably suffering from headaches caused by sinus congestion. Mr Collins subsequently attended Dr O'Connor's surgery on 28 February, where he provided a blood sample for a cholesterol test.

Dr Nur

James Collins did not get any better. On 17 March 1991, Mrs Collins again rang Dr O'Connor. The doctor was not working on that day but had a locum. Mrs Collins decided that there would be no point in her husband going to see the locum. However, the following day, Mr Collins did go and see another general practitioner in the locality, Dr Maurice O'Brien. Dr O'Brien was of the opinion that Mr Collins needed a CT scan.

At 5pm on 20 March, Mr Collins was brought to the outpatients' clinic in the hospital, the responsibility of the Mid-Western Health Board, where he saw a senior house officer, Dr Nur. After a full examination, Dr Nur was of the opinion that Mr Collins needed further examinations and said that he would make an appointment for Mr Collins to see a specialist. Meanwhile, he sent him home.

Mrs Collins immediately contacted Dr O'Brien. On the following day, Dr O'Brien sought an assurance from Dr Nur that Mr Collins would be admitted. On 22 March at about 2am, Mr Collins appeared to have a further serious attack and was immediately brought into hospital as an emergency. His condition was serious. A lumbar puncture was carried out at 4am and a CT scan at 10am. He was diagnosed as having suffered a subarachnoid haemorrhage. He was then transferred to Cork. There, he came under the care of Mr Marks, a consultant neurosurgeon. A further CT scan was carried out sometime in the late afternoon which was a similar pattern to the first one. At this stage, James Collins was unconscious and had no real hope of recovery. He died on 27 March 1991.

Civil proceedings

Carmel Collins subsequently brought proceedings on her own behalf and on behalf of her three children against the Mid-Western Health Board and Dr O'Connor for negligence. Her claim was divided into three parts. The first part was a claim against Dr O'Connor. It was argued that he was negligent at the consultation on 20 February 1991. In the alternative, it was argued that, even if he was not negli-

gent on that occasion, he ought subsequently to have referred the patient to a specialist. The second claim was against the Mid-Western Health Board because of the failure of Dr Nur to admit the patient to the hospital on 20 March 1991. Finally, there was another claim against the hospital for negligence relating to the manner in which the patient was treated when he was admitted on 22 March.

The case came before Johnson J, who delivered judgment on 14 May 1996 and found no negligence against the defendants. Mrs Collins and her three children appealed to the Supreme Court.

The case came for hearing on appeal before five judges in the Supreme Court: Hamilton CJ, Barrington, Keane, Lynch and Barron JJ. Barron J, in a reserved judgment, delivered the principal judgment on 12 November 1999. Keane J also delivered a concurring judgment in which he agreed with the judgment of Barron J.

THE JUDGMENT

Barron J set out the facts of the case and noted that the High Court had held that Dr O'Connor was not told of the sudden onset of headache and had no reason as a result of his surgery consultation to go beyond his diagnosis of an upper respiratory tract infection. The High Court had found that in the course of Mr Collins's visit to the surgery, Dr O'Connor had asked all the correct questions. That finding was made in the light of expert medical evidence that a general practitioner in a surgery visit had an obligation not only to listen to what the patient said but also to ask appropriate questions. Barron J considered this statement no more than a reiteration of the general principle that it is the duty of a professional person to satisfy himself or herself that he or she knows what is being asked of him and that it is proper in the interests of the patient or client to act on such instructions.

The test of the obligation of the general practitioner, according to the Supreme Court, was whether a reasonably prudent general practitioner exercising ordinary care would have acted as Dr O'Connor did in the circumstances. The reality of the test is to enquire whether or not the general practitioner acted reasonably in the circumstances as known to him. Mrs Collins argued that the doctor had failed in his duty to the patient by not taking into account the circumstances in which the visit was arranged and what was said by Mrs Collins in arranging the visit.

Reference was made to expert evidence as to what was expected of a general practitioner. There was evidence that 80% of a diagnosis was gained from history. There was also expert evidence to the effect that it is the responsibility of the general practitioner to ask questions of the patient to elucidate the details of the symptoms. Not to do so would constitute neglect. It was not for the patient to volunteer everything that they could think of.

Barron J considered that severe headache in a person over 35 is something which should be considered carefully. Headache in a patient without an obvious cause, or one which persists for some time, or one which interferes with the patient's way of life, all suggest the need for referral. What should be enquired about is the quality of the headache, its severity, its location, its duration, the type of onset, as well as any previous history, whether there had been any change in behaviour, any memory loss, any vomiting, any sensitivity to light or any other change in the way of life. Barron J considered that much of the evidence adduced on behalf of Mrs Collins concentrated on the suddenness of the onset of the headache suffered by her husband. With knowledge of such onset, it was argued that Dr O'Connor was negligent not to have referred Mr Collins for further examination by a specialist. Barron J considered that to some extent this clouded the issue. Dr O'Connor accepted that he knew the import of the sudden onset of headache in his patient and, had he known of it, would have referred his patient immediately.

The real issue, since Dr O'Connor did not discover that there had been a sudden onset of severe headache, was whether or not he ought to have ascertained that fact. There was expert evidence to state that Dr O'Connor had asked the proper questions.

Barron J then referred to expert evidence by Professor Behan, a consultant neurologist with several appointments in Glasgow. Professor Behan was of the view that the patient had clearly not been suffering from an upper respiratory tract infection and that Dr O'Connor did not take a proper history. He said there was a battery of standard questions which should be asked in relation to headaches and that the patient should have been referred to a specialist.

He noted that on 20 February 1991 Dr O'Connor asked the patient a series of questions relating to his past medical history and other matters which might affect any diagnosis. The court considered that the effect of the evidence suggested that simple questions should be asked whenever pain was a significant presenting feature and that a doctor cannot rely only on what he has been told, when it is reasonable to ask further questions. The evidence also suggests that where there are inconsistencies between what the doctor is told and what he finds, this is a further ground for making further enquiry.

Barron J noted that the High Court judge found Dr O'Connor to be a careful and considerate doctor, and that the High Court had found that Dr O'Connor had:

- Asked the correct questions in the course of taking the history in his examination
- Recorded accurately the history which was given to him by the patient, and
- Having regard to the condition of the patient at the time, there was no need for the doctor to go further to take a history.

The judge accepted that there were telephone calls from Mrs Collins for which the doctor had no recollection. The High Court judge had found that the patient had failed to communicate to either Dr O'Connor, Dr O'Brien or Dr Nur the following facts: the sudden onset of the headache; its severity; and the persisting disabling effects of the headache.

THE TELEPHONE CALLS

Barron J in the Supreme Court considered that if the trial judge was entitled to rely solely upon what occurred in the surgery visit on the 20 February 1991 then his findings of no negligence could not be disturbed. However, in the Supreme Court's view, the telephone calls should not have been ignored. Barron J was considerably influenced by the fact that when the visit to the doctor was preceded by a telephone call which suggested urgency, the doctor should have had regard to all those circumstances and what was said in the course of these telephone calls.

In the first place, the doctor should have asked himself whether somebody who never went to a doctor would come to him as a matter of urgency for

what was a mild infection. Barron J considered that Dr O'Connor should have been concerned as to why Mrs Collins had highlighted the question of headache when her husband had not done so. The Supreme Court considered that the discrepancy between what Dr O'Connor was told and the reason for the telephone call and its content must have put the doctor on notice to probe further. Barron J had no doubt that had the doctor asked even a couple of simple questions, he would have been told of the sudden onset and severity of the headaches which would have led to referral.

The Supreme Court considered that the circumstances of the telephone call from Mrs Collins on 20 February 1991, and what she said, would also have been a reason to seek to probe beyond what Dr O'Connor had been told by his patient. It is common-sense that the patient may leave out something which is not important to him but which, if the doctor had been told, would have been important.

The Supreme Court considered that the case essentially related to the headache, but the probing should have been in regard to all the symptoms of which complaint had been made. In the ordinary case, one or two questions would probably be sufficient. In this case, because of the telephone call and what the doctor had been told, there should also have been a focus on headaches with a series of relevant questions.

Barron J stated that the conclusion which had been drawn from these matters, having regard to the evidence given or accepted on behalf of the defence, is that Dr O'Connor fell below the standard required of him. In essence, the question in relation to 20 February 1991 was whether Dr O'Connor was entitled to ignore completely the telephone call to him from Mrs Collins approximately ten minutes or so, or perhaps less, before the patient's visit to the surgery. Barron J stated that he could not see how the answer could be other than no. Similarly, on 23 and 25 February 1991, the doctor was not entitled to disregard totally the telephone calls made by Mrs Collins on those days as well as on 20 February.

The Supreme Court considered that Dr O'Connor was not expected to make the correct diagnosis but he was expected to be in a position to know when his patient should be referred to a specialist. History was said to be 80% of diagnosis. So if no proper history in the sense of correct questions is taken, the chance of an accurate diagnosis or decision to refer is seriously restricted.

The question arose, according to the Supreme Court, of whether Dr O'Connor was entitled to rely upon what he was told by the patient. Obviously yes, but that did not absolve him from asking questions to establish that his patient had left nothing out that he as a doctor, would have considered material to a proper diagnosis. Simple questions would probably be all that was necessary to satisfy the doctor that what he had been told did not mask anything else.

The court considered this was not just a simple surgery visit; it was preceded by a telephone call suggesting urgency and which at the same time gave the doctor two further pieces of information. First, Mr Collins's condition was likely to be serious, because he did not go to doctors and, second, that the principal symptom was severe headache. Even without the added element of urgency, both of these matters needed to be taken into account. In Barron J's view, to have been satisfied with the diagnosis of upper respiratory tract infection was negligence.

The Supreme Court considered that at the High Court hearing it was common case that the patient had suffered serious trauma to the brain on 20 February 1991. It was all too easy to assume, therefore, that the doctor was negligent because he failed to diagnose it. The court considered that was not the test. The questions to be asked were: did the doctor do all that could reasonably be expected of a reasonably prudent general practitioner exercising ordinary care and, if not, would what he should have done have led to a correct diagnosis either by him or by a specialist to whom he would have been referred?

ADDITIONAL INFORMATION

The Supreme Court considered that where information is supplied by someone other than the patient, whether in arranging the consultation or before or after a visit, it should be taken into account and, if necessary, further questions asked. This was particularly so when, as in this case, there was a discrepancy between what was said by the patient, on the one hand, and the family member, on the other.

The failure to heed what was said by Mrs Collins in each of her three telephone calls, and to follow it up, was negligence. In the circumstances, the court found that Dr O'Connor was not entitled to confine himself to what he was told by the patient and what he saw. He had an obligation to consider the circumstances of several telephone calls from Mrs Collins and what she said in the course of each call. Had the doctor not so confined himself, he would have realised the need to refer the patient to a specialist. What would then have happened and what recovery the patient would have made is a matter which remained to be determined.

The Mid-Western Health Board

The Supreme Court considered the issue in relation to the Mid-Western Health Board and Dr Nur. The case for Mrs Collins was that Dr Nur should have admitted her husband as an in-patient. At the time of his examination in the casualty department of the hospital, Dr Nur was aware that Dr O'Brien, the general practitioner, had formed the opinion that the patient should be referred for expert opinion. Accordingly, Dr Nur started his examination with this knowledge.

Dr Nur formed the opinion that the patient required further examination. It did not seem to him that there was a matter of extreme urgency. The Supreme Court considered that what was significant was the authority vested in Dr Nur, a senior house officer in the accident and emergency unit. While he could refuse admission, he could not admit a patient without a second opinion. Again, Dr O'Brien, the general practitioner, in his introductory letter referred to the possibility of something sinister underlying the patient's symptoms, but Dr Nur did not seek a further opinion.

Barron J considered that any system which gives absolute authority to a junior doctor is inadvisable. By its very nature, the position of a senior house officer is one where the holder is learning his profession. He must meet from time to time cases with which he is not familiar and in which he would welcome the opinion of a senior. If he is given absolute authority, there is a danger that he may miss matters which his seniors would not. The court considered that all the indications were that Dr Nur ought to have referred the patient to the medical team, having regard in particular to the letter written by Dr O'Brien.

In the Supreme Court's view, Dr Nur was wrong not to do so.

Dr Nur was, in effect, ignoring Dr O'Brien's concerns and treating the case as calling solely for his own diagnosis. The court considered that perhaps he felt bound by the system, in which case it was the authors of the system who must take the blame. In either case, there was a breach of the duty of care for which the Mid-Western Health Board was liable.

The Supreme Court considered that the tort of negligence is not committed unless there is both a breach of duty and loss flowing from it. Although Barron J stated he used the word 'negligent' to describe conduct in breach of a duty to take care, that was a colloquial use of the word. Whether loss flowed from the breaches of care which had been identified and, if so, to what extent, was expressly left over by the parties to be determined only in the event of breach of duty being established. The Supreme Court stated that breach of duty had been established and allowed the appeal.

Practices approved by colleagues

Keane J, in a concurring judgment, referred to the case of *Dunne v The National Maternity Hospital* ([1989] IR 91). Finlay CJ, speaking for the court, had set out the principles of law which are applicable to allegations of medical negligence. Keane J quoted from the then Chief Justice as follows:

'If a medical practitioner charged with negligence defends his conduct by establishing that he followed a practice which was general, and which was approved of by his colleagues of similar specialisation and skill, he cannot escape liability if in reply the plaintiff establishes that such a practice has inherent defects which ought to be obvious to any person giving the matter due consideration'.

Keane J stated that in general a lay tribunal would be reluctant to condemn as unsafe a practice which has been universally approved in a particular profession. Keane J stressed that the courts must reserve the power to find as unsafe practices that have been generally followed in a profession.

Keane J considered that the decision in this case should not be taken as encouraging general practitioners to send patients to hospital where that was unnecessary. It was clearly necessary in the present case that the patient should have be admitted to hospital and investigated. Keane J considered that there was no reason to doubt the importance of having a filtering system in a hospital operated by junior doctors which ensures that the limited time and resources of the hospital are not overtaxed by the admission of relatively minor cases. He stated that on the facts of the present case it was evident that the system in operation failed to segregate a case which plainly required expert investigation from the more routine and even trivial cases.

Liam Gaynor, Gerald Tynan, David Kelly and Michael McMahon, instructed by Twomey Scott & Co, Solicitors, Limerick, represented Mrs Collins and her three children.

Murray McGrath, Eugene Gleeson, Paul Sreenan and Nuala Butler, instructed by Hayes & Sons, Dublin, represented the defendants. G

This summary was compiled by Dr Eamonn Hall, Solicitor, from the judgments of the High and Supreme Court.

SUPREME COURT ORDER

The Supreme Court allowed the appeal of Mrs Collins and remitted the matter to the High Court to determine whether loss flowed from the breaches of duty of the Mid-Western Health Board on 20 March 1991 and of Dr O'Connor on 20 February 1991, 23 February and 25 February 1991, or either of them, and, if so, the extent of such loss.

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News from Ireland's on-line legal awareness service
Compiled by John X Kelly of FirstLaw

COMMERCIAL

Intellectual property

Registration of a trademark – opposition – similarity – confusion – deception – bona fides – Trademarks Act, 1963 – Trademarks Act, 1996 – Rules of the superior courts 1986

The applicant (Montex Holdings) had attempted to register the trademark 'Diesel' in respect of items of clothing. The second defendant (Diesel SPA) had objected to the registration. The Controller of Patents had refused the application primarily on the basis that the use of the mark by the applicant would cause deception and confusion among a substantial number of people. The applicant appealed the decision of the controller to the High Court. O'Sullivan J held that the registration of a trademark would be refused where its registration would be likely to cause confusion or deception. There was no need to prove an additional element of blameworthiness for the registration to be refused. Accordingly, the decision of the controller declining to permit the registration of the trademark in question was upheld and the appeal was dismissed.

***Montex v Diesel*, High Court, Mr Justice O'Sullivan, 14/01/2000** [FL2211]

CONSTITUTIONAL

Right to speedy trial

Criminal law – prohibition – prejudice – right of the applicant to an expeditious trial – delay in prosecuting offences – whether delay involved was inordinate and inexcusable – whether applicant entitled to have prosecution of the alleged offences prohibited – Forgery Act, 1913 – Larceny Act 1916 – Larceny Act, 1990 – Bunreacht na hÉireann, *articles 38.1*, *40*, *41*

The applicant had been the subject of an investigation with regard to alleged forgery offences. These offences were alleged to have taken place in 1991 and 1992. It was not until 1998 that a decision was taken to prefer charges against the applicant. The applicant sought an order prohibiting the impending prosecution. The applicant claimed that the relief should issue on the basis of the delay that had occurred and the prejudice he would suffer if the trial was to go ahead. In the High Court, Kelly J held that there was an onus on the state authorities to prosecute criminal offences as soon as practicable. Although some of the delays involved in the case were inordinate and inexcusable, the overall prejudice resulting to the applicant was not so excessive as to entitle him to a declaration prohibiting the impending prosecution. Mr Justice Kelly therefore declined to grant the relief sought.

***McKenna v DPP*, High Court, Mr Justice Kelly, 14/01/2000** [FL2190]

CONSUMER

Consumer protection

Anti-dumping proceedings – administrative proceedings – consumer organisation – 'interested party' – consumer associations entitled to intervene in anti-dumping proceedings even where products are not sold to end-users

The European Court of Justice has held that the fact that imported goods were not sold at retail level did not allow the European Commission to consider systematically that consumer associations could not be 'interested parties' in anti-dumping proceedings.

***Bureau Européen des Unions de Consommateurs (BEUC) v Commission*, Case T-256/97, 27/01/2000** [FL2173]

CRIMINAL

Judicial review

Evidence – technical proof – adjournment – discretion to adjourn generally – whether a photocopy of an order is admissible as proof of the order – whether a district judge may adjourn a criminal prosecution during the course of the prosecution case with a view to making good a procedural or technical defect in the proof of a formal document – Law of Evidence Act 1851 – Rules of the superior court 1986, *order 39*, *rule 3* – Criminal Evidence Act, 1992 – Domestic Violence Act, 1996, *section 17* – District Court rules, *order 2*, *rule 2*

That section 30 of the *Criminal Evidence Act, 1992* confers a discretion on a judge to accept copies of a document as admissible as evidence in criminal proceedings. That a district judge may determine the manner in which she shall deem a copy of a document to be duly authenticated. The first respondent indicated that she would accept a photocopy as duly authenticated and for that reason the applicant's argument is incorrectly founded. That the discretion of a district judge, provided for by order 2, rule 2 of the *Rules of the District Court*, to adjourn a case at hearing must be exercised according to fair procedures. It was apparent that the adjournment was with regard to evidence of a formal nature, affecting the technical proof of the offence and accordingly adjournment of the case was not inappropriate. The defendant had not been prejudiced in any way and the application was dismissed. That the adjournment of a case is a matter for the discretion of the district judge and it was a matter on which the appellate courts should intervene cautiously.

***Carey v Judge Hussey and DPP*, High Court, Mr Justice Kearns, 21/12/99** [FL2161]

Judicial review

Practice – certiorari – *consolidation of offences – joinder of charges – jurisdiction of the Circuit Court – whether the consolidation was lawful – whether the applicant's constitutional rights were affected – whether the mind of the jury would be confused – whether the first respondent had the power to consolidate charges* – Larceny Act 1916 – Rules of the superior courts 1986, *order 49*, *rule 6* – Criminal Justice (Administration) Act, 1924, *sections 5 and 6(3)*

The resignation of the first respondent did not affect the application as the applicant did not have a function in the proceedings. The purpose and effect of the orders of 21 July 1998 and 3 November 1998 was the joinder of the additional charges to the bill of indictment. The first respondent had jurisdiction to make the orders as provided for by the *Criminal Justice (Administration) Act, 1924*, section 5. The joinder of the charges did not damage the

applicant's constitutional rights. Held by the High Court in refusing the reliefs sought.

***Conlon v DPP*, High Court, Ms Justice McGuinness, 14/12/99** [FL2184]

DISCRIMINATION

Equal treatment

Sex discrimination – pregnant workers

Extending its case law on the protection of pregnant workers, the European Court of Justice has ruled that women could not be refused access to employment on the ground of pregnancy.

ECJ, Case C-207/98, 03/02/2000 [FL2179]

EDUCATION

Duty of parents

Constitution – rights of children to be educated – role of state in educating children – standard of education to be provided – whether Oireachtas obliged to define 'a suitable elementary standard' of education – statutory interpretation – School Attendance Act, 1926, *s4 – District Court prosecution* – Courts (Supplemental Provisions) Act, 1961, *s52* – Bunreacht na hÉireann

The respondent had been prosecuted in the District Court on a charge that she had failed to secure the attendance of her children at the local primary school and in lieu was not providing a suitable elementary education. The respondent had opted to educate her children at home. In the District Court, evidence had been tendered that the children were not receiving an adequate standard of education at home and that the respondent was therefore in breach of the *Schools Attendance Act, 1926*. On behalf of the respondent, it was argued that parents had a constitutional right to educate their children at home and in addition that, as the Oireachtas had not adequately defined the standard to be applied, a successful prosecution could not be maintained. In answering the case stated from the District Court, Geoghegan J in the High Court held that in the absence of a formal definition of the suitable standard of education, the respondent should not be prosecuted. On appeal, the Supreme Court reversed this decision, holding that it was for the district judge to decide on the balance of probabilities whether or not a suitable standard of education was being provided and thereafter to acquit or convict as the case may be.

***Best v Attorney General*, Supreme Court, 27/07/99** [FL2132]

EMPLOYMENT

Judicial review

Garda Síochána – breach of discipline – disciplinary charges – dismissal – tribunal of inquiry – Garda Síochána (Discipline) Regulations 1971 and 1989

An appeal had been brought by the applicant in respect of an earlier decision of the High Court upholding the decision of a tribunal of inquiry and the Garda Commissioner to dismiss him from the Garda Síochána. The applicant had argued that the tribunal of inquiry had improperly taken a particular charge into consideration in reaching its decision. The charge in question was later rejected by an appeals board but the findings in relation to other charges were upheld and the dismissal was affirmed. The applicant claimed that the original inclusion of the later impugned charge vitiated the whole proceedings. The Supreme Court rejected this argument, holding that, although one charge against the applicant had been dropped, the applicant had quite properly been found in breach of a distinct and more serious charge. The appeal was dismissed.

***Hynes v Garda Commissioner*, Supreme Court, 13/01/99** [FL2073]

Free movement

Employment – free movement of workers – termination of employment – compensation

Following Advocate General Fennelly's opinion, the European Court of Justice has held that national rules providing for compensation of an employee whose contract was terminated by his employer (but not when termination occurred on the employee's initiative) did not constitute an obstacle to the freedom of movement of workers.

ECJ, Case C-190/98, 27/01/2000

ENVIRONMENT

Injunction

Dredging operation – Boyne estuary – wild birds – alternate feeding ground – environmental inspection report – whether the court failed to give due consideration to the sworn evidence of the appellant in preference to an exhibited letter from Dúchas relied upon by the respondents

That the purpose of the High Court order dated 10 September 1999 was to provide a compensating feeding ground for wild birds wintering in Drogheda whose habitual site was involved in the development of Drogheda port. That the High Court judge erred in law in relying on the letter from Dúchas, having regard to the contrary averments contained in the appellant's affidavit. That complicated issues of fact arose in the proceedings and required oral testimony and should not be determined on an interlocutory application before the Supreme Court. That in circumstances where complicated issues of fact fall to be determined on an interlocutory injunction, an applicant must: 1) establish that she has a stateable case; 2) establish that the balance of convenience lies in favour of granting or withholding the order sought; and 3) establish that damages are not an adequate remedy. That the appellant had raised a stateable case and the balance of convenience favoured granting the relief sought pending the hearing of the action except as

regards opening the controlling sluice and restoring the tidal flow to Stagreenan Polder. That the case be remitted to the High Court to determine whether the respondent was providing an alternate feeding ground in accordance with the order of the High Court. Held by the Supreme Court in granting the relief sought, except as regards an injunction restoring the tidal flow to Stagreenan Polder.

***Dubsky v Drogheda Port Co*, Supreme Court, 17/11/99** [FL2121]

FAMILY

Divorce

Respondent an engineer – applicant worked as his secretary for first five years of marriage – applicant provided food and lodging for student in later years and retained income – applicant had no access to respondent's accounts – marriage irretrievably broken down for some years – parties were joint tenants of family home and of holiday home – respondent had a further interest in another holiday home – affidavit of means understated respondent's assets – lump sum had been paid to applicant

The respondent produced unaudited accounts showing his net income, and swore an affidavit of means disclosing other assets and income. However, the applicant subsequently discovered documents which revealed that he had grossly understated his assets. While the true value of the respondent's assets and income over the previous four or five years could not accurately be determined, his admitted assets amounted to £732,500 excluding his business account. So held by the High Court in ordering that the respondent pay the applicant a lump sum of £425,000 and directing maintenance payments of £300 and £50 a week in respect of the applicant and their dependant child respectively.

***PP v AP*, High Court, Mr Justice McCracken, 14/12/99** [FL2029]

Living apart

Definition of 'living apart from one another' – financial provisions – Judicial Separation and Family Law Reform Act, 1989 – Family Law (Divorce) Act, 1996

In the case of parties who were living in the same household and one party was claiming an entitlement to a divorce, it was for the court to decide whether such an entitlement arose. This would involve the court making a decision as to whether the parties were in effect 'living apart from one another' for the purpose of the *Family Law (Divorce) Act, 1996*. However, Mr Justice McCracken was of the view that the matrimonial relationship cannot be dictated purely by reference to the location of the parties involved or by whether the spouses live under the same roof: one must also consider the mental and intellectual attitude of the parties involved. Taking these factors into account, McCracken held that the parties had in effect lived apart from one another for the requisite number of years and thus a decree of divorce would issue.

***M McA v X McA*, High Court, Mr Justice McCracken, 21/01/2000** [FL2189]

INSOLVENCY

Bankruptcy

Debtor's summons – adjudication order – petitioning creditor – order in aid of bankruptcy – whether delay involved was inordinate and excusable – annulment – whether grounds existed for setting aside bankruptcy order – whether affidavit grounding original application had been defective – mala fides – Bankruptcy Act, 1988, *ss85(5), 135* – Statute of Limitations, 1957 – Rules of the superior courts 1989

The applicant had been adjudged bankrupt in 1987 on foot of an application by a petitioning creditor. An official assignee had been appointed to supervise the bankruptcy and to distribute any funds arising from the bankruptcy. The petitioning creditor had subsequently withdrawn all claims against the bankrupt. The bankrupt now sought to have the order adjudging him bankrupt annulled on the grounds that the affidavit grounding the original application had been defective. Laffoy J declined to grant the relief sought, holding that the delay on the part of the bankrupt in bringing the application had been inordinate and inexcusable. Furthermore, to annul the bankruptcy order at this time would deprive the original creditors of the bankrupt their normal legal remedies as the claims involved would now be statute-barred.

***O'Maoileoin v Official Assignee*, High Court, Ms Justice Laffoy, 21/12/99** [FL2160]

Proof of debts

Time limit for submission of proof of debt to official assignee – extension by order of the court – authority of deponent swearing affidavit of debt – laches – whether delay was inordinate and inexcusable – whether prejudice suffered by bankrupt – fraudulent trading – whether a finding of personal liability of a director for debts of a company constituted proof of debt in

relation to the applicant in bankruptcy – whether finding of personal liability created a trust in favour of the applicant – whether finding of personal liability of the director was statute-barred

Where proof of a debt in bankruptcy arrived only one day late and the delay was due to administrative error, it was appropriate to extend time. However, a delay of two years was inordinate and inexcusable and had prejudiced the bankrupt. Where a director is made personally liable for the debts of a company in the event of a finding of fraudulent trading under section 297 of the *Companies Act, 1963*, the debt owed by the director is to the official liquidator and not to any particular creditor, and so the Revenue Commissioners derived no specific rights as against the director thereunder. So held by the High Court in extending time in respect of proof of admitted debts and those in respect of which proof was not inordinately delayed and refusing such extension in respect of the other alleged debts of the bankrupt.

***Kelly v Revenue Commissioners*, High Court, Ms Justice Laffoy, 20/12/99** [FL2105]

JURISDICTION

Brussels *and* San Sebastian *conventions – immovable property – holiday accommodation – exclusive jurisdiction*

The European Court of Justice has held that an action for damages arising from a short-let contract brought by a person subrogated to the property owner's rights constituted proceedings concerning the tenancy of immovable property, giving the courts of the state of situation of the property exclusive jurisdiction.

ECJ, *Dansommer v Götz*, Case C-8/98, 27/02/2000 [FL2220]

PERSONAL INJURY

Contributory negligence

Van collided with car – driver of van and one car passenger killed – one passenger badly injured – car on the wrong side of the road – car travelling at substantial speed – van attempting turning manoeuvre – second-named defendant not called to give evidence – whether each party should be assessed as equally liable if the trial judge cannot decide which party was liable – Civil Liabilities Act, 1961, *sections 21(2) and 34(1)*

If a trial judge cannot decide which party is negligent, he should apportion damages equally between them. This only applies where according to section 34(1) of the *Civil Liabilities Act, 1963* the damage is caused partly by the plaintiff and partly by the defendant and contributory negligence is established against the plaintiff and the court is unable to establish degrees of fault. No question of contributory negligence arose on the part of the plaintiff. The procedure adopted by the High Court in hearing evidence on behalf of both the plaintiff and the defendants before the court ruled finally on liability was correct, as it had been indicated to the court that no evidence would be called on behalf of the third-named defendant or given by the second-named defendant. The issue of whether one or other of the defendants were entitled to a dismissal of the case against them on the ground that the plaintiff had failed to establish any negligence against them should have been addressed by the trial judge. The case against the third-named defendant should have been dismissed. There was no basis for the inference drawn by the trial judge that the third-named defendant was guilty of lack of judgment amounting to negligence, and the trial judge erred in law in treating him as a concurrent wrongdoer. The evidence given by the Garda sergeant as to the statement made by the second-named defendant, who did not give evidence, was hearsay. The Supreme Court so held in allowing the appeal and dismissing the plaintiff's claim against the third-named defendant.

***Doran v Cosgrove*, Supreme Court, 12/11/99** [FL2086]

PRACTICE

Discovery

Personal injuries – negligence – evidence – loss of earnings – replies to particulars – revenue – whether plaintiff obliged to furnish copies of income tax returns to the defendant

The plaintiff had brought an action seeking damages for personal injuries arising out of the alleged negligence of the defendant. In the course of finalising the pleadings, a dispute arose as to the extent of loss of earnings suffered by the plaintiff. The defendant maintained that they were entitled to discovery of the plaintiff's tax returns in order to ascertain such losses. An order directing such discovery had been granted by the Master of the High Court. This order on appeal had been discharged by Carney J. The Supreme Court held that the documents sought were relevant and that the defendants were entitled to same. The appeal was allowed and the order of the Master was affirmed.

***Fields v Woodland Products Ltd*, Supreme Court, 16/07/99** [FL2074]

SUCCESSION

Section 117

Will – provision for children – bad feeling between testator and plaintiff arising out of plaintiff's marriage – legal proceedings and conflict between plaintiff and testator – plaintiff received only minimal bequest in will – whether testator had failed in his moral duty to the plaintiff – whether bad feeling between testator and plaintiff could extinguish his moral duty to provide for the latter in his will – whether use and occupancy of the testator's lands during his lifetime was sufficient to discharge moral duty

While there was fault on both sides in the history of conflict which had developed between the testator and the plaintiff, and while the plaintiff had received the benefit of occupancy and use of the testator's lands during the lifetime of the latter, neither of these factors was enough in the circumstances of this case to entirely extinguish the moral duty to provide for his son pursuant to section 117 of the *Succession Act, 1965*. So held by the High Court in allowing the plaintiff's appeal and ordering consequent adjustments to the administration of the estate of the testator.

***MacDonald v Norris*, Supreme Court, 25/11/99** [FL2008]

TAXATION

VAT

'Taxable person' – 'economic activity' – letting of property – partnership – farming

The European Court of Justice has held that the letting of property by a partner to a partnership of which he is a member should be regarded as an independent economic activity under the sixth *VAT directive*.

ECJ, Case C-23/98, 27/01/2000 [FL2222]

TELECOMMUNICATIONS

Broadcasting

Television – cable – satellite – copyright – 'act of communication to the public' – 'reception by the public'

In the absence of harmonisation, the European Court of Justice held that the definition of 'act of communication to the public' under the *Cable and satellite broadcasting directive* had to be decided by reference to national law.

ECJ, Case C-293/98, 03/02/2000 [FL2188] G

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Eurlegal

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

EU proposals for a multi-racial and diverse Europe

On 26 November last – and almost unnoticed – the European Commission published an impressive package of draft measures to tackle discrimination (including racial discrimination) on a Europe-wide scale. The package contains three elements: a draft directive prohibiting racial discrimination in a wide variety of contexts, a draft directive prohibiting discrimination on a number of new grounds (for example, age and disability) in the specific field of employment, and a proposed Community action programme to complement the legalistic approach of the directives. The whole package will go to the European Council for decision sometime in the next three months or so. The significance of this package and its potential impact on an Ireland that is rapidly becoming multi-cultural and multi-racial can hardly be overstated.

The background to these proposals goes back to the last Intergovernmental Council (IGC) of 1997, set up to revise the EU treaties. At that point many non-governmental organisations (NGOs) argued strongly for the broadening of existing anti-discrimination provisions, which were then confined to the grounds of gender and nationality, to enable the Union to fight discrimination on a number of fronts. The arguments of the NGOs were strongly supported by the Reflection Group (under Carlos Westendorp) set up by the governments themselves to prepare for the treaty negotiations. It was generally felt that the Union had for too long paraded itself as being founded on the principles of liberty, democracy, respect for human rights and the rule of law without taking the next logical step of equipping itself with the legal means to convert principles into reality. Here now was an acid test of its sincerity, especially in the area of racial discrimination.

The IGC conceded the political and moral arguments. But instead of broadening the existing anti-discrimination provisions, it added a new provision (article 13) that would merely allow the Council, when acting unanimously on a proposal from the Commission, to adopt measures directed at tackling discrimination on a wider variety of grounds. In the end, article 13 is merely permissive of Council action and unanimity in Council is required. The new anti-discrimination provisions might have been diluted even further had not the Irish presidency insisted on clear movement in this field.

Political pressure

Despite the limited nature of the treaty advances, political pressure for concrete anti-discrimination proposals surfaced almost at once. After a prolonged and intensive period of dialogue with a wide selection of stakeholders (both governments and NGOs), and due allowances being made for the time needed to arrange for a smooth transition from the Santer to the Prodi Commission, the long-awaited article 13 proposals are now finally in the public domain.

The first element in the article 13 package includes a draft directive prohibiting racial discrimination. The phenomenon of racial discrimination has been a concern at Union level for the past number of years. An EU Monitoring Centre on Racism was set up in 1997, which was also declared the European Year against Racism. Racism is seen as both an urgent moral and political priority, which explains why it receives separate treatment in a directive of its own.

The purpose of the race directive is to put into effect in the Member States the principle of equal treatment between individuals irrespective of racial or ethnic origin (article 1). The concept of discrimination used in the draft is broad and covers both direct and indirect discrimination (article 2). The fields of application are wide and include employment, vocational training, working conditions, membership of trade unions, social protection and social security, social advantage (for example, concessionary travel on public transport), education, supply of goods and services (service in a pub, for instance) and cultural activities (for example, attendance at a play). An exception is made to allow discrimination on the basis of race to occur, say, for the production of a play with black- or white-only characters (article 4).

The terms of the draft directive do not jeopardise those Member States that wish to pursue more robust measures of positive action in favour of ethnic groups (article 5). Nor is it to be taken as an opportunity to lower existing standards (article 6). Remedies are required in the shape of judicial and/or administrative procedures (article 7) and the burden of proof rests with the respondent (article 8). The draft directive also calls for the existence of an independent body for the promotion of the principle of equal racial treatment linked to national human rights agencies (article 12). Member States will be given only two years within which to ensure that their laws, regulations and administrative procedures comply with the directive (article 15).

Unequivocal statement

The Commission argues that the adoption of the draft race directive will 'constitute an unequivocal statement of public policy towards (racial) discrimination'. It also argues that adoption would underpin the impressive efforts of the Member States, and, indeed, provide a solid basis for enlargement of the Union eastwards – a process that must be 'founded on the full and effective respect for human rights'.

If adopted, this directive will apply to Ireland irrespective of whether it proceeds to ratify the *UN convention on the elimination of all forms of racial discrimination*. Indeed, the goods and services provisions will apply whether or not the *Equal Status Bill* is enacted.

The Commission's package also includes a draft horizontal directive that prohibits discrimination on several new grounds covered in article 13, including racial or ethnic origin, age, religion or belief, disability, age or

sexual orientation, but only in the specific field of employment. The inclusion of racial or ethnic origin means there will be an overlap between the two directives. Gender is left out because it is already covered in a web of Community legal instruments.

Both direct and indirect discrimination, as well as harassment, are prohibited under the draft horizontal directive (article 2). The directive will apply to all aspects of employment, including conditions for access to employment, access to vocational education and training, employment and working conditions, membership and involvement in trade union activities (article 3). The directive does allow for several justifications for discrimination on the ground of age (to protect the young, to fix minimum age as a condition for retirement, to fix age limits for invalidity benefits). Like the race directive, there is a saver for positive action and the burden of proof is shifted to the employer. Member States are expected to disseminate information on the directive and to encourage the social partners to take an active interest. Member States will be given two years following adoption to conform their laws and make other necessary changes.

Significantly for Ireland, the draft directive states that in order to guarantee respect for the principle of equal treatment for people with disabilities, 'reasonable accommodation' shall be provided where needed to enable the person to have access to, participate in or advance in employment, unless this creates an undue hardship (article 2.4). Since the directive is addressed to the Member States, it will be up to them to implement this requirement. This may mean passing on the obligation directly to employers. There are two limitations to the obligation. The first is inherent in the term 'reasonable' in 'reasonable accommodation'. The second arises where undue hardship would result (which term is itself left undefined). Nevertheless, this set of provisions would still go beyond what Irish law currently requires. Section 16.3.c of the *Employment Equality Act, 1999* relieves an employer of the obligation to engage in 'reasonable accommodation' if it would give rise to a cost other than a nominal cost.

If adopted, the directive would require substantial amendments to the *Employment Equality Act* in the field of disability discrimination. It is to be noted that since the transposition of the directive into Irish law would flow directly from our obligations under EU law, its terms would outflank the kinds of constitutional niceties that led the Supreme Court to strike down the *Employment Equality Bill* in 1997, which itself led directly to the diluted obligations on 'reasonable accommodation' contained in section 16.4.c of the present Act.

Community action programme

Since law does not exist in a vacuum, the Commission also proposes the establishment of a five-year Community action programme on discrimination (2001-2006) to complement the draft directives. The overall total of monies to be allocated over the lifespan of the programme is considerable (98 million euros) and reflects the priority given to the fight against discrimination.

The three main objects of the programme are to deepen knowledge about discrimination and the effectiveness of the various strategies for overcoming it, to help build the capacity of the various actors in the Member States, and to help promote the values of equality and diversity and disseminate relevant EU information. The action shall take the form of the development of sophisticated statistical information, transnational exchange actions involving actors (including NGOs) from a variety of Member States, core funding for European-level NGOs involved in the struggle against discrimination, and the organisation of conferences and seminars as well as media campaigns. The programme will cover all groups (age, disabled, racial minorities and so on) but without any ring-fencing of monies. The Commission envisages the establishment of an advisory committee of representatives of the Members States to help guide the programme.

If the Commission's proposals succeed, this will have a major impact on Irish policy, especially in the fields of race and disability. Whether these proposals succeed or not, it is becoming plain that the Union now sees itself (and wishes to be seen) not merely as a force but also as a force for good. The slow but inevitable accretion of human rights competences to the Union is an aspect of constitution-building at the level of the Union. The struggle against discrimination and the re-engineering of the polity to respect and value difference is part of that broader story. In short, equality – and the equality agenda – is now seen not merely as a productive factor but also as a civilising factor. G

Dr Gerard Quinn is an adviser to the European Commission (DGV) on comparative anti-discrimination law and a lecturer at the National University of Ireland, Galway.

Taxation and European Community law

Taxation has been one of the most sensitive areas in the development of the European Union. The creation of a true internal market requires a considerable degree of harmonisation of taxation law. The existence of 15 different tax authorities and 15 different systems of tax law in the EU poses a daunting challenge for businesses operating throughout the Union.

However, there have been varying levels of progress in this regard. There is a uniform system of customs duties throughout the Member States. VAT has been substantially harmonised. Excise duties are being drawn together. But there has been far less legislative activity in the field of direct taxation. Despite this, the European Court of Justice (ECJ) has handed down a number of significant decisions on taxation. In the area of corporate tax, uniform rules are minimal and concern cross-border dividends between parent and subsidiary companies and cross-border mergers of companies within the Union. In the area of personal income tax or social security, there is no uniformity whatsoever.

Direct taxation

There is no express legislative basis for the harmonisation of direct taxation within the European Union. However, article 94 permits the issue of directives for the approximation of the laws of Member States that 'directly affect the establishment or functioning of the common market'. It should be noted that unanimity is required in the Council for votes on taxation matters. Double taxation can be avoided through bilateral negotiations under article 293.

Attempts to reach agreement on a programme of general harmonisation have failed. The Commission has had to withdraw over 30 legislative

proposals on this matter because unanimity in the Council could not be reached. The idea of universal harmonisation has given way to a more pragmatic approach.

The Commission has examined the issue of harmonising national tax laws since the establishment of the Community. The 1962 *Nuemark report* resulted in little legislative action. It was not until 1990 that finance ministers agreed to implement two directives and a convention.

Progress was slowed further by the introduction of the principle of subsidiarity in the *Maastricht treaty*. States such as the UK and Denmark have proved quite successful in using this to block any further moves towards an approximation of tax rules in the EU.

Over the last few years, the ECJ has expanded the scope of the basic freedoms of the treaty into the area of direct taxes. Using principles such as non-discrimination and freedom of establishment, it has found national tax legislation incompatible with the common market. These sorts of cases have nudged states closer to tax harmonisation.

Company taxation

Variations in corporate taxation in the Union lead to economic distortions in the single market and restrict intra-community competition. Two directives on cross-border mergers and on cross-border dividends were approved in 1990. Directive 90/434 on transactions associated with cross-border mergers set out to standardise tax reliefs available for certain forms of corporate reorganisation. Directive 90/435 dealt with cross-border parents and subsidiaries. It requires that dividends paid between parents and subsidiaries in different Member States must be free from withholding tax on payment and either tax exempt in the hands of the recipient or with credit for the tax paid on its profits. These directives became law on 1 January 1992. The *Transfer pricing arbitration convention* obliges Member States to establish an arbitration procedure for transfer pricing. It came into effect on 1 January 1995.

Two further draft directives were proposed. The *Interest and royalties directive* sought to abolish withholding tax on interest and royalties paid between Member States. It was withdrawn, as agreement could not be reached between the Member States. The *Losses directive* aimed to allow the losses of a subsidiary in one Member State to be offset against the profits of a parent in another. This had not been formally withdrawn, but it had not proceeded beyond draft form and there is no indication that it will do so in the future.

In 1992, the Ruding Committee issued a report on further harmonisation of corporate tax necessary to eliminate all economic distortions cased by differing tax rates. It proposed a wide range of minimum rules to be adopted in determining the tax base and the tax rate for companies. These reform proposals were minimised by the Commission when it issued its guidelines on company taxation. The Commission then began to take an increasingly pragmatic approach. It began to look at specific distortions at national frontiers rather than endeavouring to impose a common system of direct taxation. This approach was seen in a Commission working document in 1996, which replaced the word 'harmonisation' with 'fiscal co-operation' and 'consultation'. The paper called for the improvement of the transparency of European and national taxation measures and the definition of joint codes of conduct relating to the introduction of tax incentives in the Member States.

In late 1997, the Commission recommended a code of conduct, which aims to eliminate the distortions to the single market caused by the 'harmful tax competition' comprised in certain elements of the business tax regimes of various Member States. The Council adopted the code on 1 December 1997.

The Commission will present a report on company taxation in the Member States in 2000. Its aim is to show the diversity in levels of company taxation and to identify any obstacles to cross-border economic operations. This study will complement the work of the Primarolo Group which is investigating harmful or unfair tax competition in the EU. This group is investigating just under 200 measures.

This area of taxation is best set out in the words of Advocate General Leger in Case C-279/93 *Finanzamt Köln-Alstadt v Schumacher*: 'unlike VAT, direct taxation is at a purely embryonic stage of harmonisation'. It is likely to remain so for some time.

State aids

Part of the Commission's new approach is a strict application of the state aid rules to national taxation. Commission Notice 98/C384/03 seeks to clarify the application of the state aid rules to national taxation measures. Article 87 of the treaty provides that: 'Any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market'.

The notice sets out cumulative criteria which a national measure must meet to be considered a state aid. First, the measure must confer on recipients an advantage which relieves them of charges that are normally borne from their budgets, such as a reduction in the tax base, the amount of tax due or the deferment/cancellation of tax debts. Second, the advantage must be granted by the state or through state resources. Third, competition and trade between Member States must be affected. The fourth criterion requires that the tax measure is specific or selective in favouring certain undertakings or the production of certain goods. Provided that they apply to all firms and to the production of all goods, tax measures of a purely technical nature (such as rates, depreciation allowances or use of losses) will not constitute state aid. The same principle applies to measures pursuing general economic policy objectives through the reduction of the tax burden in relation to certain production costs (such as research and development, training and employment). However, if measures are regional or local or where they are sectorally specific, they are likely to fall foul of the state aid provisions.

State aids may be justified by 'the nature or general scheme of the system'. The notice gives the redistributive purpose of a profit tax as an example. The state aids provisions require recovery of the aid in question. If these provisions are used aggressively, they could make significant inroads into the sovereignty of Member States in tax matters.

Impact on national taxation

Another phenomenon worthy of note is the increasing impact of rules of EC law on national taxation. Fundamental rules of EC law can override domestic tax rules where there is a conflict between the two. The case law is based on the principle of non-discrimination between Community nationals set out in article 6 as applied to the four freedoms (free circulation of goods, free movement of persons and right of establishment, free-

dom to provide services, and free movement of capital). Recent case law is diverging from the court's decision in Case C-204/90 *Bachmann*, where the court held that different treatment in tax matters could be justified on the basis of 'the coherence of the national tax system'. During the last five years, there have been a number of decisions applying principles of non-discrimination and effectively disregarding the decision in *Bachmann*.

In Case C-330/91 *R v Commissioners of Inland Revenue, ex parte Commerzbank AG*, the ECJ held that the concept of the 'seat' of a company could be equated with the concept of nationality for individuals. Thus, the use of the criterion of residence for granting interest on refunded tax could lead to indirect discrimination in contravention of EC law. The UK had breached the principle of freedom of establishment. In Case C-1/93 *Halliburton Services BV v Staatssecretaris van Financiën*, the Netherlands was held to be discriminating in levying property tax on a Dutch branch of a German company where, in similar circumstances, relief would have been available to a Dutch company.

In Case C-279/93 *Schumaker*, the ECJ held that German rules on awarding a favourable family-related tax status to workers resident in Germany violated article 48. Germany could not give these benefits to residents and deny them to a Belgian national residing in Belgium who worked in Germany. His income was derived entirely or almost entirely from his work in Germany. His income in Belgium was too low to enable the Belgian authorities to take his personal and family circumstances into account. National rules discriminated against him as his personal situation was not taken into account either by the taxation authorities in his state of residence or his state of employment. The court refused to accept German arguments that there would be administrative difficulties ascertaining the income of non-residents received in their state of residence.

The court adopted a similar approach in Case C-118/96 *Jessica Safir v Skattemyndigheten i Dalarnas Län*, formerly *Skattemyndigheten i Kopparbergs Län*. Swedish tax legislation laid down a different tax regime for capital life assurance depending on whether it was taken out with companies established in Sweden or companies established outside Sweden. Swedish insurance companies were required to pay tax on the yield from the insurance capital. This was calculated in a standard manner and levied on the insurer. In contrast, Swedes who took out insurance with companies not established in Sweden were required to register with a central body and declare payment of premiums to it.

This body could grant an exemption from payment of the tax or reduce the tax by one half if the company with which the insurance was taken out was subject in its state of establishment to tax on revenue comparable to that paid by Swedish insurance companies. The tax on premiums could be reduced by half if the foreign tax was at least one quarter of the tax applicable in Sweden and could be reduced to zero if the foreign tax was at least one half of the tax applicable in Sweden. Ms Safir took out insurance with a company established outside Sweden. She applied for exemption from payment of tax on insurance premiums. The tax was reduced by 50%.

The court held that the Swedish legislation was an obstacle to freedom to provide services. It would dissuade individuals from taking out capital life assurance with companies not established in Sweden and dissuade insurance companies from offering their services on the Swedish market. People holding such policies were required to register themselves and declare premium payments. They were also obliged to pay the tax assessed themselves. When applying for a reduction in tax or exemption from it, precise information concerning the revenue tax to which the company is subject is required. The legislation requires an assessment of the tax regime in the company's state of origin. Different assessments have been made of the same tax regime in the past. This leads to uncertainty on the part of potential policyholders. Although the Swedish legislation allowed account to be taken of the tax applicable in another Member State, it imposed a threshold, as payment of such tax was not taken into account if it did not amount to at least one quarter of the tax applicable in Sweden. The court rejected the arguments advanced by the Swedish government based on the efficacy of the tax regime. The court concluded that the legislation restricted the freedom to provide services and could not be justified.

A good recent instance of this approach taken by the ECJ is the decision of the court in Case C-254/97 *Société Baxter and Ors v Premier Ministre*. Société Baxter and a number of other French undertakings exploit proprietary medicinal products. They are subsidiaries of companies whose seat is located in Member States other than France. On 24 January 1996, an order of the French Government introduced 'urgent measures for restoring financial stability in the social security system'. The order provided that pharmaceutical laboratories must pay a special levy based on the pre-tax turnover achieved in France between 1 January 1995 and 31 December 1995 in reimbursable proprietary medicinal products and medicinal products approved for use by public authorities. Article 12 of the order allowed the undertakings concerned to deduct from the amount of that levy the costs corresponding for the same period to expenditure on scientific and technical expenditure carried out in France. Baxter and the other undertakings challenged that provision before the *Conseil d'État*. It referred a question to the ECJ on the compatibility of such a provision with Community law.

The ECJ observed that the principles of freedom of establishment enable business to be carried on through branches, agencies or subsidiaries whose seats are located in other Member States. The court also referred to its own case law, which prohibits, in the name of equality of treatment, all forms of discrimination by reason of nationality or, in the case of a company, its seat. The particular allowance only took account of expenditure on research carried out in the Member State of taxation. The French government justified this as necessary to enable the tax authorities to ascertain the nature and genuineness of the research expenditure. The court held that in this case effectiveness of fiscal supervision was not capable of justifying a restriction on the exercise of fundamental freedoms. National legislation absolutely preventing the subsidiaries from submitting evidence that their research carried on in other Member States was actually undertaken, when documentary evidence could be produced, cannot be justified on the basis of effective fiscal supervision. Thus, the tax provision in question was not compatible with Community law. G

TP Kennedy is the Law Society's Director of Education.

Recent developments in European and international law

COMPETITION

UPS Europe SA v European Commission ([1999] All ER (EC) 794). UPS is a member company of a group that distributes parcels around the world. It had brought a complaint to the European Commission, arguing that *Deutsche Post AG* (the German post office) had been guilty of abusive conduct and that its funding violated the state aids rules in the treaty. In August 1994, the Commission wrote to UPS indicating that it would act on the abuse of dominance but not the alleged state aids breaches. Following much correspondence, in December 1997 the Commission decided not to proceed with the article 82 complaint. The ECJ upheld a complaint against the Commission. Once the complainant had responded to a notice given by the Commission under article 6 of Regulation 2842/98, the Commission within a reasonable time should initiate an investigation or adopt a decision not to do so. In this case, the Commission had 47 months between the original notification of the complaint and UPS' final demand for a definition of position. The court held that the Commission was in breach of article 232 but also held that it could not order the Commission to do anything.

FREE MOVEMENT OF GOODS

Case C-97/98 *Peter Jägerskiöld v Torolf Gustafsson*, judgment of 21 October 1999. Mr Jägerskiöld owns waters in Finland. Mr Gustafsson fished with a fishing rod in those waters. He had paid a fee to the Finnish government, which allowed him to fish in private waters. The applicant argued that this Finnish law was contrary to the free movement rules in the *EC treaty*. He argued that fishing rights and permits are goods within the meaning of these rules. The ECJ held that the grant of fishing rights or fishing permits for consideration and upon certain conditions is the provision of a service. If it has a cross-border dimension, article 59 of the treaty covers it. However, it does not apply to dispute between two Finnish nationals concerning the right of one of them to fish in Finnish waters. The court held that fishing rights or fishing permits did not constitute goods.

INTELLECTUAL PROPERTY

Trade names

Case 255/97 *Pfeiffer Grosshandel GmbH v Lowa Warenhandel GmbH*, judgment of 11 May 1999. Pfeiffer ran a large supermarket in Austria under the trade name *Plus KAUF PARK*. This name was registered as a text and picture mark in Austria. It sold a wide range of food and drink under the registered trademark *Plus wir bieten mehr*. Lowa's parent company owned the international trademark *Plus*. A German subsidiary owned the text and picture mark *Plus prima leben und sparen*, which had been registered in Austria. Lowa started to market its goods under the trademark *Plus* and renamed 17 of its Austrian supermarkets, *Plus prima leben und sparen*. Pfeiffer sought an injunction to prevent Lowa from using the trade name *Plus* in Austria. The Austrian court held that there was a risk of confusion. The ECJ held that the injunction was justified as preventing the risk of confusion.

LITIGATION

Forum non conveniens

In *Berezovsky v Forbes* ([1999] EMLR 278), the English Court of Appeal found that England was the appropriate forum in respect of two plaintiffs whose ties to England were relatively tenuous. This could be quite a far-reaching decision. At first instance, Popplewell J stayed the action as it was a 'peculiarly Russian case' and the connection of the plaintiffs to England was not strong. Both plaintiffs were Russian and had been seeking the leave of the English courts to serve a writ on *Forbes* magazine in the USA. *Forbes* is distributed worldwide. 780,000 copies of the particular issue had been published in the USA and Canada, 2,000 copies in England and Wales, and 13 in Russia. The plaintiffs' claim was confined to publication within the jurisdiction of the English courts (including the availability of the article on the Internet). Under English law, each publication is a separate tort. The plaintiffs argued that this gave rise to a strong case in favour of English jurisdiction. *Forbes* argued that multi-jurisdictional libel cases should be treated as a single cause of action and then examined to determine where the global cause of action arose. Hirst LJ rejected this argument as being inconsistent with the basic principle that each publication was a separate tort and with the approach of the ECJ in *Shevill*. The Court of Appeal, while recognising that *Shevill* only applied to convention cases, felt it desirable to adopt a similar approach in non-convention cases.

The court considered the plaintiffs' connections with the jurisdiction. They both lived in Russia and conducted their businesses there. However, Mr Berezovsky was able to produce numerous news cuttings from the British press referring to him. Hirst LJ found that the distribution of 2,000 copies of the magazine in the UK was a 'significant link' with the UK. The court was prepared to accept jurisdiction even though the article concerned events in Russia and any trial of the action would involve a large number of witnesses and documents coming from Russia. Hirst LJ held that these difficulties would only carry weight if the defendants produced 'some evidential support for their plea, rather than trying to make bricks without straw'.

The key issue in *forum non conveniens* is the alternative forum. In this case, it was Russia or the USA. While the plaintiffs were Russian and the subject matter of the article concerned Russia, only 13 copies circulated there. *Forbes* had strong ties to the USA but with two offices in London had stronger connections with the UK. The court also pointed out that the complaint was limited to publication in England and Wales and held that a Russian or US court would be 'ill-equipped to make the assessment of damage suffered in England'.

Forbes had argued that the prospect of American publishers having to defend libel actions in the UK would inhibit freedom of speech. This argument was rejected. The conclusion of the court was that England was the natural forum where the actions have their 'most real and substantial connection'. G

All European Commission documents referred to can be found on www.europa.eu.int.

Cash up front: Lisa O'Shea from the children's charity GOAL and A&L Goodbody solicitor Eoin MacNeill flank Aussie tennis star Pat Cash at a kick-off event for the GOAL Calcutta Run 2000. The 10-kilometre event takes off from the Law Society on 21 May and those interested in running, walking or helping out can contact Alan Roberts on 01 649 2000

Taking the legal angle: Gathered for the Dublin CLE seminar on *The Budget from a legal perspective* are *(left to right):* Aidan McLoughlin from Financial Engineering Ltd, CLE's Sarah O'Reilly, Terry Oliver of OSK Accountants and Business Consultants, and solicitor Brian Bohan

Movers and shakers: At Round Hall Publishing's party to celebrate their new Fitzwilliam Place offices are Law Society President Anthony Ensor, solicitor Tom Courtney, who was recently named Chairman of the *Company Law Review Group,* and Mr Justice Roderick Murphy, who was appointed to the High Court in January

Top brass in Blackhall

Assembled at the meeting of Presidents and Secretaries were *(front row):* Robert Sayer, President, Law Society of England & Wales; President Anthony Ensor; Michael Scanlan, President, Law Society of Scotland; and John Meehan, President, Law Society of Northern Ireland; *(back row, left to right):* John Fish, Second Vice-President, CCBE; Jane Betts, Secretary General, Law Society of England & Wales; John Bailie, Chief Executive, Law Society of Northern Ireland; Ward McEllin, Senior Vice-President, Law Society of Ireland; John Neill, Vice-President, Law Society of Northern Ireland; Director General Ken Murphy; Deputy Director General Mary Keane; Alastair Thornton, Vice-President, Law Society of Scotland; and Douglas Mill, Secretary, Law Society of Scotland.

The leaders of the more than 100,000 solicitors who are members of law societies in Ireland and Britain met in Blackhall Place recently to discuss matters of mutual interest. The Presidents, Vice-Presidents and Secretaries of the law societies of Ireland, Northern Ireland, Scotland and England & Wales meet twice a year, and once every two years the meeting takes place in Dublin. On this occasion, it was chaired by the host, President Anthony Ensor.

The meetings are forums for discussing broad issues in relation to the solicitors' profession in these islands and beyond. The problems facing the profession in all four jurisdictions are very similar and much can be learned from exchanging ideas and experiences on how to tackle them.

One guest who attended part of the meeting on this occasion was Law Society Council member, John Fish, who was recently elected Second Vice-President of the CCBE, the Council of European bars and law societies. He is due to take over the presidency of that organisation on 1 January 2002.

He participated in a discussion on how the effectiveness of the CCBE might be improved. He also discussed the proposed EU directive on money laundering and the policy of the profession in relation to solicitors becoming involved in multi-disciplinary practices/partnerships. This is an issue on which the Law Society of England & Wales appears to be moving in a different direction from most other national law societies and bar associations in Europe and North America.

The challenges for law societies in representing both small and large law firms, the future of the self-regulation of the solicitors' profession and the ways in which co-operation between the four societies could be made more effective were among other items considered at the meeting. G

Having a ball

The professional course ball was held in Clontarf Castle on 22 January 2000 and was attended by well over 200 apprentices celebrating the completion of their marathon studying session. Organised by the social reps on the course, the speeches were brief – although an emotional appreciation of class members and Dublin pubs by Pauric Heraghty moved the normally hard-bitten crowd. A special tribute was paid to the great work of the education reps for their continued and unpublicised work for apprentices throughout the nine months of the course, and sponsors Ulster Bank and Chief O'Neills were also thanked.

A number of awards were presented, honouring outstanding apprentices for their deeds and misdeeds, although modesty prevents them from allowing their names to be included here. Social highlights of the period in Griffith College were the trips to the Leopardstown races, the Shelbourne dogs, the music session on the way down to Westport, the President of the Law Society's welcome and reception in Blackhall Place at the start of the course, and many nights in Leggs. G

Belles of the ball: apprentices Mary Reynolds and Kayanne Horgan at the January 2000 ball

Back to school for new apprentices

A new batch of 300 apprentices arrived in Griffith College for the first day of the professional practice course on Valentine's Day. Appropriately for the date, family law was the chosen topic and it was introduced by the Law Society's Deputy Director of Education, Geoffrey Shannon. Director General Ken Murphy and Director of Education TP Kennedy were on hand to offer a few words of advice and encouragement to new students. Judging by the performance of a few apprentices at the SADSI reception following the lectures, the spirit of romance had not been completely deadened by talk of the realities of marriage breakdown. In fact, it may even increase before the course finishes at the end of August. G

UPCOMING EVENTS

- Seminar series in the Law School, Griffith College
- SADSI events in Cork, Limerick and Dublin

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 3 March 2000)

Regd owner: Richard and Olive Warren; Folio: 1748F and 2244F; Lands: Ballymartin, Currane & Kilcloney and the Barony of St Mullins Lower; **Co Carlow**

Regd owner: John James Darcy, Ballydonoghoe, Kilmaley, Ennis, Co Clare; Folio: 6360, 6369 and 17792; Lands: Townland of 1) Ballydonohoe, 2) Ballydonohoe, and 3) Ballyillaun, and Barony of Islands; Area: 17a 1r 16p (6360); 16a 2r 18p (6369); 14a 1r 10p (17792); **Co Clare**

Regd owner: John J Burke and Eileen Burke; Folio: 20991; Lands: Known as a plot of ground situate in the Townland of Raheen and the Barony of Muskerry East in the County of Cork; **Co Cork**

Regd owner: Michael McMahon; Folio: 46654; Lands: Known as a plot of ground situate in the Townland of Templemary and the Barony of Orrery and Kilmore in the County of Cork; **Co Cork**

Regd owner: Richard Crowley; Folio: 58932; Lands: Known as a plot of ground in the Townland of Coolowne and the Barony of Cork; **Co Cork**

Regd owner: Molnlycke Limited; Folio: 6515F; Lands: Known as a plot of ground situate in the Townland of Underhill and the Barony of Carbery East (West Division) in the County of Cork; **Co Cork**

Regd owner: Patrick McFadden and Sarah McHugh, Lunniagh, Derrybeg, Co Donegal; Folio: 27451; Lands: Stramackilmartin; Area: 5.50 acres; **Co Donegal**

Regd owner: Charles Kelly, Golan, Milford PO, via Letterkenny, Co Donegal; Folio: 31726; Lands: Millford; Area: 2.497 acres; **Co Donegal**

Regd owner: Paul Clifford; Folio: 125638F; Lands: Known as 19 Deerhaven Park, Huntersrun, Blanchardstown, in the Townland of Huntstown and the Barony of Castleknock; **Co Dublin**

Regd owner: Sean Bentley; Folio: 4413; Lands: Townland of Lusk and the Barony of Balrothery East; **Co Dublin**

Regd owner: John Carey (deceased) and Dorothy Carey; Folio: 31263; Lands: Townland of Ardroe and the Barony of Corkaguiny; **Co Kerry**

Regd owner: Patrick Murphy; Folio: 4198; Lands: Cappagh and the Barony of Gowran; **Co Kilkenny**

Regd owner: Claudine Donnelly, c/o Edward Donnelly, Keshcar-rigan, Co Leitrim; Folio: 1082, 1088; Lands: Toomans; Area: 22.513 acres; **Co Leitrim**

Regd owner: George Doyle; Folio: 14867F; Lands: Townland of Farnane Franklin, Cullenagh & Buffanoky and the Barony of Owneybeg; **Co Limerick**

Regd owner: Patrick and Mary O'Callaghan, Rock Road, Blackrock, Dundalk, Co Louth; Folio: 12963; Lands: Haggards-town; Area: 0.25 acres; **Co Louth**

Regd owner: Thomas and Ita McKevitt (as tenants in common), Barronstown, Hackballscross, Dundalk, Co Louth; Folio: 5664; Lands: Barronstown; Area: 14.069 acres; **Co Louth**

Regd owner: William and Elizabeth Cairns, 294 Bay Estate, Dundalk, Co Louth and 1 Willowdale, Bay Estate, Dundalk, Co Louth; Folio: 588L; **Co Louth**

Regd owner: Philip Carolan, Kells Road, Kingscourt, Co Cavan; Folio: 18542; Lands: Annacroff; Area: 12.688 acres; **Co Monaghan**

Regd owner: Leslie and Noreen Phillips, The Bungalow, Monksland, Athlone, Co Roscommon; Folio: 36384; Lands: Townland of Monksland and the Barony of Athlone South; Area: 0a 2r 3p; **Co Roscommon**

Regd owner: Martin Kenny, Ballinleg, Fuerty, Roscommon; Folio: 15987; Lands: **Co Roscommon**

Regd owner: Patrick Hourican; Folio: 1528L; Lands: Wallers Lot and the Barony of Cashel; **Co Tipperary**

Regd owner: James Egan; Folio: 4847F; Lands: Cloneygowny and the Barony of Owney & Arra; **Co Tipperary**

Regd owner: John and Patricia Flanagan; Folio: 235F; Lands: Townland of Knockateemore and the Barony of Decies-without-Drum; **Co Waterford**

Regd owner: Betty Clavin, 40 Goldenbridge Avenue, Inchicore, Dublin 8; Folio: 6175F; Lands: Clonmellon; **Co Westmeath**

Regd owner: John Whelehan, Raheenquill, Tyrellspass, Co Westmeath and Tyrellspass, Co Westmeath; Folio: 4234F; Lands: Rathgarrett; Area: 9.456 acres; **Co Westmeath**

Regd owner: Adam F Torrie; Folio: 8919F; Lands: New Ross and the Barony of Bantry; **Co Wexford**

Regd owner: Edward Codd; Folio: 1852F; Lands: Money Lower and the Barony of Shillelagh; **Co Wicklow**

WILLS

Brennan, Myles, late of Station Road, Rathvilly, Co Carlow (otherwise of Rathvilly, Co Carlow). Would any person having knowledge of a will executed by the above named deceased who died on 3 February 1971, please contact O'Gorman Begley, Solicitors, Kincora, Athy Road, Carlow, tel: 0503 40999, fax: 0503 33095

Hogg, Dorothy, Ann, (deceased), late of Penryll, Hollymount, Lee Road, Cork. Would any person having knowledge of a will of the above named deceased who died on 14 December 1999, please contact Marcella Power, Flynn English & Company, Solicitors, 33/34 Cook Street, Cork, tel: 021 275900

Kiernan, Frances (deceased), late of 27 Ring Terrace, Inchicore, Dublin 8. Would any person having knowledge of a will of the above named deceased who died on 24 August 1999, please contact Cullen & Company, Solicitors, 86-88 Tyrconnell Road, Inchicore, Dublin 8, tel: 01 4536114, fax: 01 4535498

Ledden, Margaret (deceased), late of 20 Millwood Court, Raheny, Dublin 5 and formerly at 6 Rutland Street Cottages, Raheny, Dublin 5 . Would any person having knowledge of a will executed by the above named deceased who died on 7 January 2000, please contact M O'Leary & Company, Solicitors, 183 Howth Road, Killester, Dublin 3, tel: 01 8331900, fax: 01 8334991

Lynch, Mary (deceased), late of Kilronan, Aran Islands, Co Galway. Would any person having knowledge of the whereabouts of the original will dated 22 June 1984 of the above named deceased who died on 14 November 1994, please contact WB Gavin & Company, Solicitors, 4 Devon Place, The Crescent, Galway, tel: 091 583197, fax: 091 581220

McGettrick, John (deceased), late of Rinnaroghue, Ballymote, Co Sligo. Would any person having knowledge of a will of the above named deceased who died on 13 October 1999, please contact MJ O'Connor & Company, Solicitors, 2 George Street, Wexford, tel: 053 22555, reference: CM/AMOD

Mitchell, Mary (deceased), late of 23 Sycamore Drive, Highfield Park, Galway. Would any person having

knowledge of the whereabouts of the original will of the above named deceased who died on 24 January 2000, please contact M/s Joseph Fahey & Co, Solicitors, Mountbellow, Co Galway, tel: 0905 79680, fax: 0905 79681

Mortimer, Lewis (deceased), late of Caherconlish, Co Limerick. Would any person having knowledge of the whereabouts of the original will executed by the above named deceased on 17 April 1996, the said deceased having died on 8 January 1998, please contact Michael Moran & Company, Solicitors, Castlebar, Co Mayo, tel: 094 21688, fax: 094 22356

Mulligan, Colm (otherwise John Colum), (deceased). Would any person with information as to the whereabouts of an original will of Colm Mulligan, late of 37 Thomas Moore Road, Walkinstown, Dublin 12, or title deeds relating to the said premises, please contact James M Sweeney, Solicitor, 14 New Cabra Road, Phibsborough, Dublin 7, tel: 01 8389756

O'Boyle, Joseph (otherwise Michael Joseph), (deceased), late of Drumee, Ballintogher, Co Sligo and 7 Hillview Glade, Ballinteer, Dublin 16. Would any person having knowledge of a will executed by the above named deceased who died on 22 January 2000, please contact Dermot G McDermott & Company, Solicitors, 1 Union Street, Sligo, tel: 071 61886, reference: JW

O'Brien, Bridget (deceased), late of Ballydonohue, Lisdoonvarna, Co Clare. Would any person having knowledge of the original will/codicil of the above named deceased who died on 30 March 1962, please contact Loughnane & Company, Solicitors, Scariff, Co Clare, tel: 061 921117, fax: 061 921500

O'Loughlin, Annie (née Lambe), (deceased), late of 31 Duke Street, Athy, Co Kildare, school teacher. Would any person having knowledge of a will executed by the above named deceased who died on 9 November 1988, please contact Wilkie & Flanagan Solicitors, Main Street, Castleblayney, Co Monaghan, tel: 042 9740064, fax: 042 9740064

Ward, James (deceased), late of 37 Fatima Drive, Dundalk, County Louth. Would any person having knowledge of an original will of the above named deceased who died on 17 December 1998 at Louth County Hospital, Dundalk, County Louth, please contact Patrick Quinn & Company, Solicitors, Ivy House, Roden Place, Dundalk, County Louth, tel: 042 9332238, fax: 042 9334565

Whelan, Stella (deceased), late of 8 Whitethorn Walk, Westminster Park, Foxrock, Dublin 18. Would any person having knowledge of a will executed by the above named deceased who died on 13 July 1998, please contact John P O'Malley & Company, Solicitors, 38 Percy Place, Dublin 4, tel: 01 6680661; fax: 01 6680956

EMPLOYMENT

Solicitors – South West. Sole practitioner with very strong client base has vacancies for two solicitors (a) an ambitious, experienced person for whom there will be an opportunity of partnership, and (b) newly qualified or about to qualify or with some PQE. All applications will be treated in the strictest confidence. **Reply to Box No 21**

Solicitor for nine months' contract in busy general practice in county town in West of Ireland. **Reply to Box No 22**

Experienced locum solicitor general practical experience available. **Reply to Box No 23**

Locum solicitor – Kerry. Duration, days per week, salary all open to discussion – mainly probate, conveyancing and taxation. Prospects of full-time position can also be discussed. **Reply to Box No 24**

Solicitor, mid-forties, three years' PQE mostly in conveyancing and probate, who has been living abroad and has not practised for a number of years, wishes to return to practice and reclaim skills. Willing to work for modest remuneration as the acquisition of practical experience is what is most important. E-mail: ithaca@operamail.com

Female solicitor in Nigeria seeks legal work in Ireland. Six years' PQE, specialises in conveyancing, litigation, probate, plaintiff/ defence work and military law. Will work flexible hours depending on work demand, tel: 086 8622371 for CV

Experienced solicitor seeks part-time (mornings) position in Limerick City – conveyancing, probate. **Reply to Box No 25**

Solicitor required for busy Galway City practice. Might suit newly or recently-qualified solicitor who has dealt with all aspects of general practice. Attractive terms for suitable candidate. **Reply to Box No 26**

Solicitor, recently qualified, seeks employment in the city or county of Galway. **Reply to Box No 27**

Newly or recently-qualified solicitor required for corporate and financial services work. Attractive terms for suitable candidate. Applications to Bridget Ryan, Head of Compliance, First Active plc, Skehan House, Booterstown, Co Dublin

MISCELLANEOUS

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

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

Personal injury claims, 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

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

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

For sale – ordinary seven-day publican's licence, without restrictions. Apply to Patrick J Durcan & Company, Solicitors, Westport, County Mayo, tel: 098 25100

Seven-day liquor licence for sale. Completion date in August 2000. Contact Joy, Brennan & Company, Solicitors, 1 New Quay, Clonmel

Solicitor seeks to purchase practice in the Munster area. Reply quoting ref: DJC/S915 to: O'Brien, Cahill & Company, Chartered Accountants & Registered Auditors, 169 West End, Mallow, Co Cork. E-mail: obc@indigo.ie; web: http://indigo.ie/~obc

Ordinary seven-day publican's licence required. Anywhere in Ireland. Please reply to Coakley Moloney, Solicitors, 49 South Mall, Cork. Reference: PD/OD

EYE INJURIES AND OPHTHALMOLOGIAL NEGLIGENCE

Mr Louis Clearkin ChM, FRCS, FRCOphth, DO, MAI, MEWI
Consultant Ophthalmic Surgeon
Experienced expert witness in ophthalmological personal injury, medical negligence and civil litigation

Renuntiabo, 8 Rose Mount, Oxton, Wirral, Merseyside, L43 5SW
secretary: +44 (0) 151 6047047
fax: +44 (0) 151 6047152
e-mail: L.Clearkin@Liv.ac.uk

TITLE DEEDS

***Landlord and Tenants (Ground Rents) Acts, 1967–1984*: notice of Intention to acquire a fee simple (section 4)**
To: the person or persons for the time being entitled to the interest of Mary Fenella Kelly in the premises hereinafter described under the leases hereinafter described.

Description of land: all that and those the premises known as Number 47 and 47A Smithfield in the Parish of Saint Paul in the City of Dublin.

Particulars of applicant's lease or tenancy: lease dated 26 February 1934 between Mary Fenella Kelly (lessor) and Michael Joseph Kelly (lessee) for a term of 99 years from 1 November 1933 at the yearly rent of £15 and subject to the covenants and conditions therein contained.

Take notice that the applicant, Fusano Properties Limited, having its registered office at 125-126 Lower Baggot Street, Dublin 2, being a person entitled under the provisions of sections 9 and 10 of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978*, proposes to purchase the fee simple interest in the lands described above.
Signed: Beauchamps, Dollard House, Wellington Quay, Dublin 2 (solicitors for the applicant).
27 January 2000

Landlord and Tenants Act, 1967–1984* and the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978
Would any person with information or knowledge of the estate or executors of the estate of William Wilkinson (deceased) or knowledge of the subsequent grantees of any interest in the estate of William Wilkinson (deceased), please contact Cawley & Company, Solicitors, 26 Lower Hatch Street, Dublin 2.
And
An application by Edward Rooney and Laurence O'Dea
Take notice that any person having an interest in the freehold estate of the following property: all that and those portion of the ground floor and the entire of the first floor of 3 Main Street, Swords, in the County of Dublin.

Particulars of applicants' interest referred to above: assignment dated 10 July 1999 made between John Savage of the one part and the applicants of the other part which said premises forms part of the property comprised in and demised by an indenture of lease dated 10 September 1850 and made between Philip O'Dwyer Greene of the first part, William Greene of the second part and George Watters of the third part for the term of 200 years from 25 March 1850 subject to the yearly rent of £5 thereby reserved and to the covenants on the part of the lessee and the conditions therein contained.

Take notice that the applicants, Edward Rooney and Laurence O'Dea of 6 The Rise, Malahide, County Dublin, being the persons entitled under the provisions of section 9 and 10 of the *Landlord and Tenant (Ground Rent) (No 2) Act, 1978*, propose to purchase the fee in the lands described in above.
Signed: Cawley & Company (Ref: R/0017/5P), 26 Lower Hatch Street, Dublin 2 (solicitors for the applicants).
19 January 2000

TITLE DOCUMENTS

Philip Mahon (deceased), Unit 20 North Street, Swords
Will any person having knowledge of the whereabouts of the title documents of the above mentioned property, please contact MacGeehin & Toale, Solicitors, 15 Prospect Road, Glasnevin, Dublin 9, tel: 01 8304343, reference: B392-4

Getting the dope on our sporting heroes

Peter Lennon: from small acorns ...

Peter Lennon, the man best known for representing Michelle Smith and latterly Stephen Roche, was born in Dublin in 1956 and went to Castleknock College and then Trinity College. At Trinity, he studied legal science and completed an LLB. He was apprenticed to Thomas J O'Reilly Sr, a former President of the Incorporated Law Society of Ireland, in Hickey Beauchamp Kirwan & O'Reilly. Following qualification in 1980, he spent 18 months working there as an assistant to Anthony Kirwan, before setting up Lennon Heather & Company with Douglas Heather in December 1981.

A former auditor of the Dublin University Law Society, Lennon is a keen sportsman and has sailed competitively for Ireland.

'A dedicated branch of the Common Law Division of the High Court to deal exclusively with personal injury matters would help'

What attracted you to a career in law?
I was interested in English, history and languages in school and did a lot of debating. The careers guidance officer suggested that law might be a suitable career and with some gentle prodding from my father I decided to become a solicitor. Despite my love of advocacy, I never considered doing the Bar.

Which living person do you most admire, and why?
There are a lot of people in the public arena that I admire, but the living person that I most admire is my mother. She managed to rear six of us with great aplomb and with never-ending support for all of her childrens' efforts. In addition, she managed to keep her sanity when all around were losing theirs.

What is the best piece of advice you ever got?
Never turn away a client. From our earliest days in Merrion Square, we have always taken the view that large oak trees come from small acorns and over the years we have been proven correct in following that piece of advice.

When we set up in practice, myself and my partner, Dougie Heather, were in our early- to mid-20s with a portfolio of clients of similar age. It was important to develop a very strong relationship with these clients. We knew – if they had the drive and enthusiasm that we both had for our practice – they would end up being captains of industry or successful individuals in their own chosen professions.

Whether it was a District Court parking fine or their first will, all were treated as if they were our most important client, and this I believe has stood to our benefit.

Which case do you wish you had been involved in?
The one in which I successfully defended Michelle Smith de Bruin.

Best decision you ever made?
Moving from a large practice and setting up Lennon Heather & Company in 1981/82.

Worst decision you ever made?
Not expanding as rapidly as perhaps we should have done in the mid-90s.

How do you cope with stress?
Well. It is a necessary evil in the competitive environment that we work in.

If you could make one change to the legal system, what would it be?
To change the High Court personal injury listing system. As a lawyer involved in defending personal injury actions on behalf of corporate entities, it is soul-destroying to have to explain to chief executives, risk managers and the like that although the case is listed for a certain day they may well be standing around for three or four days before the case has a chance of being heard. A dedicated branch of the Common Law Division of the High Court to deal exclusively with personal injury matters would, I believe, help both the Bar, the solicitors' profession, plaintiffs and the Insurance Federation in their efforts to meet all of the objectives that they set for one another. It would also, in my opinion, help in some way to alleviate the continued criticism of the judicial system as a forum for dealing with personal injury matters.

Time management tips?
Try to communicate as succinctly as possible. Although my typing is not great, doing one's own e-mails, memos and tasks within our office management system is a significant time-management help.

Pet hate?
Last minute applications for adjournments. G