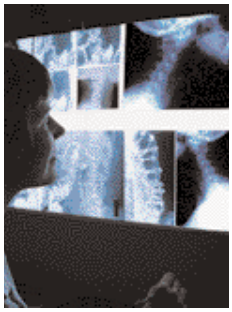
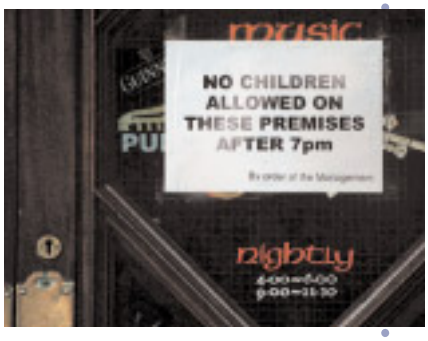
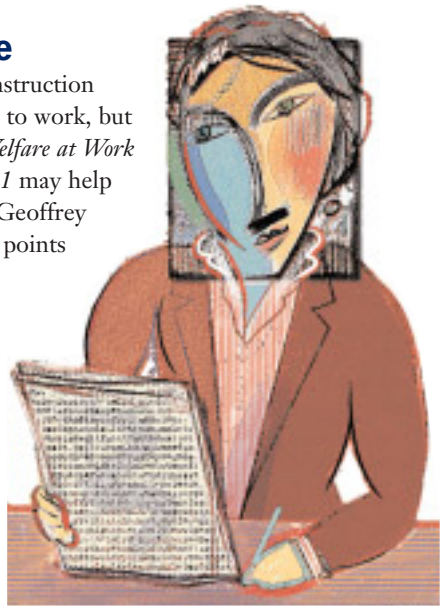
Gazette LawSociety

Regulars



Cover Story





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NEW LAW SOCIETY BROCHURES

The Law Society's Probate, Administration and Taxation Committee has produced two new publications, *Making a will* and *Administering an estate*. A sample of each brochure is included in this issue of the *Gazette*. The brochures are aimed at the layman and have a 'plain English' format, using as little legal jargon as possible. The brochures will be launched later this month and can be bought in packs of 50. To place an order, contact Maureen O'Grady at the Law Society on tel: 01 672 4800, fax: 01 672 4801.

LAW SCHOOL LANGUAGE CLASSES

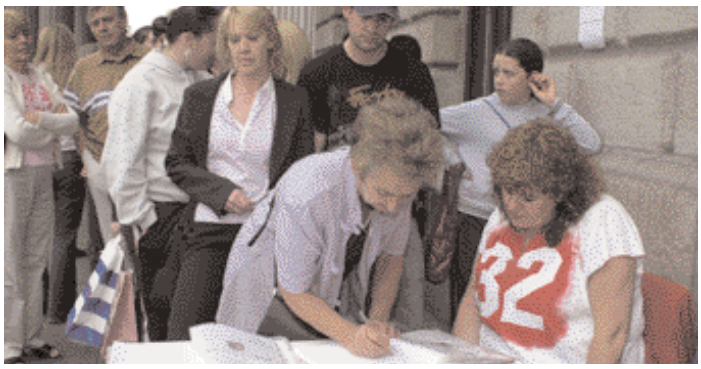
Following the success of previous years, the Law School is to run another programme of language classes this autumn. Classes will be held in the new Education Centre at Blackhall Place and courses begin in October. Each course will last eight weeks and run from 5.30-7pm. Courses on offer include French (intermediate level), Japanese (beginners' level) and sign language (beginners' level). For further details, contact the Law School's Deirdre Healy on tel: 01 672 4802.

Pre-trial publicity warning

Media coverage of the arrest of the two suspects in the Holly Wells and Jessica Chapman murders in England has highlighted the very real risk that pre-trial publicity poses to the interests of justice, Director General Ken Murphy recently told RTÉ Radio 1's *Today* programme.

He said that the relentless and sensational media reporting, clearly derived from off-the-record briefings from the police, was based on what could only be described as 'a relentless presumption of guilt'. There were two risks to this type of media coverage, Murphy said. 'One risk is the potential, as has been the case in America recently, that people who are the subject of unrestrained media speculation about criminal involvement and who turn out to be totally innocent still have their reputations destroyed forever. The second risk is of creating serious difficulty in securing a fair trial for the accused persons at a later stage'.

It had to be recognised that the police were under intense pressure in certain sensational cases where enormous public anger and emotion demanded quick results. The real question was whether the police and media were crossing boundaries which should not be crossed in the interests of justice, said Murphy.



Dubliners signing books of condolence for Holly Wells and Jessica Chapman outside the GPO

In Ireland, he pointed out, the Supreme Court has said that the test is whether or not there would be 'an unavoidable risk of unfairness' in the holding of a trial, which could not be overcome by warnings from the judge to the jury. The decision of the Circuit Court two years ago, subsequently upheld by the High Court, to postpone the trial of former taoiseach Charles Haughey in relation to alleged obstruction of the McCracken Tribunal illustrated this. That trial was postponed and has not yet taken place. However, he added that the court recognises what is referred to in the judgments as 'the fade factor', whereby the passage of time will reduce public prejudice to a level where a fair trial can be held.

PRAISE FOR BUSINESS LAW COMMITTEE

The Irish journal *Competition* has praised the Law Society's Business Law Committee in its latest edition, saying that 'this small body of solicitors was the most influential of all lobbying groups' making submissions on the *Competition Act, 2002*. The journal also notes that while the Law Society 'succeeded in getting a large number of amendments passed, most of these were in the public interest rather than in its members' interest'.

ONE TO WATCH: NEW LEGISLATION

The *Competition Act, 2002*

Most of the *Competition Act, 2002* was brought into force on 1 July 2002, and nearly the entire remainder (part 3 on mergers and acquisitions) will come into effect on 1 January 2003 (SI 199/02). The act repeals and replaces the three main statutes which deal with merger control and competition generally in the state. These are the *Mergers, Takeovers and Monopolies (Control) Act, 1978*, the *Competition Act, 1991*, and the *Competition (Amendment) Act, 1996*. It implements many of the recommendations of the Competition and Mergers Review Group, which reported in May 2000, and was drafted with regard to the proposed revision of the enforcement of EU competition law contained in a draft council regulation currently under discussion. It consolidates and updates the existing legislation, and the changes to existing legislation are set out in the explanatory memorandum with the *Competition Bill, 2001*, which can be viewed on the Oireachtas website *www.irlgov.ie/oireachtas* under *Legislative information*.

Part 2 sets out competition rules and enforcement, and is the main subject of this report. Part 3, which comes into effect in the new year, deals with mergers and acquisitions. Part 4 continues the existence of the Competition Authority and widens its functions, strengthens its independence and provides a statutory framework for practical co-operation between the authority and the sectoral regulators listed in the first schedule. Part 5 provides for miscellaneous matters such as repeals, expenses and saving and transitional provisions.

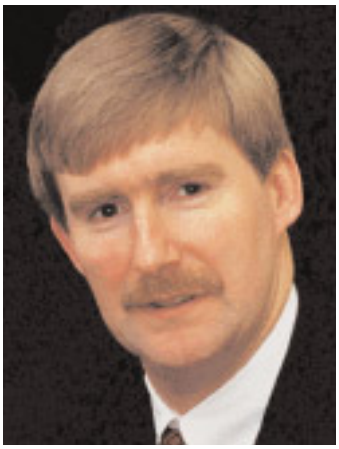
Part 2: competition rules and enforcement

Section 4 prohibits anti-competitive agreements, decisions and concerted practices and the section gives a non-exhaustive list. The more serious 'hard core' anti-competitive activities include price fixing, market sharing and bid rigging. The less serious offences include applying different conditions to equivalent transactions with different trading partners or attaching extraneous conditions. Exemptions are permitted if they come within categories declared by the Competition Authority in writing to comply with sub-section (5) (such declarations being subject to an appeal to the High Court in

Early report on competition?

The Competition Authority is trying to complete – earlier than expected – its study of competition in seven professions, including the two branches of the legal profession. Indecon, the consultants retained by the authority, have been asked to complete and submit their report by the end of this month.

On 28 August, the society had the second and last of its meetings with economists from Indecon. The society was told that its 220-page submission was the most comprehensive that had been received and that Indecon was also very pleased with the total co-operation that the society had given.



Ken Murphy: the profession has a 'good story to tell'

Interviewed on the subject of the study last month by UK-based journal *The lawyer*, Director General Ken Murphy said: 'I am a great believer in competition law and it is perfectly right that the legal profession should be reviewed in accordance with its principles to ensure that the inevitable tension between regulation and free and fair competition is properly maintained'. Where restrictions on competition exist, they must be 'both necessary and proportionate', he added.

The Law Society believed that both it and the solicitors' profession had 'a good story to tell' on the subject of competition and it was 'delighted to have the opportunity to tell it', said Murphy.

New late payment regulations issued

The *European Communities (Late Payments in Commercial Transactions) Regulations 2002* (SI 388/02) came into effect on Tuesday 7 August 2002, *writes Michael V O'Mahony*. Their main thrust is that (unless the contract includes different terms as to credit period and interest on overdue accounts, and which are fair) any commercial purchaser of goods or services becomes liable to pay interest at 10.25% (plus a fixed amount of compensation depending on the size of the debt) on accounts to suppliers outstanding for over 30 days.

In acting for a plaintiff in respect of a claim for payment on a commercial contract for goods or services, where the goods or services were delivered or the invoice was delivered after 7 August 2002, a solicitor should ensure that, in demands or pleadings (unless the contract provides otherwise), there is a claim in addition to the amount owed for both interest pursuant to regulation 4 and compensation pursuant to regulation 9 of these regulations.

The regulations seem to apply (as an alternative to the possibility under section 22 of the *Courts Acts, 1981*) in respect of pre-judgment interest in such cases, though the existing *Courts Act* interest post-judgment would continue to apply.

NEW BOOKLET TO EXPLAIN COURT SYSTEM

The Law Society, in association with the Courts Service and the Bar Council, is working on an explanatory booklet to demystify the structure and operation of the Irish court system for the general public. It's hoped that the booklet will officially be launched in early October, and solicitors' firms will be able to obtain multiple copies to give to their clients or potential clients.

WHERE THERE'S A WILL

Probate specialists Fallon & Stephenson Solicitors will be hosting a seminar on drafting wills on Friday 11 October in Dublin's Westbury Hotel. The all-day seminar costs €350 including lunch. For further information, contact Fallon & Stephenson on tel: 01 275 6759 or e-mail: annestephenson@fallon-stephenson.com.

PRACTICE MANAGEMENT SEMINAR

Marketing, IT and maximising profitability will be some of the topics covered in a practice management seminar to be held in the Law Society on Thursday 24 October. For further information, contact Outsource on tel: 01 678 8490 or e-mail: info@outsource-finance.com.

accordance with section 15). Sub-section (5) allows of exceptions if the dubious agreement, decision or concerted practice complies with 'efficiency conditions' – that is, contributes to improving the result (production, distribution, services or promotion of technical or economic progress), while sharing the benefits with the consumer, and is no more restrictive than is necessary and does not permit the substantial elimination of competition. It is no longer necessary to notify such agreements.

Section 5 prohibits abuse of a dominant position, and gives examples that are not exhaustive.

Sections 6 and 7 provide that an undertaking which is involved in any prohibited activity under section 4 or article 81(1) of the treaty establishing the EC (which prohibits anti-competitive activity) or section 5(1) or article 82 (abuse of a dominant position) shall be guilty of an offence. This makes these articles of the treaty directly applicable law. Section 6 creates a presumption that any agreement between competitors or decision made by an association of competitors or concerted practice engaged in by competitors which is to fix prices, limit output or sales, or share markets or customers (the more serious anti-competitive activities) has an anti-competitive intention, and the onus of proving otherwise is on the defendant. Any act undertaken by an employee is to be regarded as an act of the undertaking for the purposes of determining liability for an offence. Certain defences are provided, if, for example, exemptions have been granted to that category of agreement by the Competition Authority or a commission exemption was in force at the material time, or the acts concerned were done pursuant to a determination made or direction given by a statutory body (a list of four regulatory bodies is set out in the first schedule).

Section 8 deals with penalties. The more serious anti-competitive offences warrant, on summary conviction, a fine of up to €3,000 or, if the undertaking is an individual, up to six months' imprisonment and/or a fine, and €300 a day for continuing offences. On conviction on indictment, up to the greater of €4 million or 10% of the turnover of the previous financial year or, if

CLE takes on information technology

The Law Society's CLE department has introduced a number of courses to help solicitors develop their IT skills.

The courses take place in the IT room in the society's Education Centre.

The three-hour workshop on *Legal research on the Internet* held in June elicited an overwhelming response, and the workshop is being held again in October and in November. This course is run by John Furlong, director of legal resources and education in Matheson Ormsby Prentice and chairman of the society's Technology Committee. The workshop begins with a short presentation explaining the legal research tools available on the Internet, particularly the free resources, followed by a hands-on training session that includes a number of practical exercises designed to give participants confidence and knowledge.

John Furlong: June workshop had overwhelming response

This month also sees the launch of a 12-week series of IT workshops, during which Mark Hainbach will help practitioners with little or no knowledge of PCs to master the core computer skills. The syllabus will include Microsoft Word, Outlook and Internet Explorer, and the format will be highly interactive.

Practitioners interested in these courses should register immediately, as places are limited and demand is expected to be high.

(See also Net gains *in this month's issue, page 14.)*

Rent allowances for protected tenants

The *Social Welfare (Rent Allowance) (Amendment) (No 1) Regulations 2002* (SI 354/02) were signed on 10 July and came into effect on 26 July 2002, *writes Alma Clissmann*. They are a response to the expiry of the 20-year protection period for certain successor tenants under the 1982 *Housing Act*, and they continue the entitlement to a rent allowance (which was due to expire) where the amount of rent applicable up to 25 July continues to apply or where the rent has been set by the Circuit Court under the *Landlord and Tenant (Amendment) Act, 1980*. The rent allowance scheme bases the allowance on the rent increase, so that even significant increases to market rents should be covered for qualifying tenants. The regulations also make the means test more generous, making the allowance available to a wider band of tenants by tapering-off eligibility more slowly. The maximum allowance is available to a married person with a weekly income of up to €261. For any married person with an income between €261 and €461, 50c of each euro of income in that €200 band is docked, and over that amount €1 per euro of income is docked. The figures for unmarried people are between €147 and €347.

In reality, it will be some time before applications for new tenancies with new market rents or repossession cases will come up for hearing in the Circuit Court and, when they do, the rent allowance scheme should ensure that qualifying low-income tenants will not be made homeless because of inability to pay a market rent.

the undertaking is an individual, the same fine and/or five years' imprisonment. Continuing offences incur a penalty of up to €40,000 a day. The provision for a five-year maximum penalty of imprisonment automatically allows for a power of arrest under the *Criminal Justice Act, 1984*. Trials on indictment are to be heard in the Central Criminal Court (section 11).

For the lesser of the anti-competition offences and for abuse of a dominant position, the penalty on summary conviction is a fine of up to €3,000 (€300 a day for continuing offences) and, on indictment, a fine of up to the greater of €4 million or 10% of turnover (€40,000 a day for continuing offences). There is no imprisonment for these 'lesser' offences.

Individuals (directors, managers and people in positions of power and responsibility) concerned in the commission of anti-competitive offences may be prosecuted and penalised in the same way as undertakings, and sub-section 7 provides for a presumption of consent to the commission of the offence. Summary proceedings may be brought by the Competition Authority.

Sections 12 and 13 create presumptions in relation to documents (who created them, who saw them) and makes them admissible in evidence. The content of documents may also be admissible as evidence of the facts stated in them, and there are safeguards to protect the people concerned and third parties.

Section 14 gives a right of action to people or undertakings adversely affected by anti-competitive activity against the undertakings or people concerned. The Competition Authority also has a right of action, and proceedings may be brought in the Circuit or High Court, and provision is made for injunctive relief. In cases of abuse of a dominant position, the court is empowered to order the dominant position to be discontinued by sale of assets or otherwise, or its exercise subject to conditions. There is a presumption that people in positions of power and responsibility consented to any anti-competitive acts. G

Alma Clissmann is the Law Society's parliamentary and law reform executive.

Letters

Have we become too litigious as a nation?

From: Dr Eamonn Hall, Eircom plc

We have all heard complaints that the courts are too slow; procedures are more complicated than they should be, and litigants are bewildered and sometimes traumatised by their experiences in court. It is in the nature of mankind to complain about the authorities. A significant number of litigants must, by virtue of the adversarial system, go away from court disappointed. Not everyone can win.

There has been criticism in the past that there has been little reliable quantitative data about use of the courts by litigants. It is only when figures and statistics are available that sound policies and decision-making can be formulated. The compilation of statistics by the Courts Service is welcomed.

In 2001, there were 361 appeals lodged in the Supreme Court. The court dealt with 243 appeals. Of these, 107 were dismissed and 76 allowed. The remainder were either struck-out or withdrawn with consent to be dealt with in other ways. At the end of 2001, all cases certified as ready for hearing were given dates for hearing between January and April 2002. According to the Courts Service, there are no delays in receiving dates for hearing in the Supreme Court.

In the High Court, 21,602 summonses were issued last year – up from 16,868 in 2000. The Office of the High Court dealt with 82,391 pre-hearing matters, which can be described as affidavits, appearances, motions setting down for trial and related issues.

According to the Courts Service, there are no undue delays or extended periods of waiting for personal injury, judicial review, Circuit Court appeals, family law, asylum or non-jury actions coming before the High Court in the Four Courts. Cases certified as ready for hearing were given dates in the current or coming term. Outside of Dublin, the High Court hears 71% of cases within six months of their being set down as ready for hearing.

The modernisation of the administration of justice by the Courts Service is welcomed and is obviously having a beneficial effect.

Overall, there is an increase of 38% in the number of orders issued by the superior courts last year. Undoubtedly, the Irish have a propensity to sue. Are we unique?

Stupid is as stupid does

From: Patrick O'Connor, P O'Connor & Son, Swinford, Co Mayo

With tongue in cheek, may I suggest that a new award be established in Ireland, to be entitled *The Stella awards*. This might be particularly appropriate in the current frenzied climate of attacks upon lawyers for allegedly encouraging personal injury claims. It would be given each year to the person awarded the biggest amount of damages in what might be misconstrued as a frivolous lawsuit!

Bemused?

The Stella awards would be named in honour of the 81-year-old Stella Liebeck, who was awarded US$2.9 million for spilling a cup of McDonald's coffee on herself.

I understand that the latest candidate for the award is Kathleen Robertson of Austin, Texas, USA, who was awarded a sum of US$780,000 by a jury for breaking her ankle after tripping over a toddler which ran amok in a furniture store. The store owners were surprised by the verdict, given that the toddler was Mrs Robertson's own son!

A thought for your worthy and award-winning publication!

Castlebar area telephone directory

From: James Cahill, president, Mayo Solicitors' Bar Association

The new Castlebar area telephone directory contains over 15,000 telephone numbers. It also contains a very simple community-based advertisement, agreed to by all of the Castlebar solicitors. The advertisement is strategically placed in the directory and the colour scheme adopted is quite pleasing.

The cost of the advertisement worked out at just under €50 per office. The local area telephone directory, sponsored by the Chamber of Commerce, is reproduced every six or eight years and ends up in almost every household. The concept is one which might be of interest to solicitors in other towns and bar association areas in the country.

What should we expect from a

The current Supreme Court is packed with eclectic talent, writes Pat Igoe, but does it have a distinctive ethos or world view? And if so, what is it?

Significant changes are taking place in one of the most important institutions in the state. The Supreme Court, located between the Court of Criminal Appeal and High Court no 5 in the Four Courts building, is not the sleepy backwater that it may look to clients and visitors.

We are now more than two years into what we may call the Keane Supreme Court. There are a further two years to go before Mr Justice Keane is due to retire on reaching 72 years of age. Its success can hardly be measured if there is not a yardstick. So, how to judge the judges? What do we want of the Supreme Court?

It is now commonplace for non-private-sector bodies to have a 'mission statement'. On his appointment, Mr Justice Keane did not publicly set out his objectives. If he had, though, he might have included:

- Greater efficiency in the courts, with fewer anomalies and delays, and an end to some faintly ridiculous Dickensian practices
- Careful monitoring of the various branches of government to ensure that the government did not cross into the judicial role and vice versa
- Disabusing individuals of the belief that if somebody has a problem or misfortune, somebody else has to pay for it, and
- A gearing of the Supreme Court to meet the on-coming challenges as the country sheds its comfortable and protected past for the complexities of a heterogeneous and open – if not always contented – society.

Mr Justice Ronan Keane: has spoken strongly and publicly about how our courts system is in need of repair

Wheels of justice

The appointment of Mr Justice Ronan Keane as chief justice in January 2000 was a popular one. Often reportedly seen on the DART travelling to his home in Monkstown, he has spoken strongly and publicly about how our courts system is in need of repair.

Earlier this year, a new working group headed by Mr Justice Nial Fennelly was established to examine the jurisdictions of the Irish courts. At its launch, the chief justice said it would have a 'a root and branch' remit. He had earlier signalled his view of the need for a radical review of the courts in a speech in Cork last year (see *Gazette*, April 2001, p11).

In his Cork speech, Mr Justice Keane suggested that a radical restructuring of the courts might be necessary, pointing to such anomalies as both the Circuit Court and the High Court having concurrent jurisdictions to hear family law cases, such as divorce, separation and nullity. The new working group is charged with examining how the courts here have operated since their establishment in 1924.

Unlike the government or the Oireachtas of the day, the Supreme Court does not have a fixed lifespan. Like private companies, it has a continuing existence. Only the personnel change. Yet a court can be attributed an ethos according to the views and philosophies of its incumbents. So it is with the Keane Supreme Court.

Young at heart

This is a young court with eclectic talent. Mr Justices Hardiman, Fennelly and Geoghegan were appointed in 2000, as were Ms Justices McGuinness and Denham. Ms Justice McGuinness and Mr Justice Hardiman were appointed to the court on the same day as Ronan Keane was named chief justice. Mr Justice Murray was appointed in 1999. The eighth member of the court, Mr Justice Frank Murphy, was appointed in 1996 and is due to retire in a few months.

The government's expectations or ambitions – if it has any – in terms of the ethos or philosophy of the court have not been, and would not normally be, disclosed. Calls both for greater openness in the appointment of judges and for public discussion on where individual candidates for judicial office stand on social and economic issues have yielded no results as yet.

Yet, whether by chance or design, the members of the Supreme Court have a wide range of legal knowledge, experience and life views. They include Ms Justice Denham, a significant figure in the movement towards fundamental reform of the courts system; Mr Justice Hardiman, formerly a successful senior counsel and an early figure in the Progressive Democrats; and Ms Justice McGuinness, a distinguished family law judge who was rapidly promoted from the Circuit and High Courts.

Their backgrounds suggest that they sit on the liberal wing of the court, though perhaps not to the point of the late Mr Justice Niall McCarthy, who was once described by a commentator as sitting on the bench to the left of the chief justice, like a little independent republic. Their contributions are complemented by the European experience of both Mr Justice Murray and Mr Justice Fennelly, respectively a former judge of the European Court of Justice and the first Irish advocate general to the EU. Mr Justice Geoghegan and Mr Justice Murphy have widespread experience, both at the bar and on the bench. Presiding over them is the genial figure of the chief justice. Their collective views and decisions influence the daily lives of ordinary citizens in far more ways than we may realise.

Last December, by a four-to-one majority, the Supreme Court overturned the High Court decision of Mr Justice Peter Kelly, which directed the government to adhere to its own timetable in providing for children at risk. This decision put down a significant marker

modern Supreme Court?

in the relationship between the courts and the government. 'If citizens are taught to look to the courts for remedies for matters within the legislative or executive remit, they will progressively seek further remedies there, and progressively cease to look to the political arm of government', said Mr Justice Adrian Hardiman. This often-quoted extract from his judgment in the case perhaps served as one summary of the court's opinion.

An eclectic mix of talent: Adrian Hardiman and Susan Denham

Different directions

The Keane-led court has been compared, probably inappropriately, with the Supreme Court of the 1960s, led by Chief Justice Cearbhaill O'Dhálaigh, with Mr Justice Brian Walsh contributing significant intellectual ballast. But the exciting and frontier-breaking constitutional decisions of the O'Dhálaigh court do not easily lend themselves to repetition. O'Dhálaigh's famous dictum that 'we have a constitution but no-one knows what it means' no longer has the same urgency. The Keane court is looking in different directions.

Protection for democracy, even at the courts' own expense, is one trend that is emerging from the Four Courts. In overturning the O'Kelly decision in the High Court, and previously in its decision in the *Sinnott* case that the government was not obliged to provide free education beyond 18 years of age, the court's message seems to be 'render unto Caesar …'. Ironically, Mr Justice Keane was the sole dissenting judgment in *Sinnott*, arguing that the government in this case was obliged to provide free education for Jamie Sinnott 'for as long as he is capable of benefiting from it'.

In the year before his appointment as chief justice, Mr Justice Keane delivered the Supreme Court judgment which declared that part of the *Aliens Act* was unconstitutional. The Oireachtas could not assign its policy-making role to the minister for justice. 'The increasing recourse to delegated legislation throughout this century has given rise to an understandable concern that parliamentary democracy is being steadily subverted and crucial decision-making powers vested in unelected officials', he said at the time.

Coming of age

Maintaining a vigil to ensure that democracy is exercised, while redefining the word in accordance with Irish society as it develops beyond the dawn of the 21st century, seems to be one of the Keane Supreme Court's most significant roles.

The importance to the chief justice of proper respect for the institutions of the state was highlighted in his contribution to a collection on leading law cases (*Leading cases of the 20th century*, published in 2000 and edited by Eoin O'Dell). Choosing the *Sinn Fein Funds* case (*Buckley v Attorney General* [1950]), he made some significant comments on the government of the day's attempt to order the High Court how to decide a case. The decision of the court undoubtedly came as a severe jolt to politicians who were not accustomed to taking the constitution seriously into account, he wrote.

In 1942, Sinn Fein had sought possession of the sum of £24,000 lodged in the High Court to the trust of Sinn Fein in 1924. The *Sinn Fein Funds Act, 1947* sought to require the court to dismiss the action. The chief justice applauded Mr Justice Gavan Duffy's withering dismissal of the government's attempt to interfere in the judicial process. Duffy's judgment had included the statement that 'I am solemnly asked in this court, sitting as a court of justice, independent in the exercise of its functions ... to make a summary order dismissing the pending action out of court without hearing the plaintiffs on the merits of their claim'.

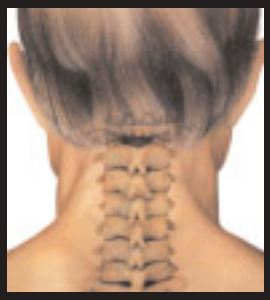
The act remains on the statute book, unused and redundant, an embarrassing reminder to successive governments of the constitutional separation of powers and the independence of the courts. Its choice by the chief justice was not insignificant.

A timely reminder

The Supreme Court's decision to overturn Mr Justice Kelly's decision on the obligations of the state may also have heralded a growing hesitation by the courts to fortify the individual at the cost of society. Media comments in recent years have questioned whether the judicial function had now spread too widely through Irish society and had, as one commentator put it, 'come to be seen as a referee of first resort, instead of last'. Whether we have a negligence culture or a compensation culture, or both, perhaps a reminder is timely that we still have to take responsibility for ourselves.

Most jurists would agree that the Keane Supreme Court is a court for our time. Greater operational efficiency, clarity in the functions of the different courts, clearer understanding of the roles of the different branches of government in the state, and easier access to the courts for deserving litigants would be an enviable legacy. A mid-term report must point confidently to the future. G

Pat Igoe is principal of the Dublin law firm Patrick Igoe and Company.



A pain IN

Whiplash has almost entered the mythology of personal injury claims associated with road traffic accidents. Here, Dr Aideen Henry explains what whiplash is, what causes it and how it should be treated

The term *soft tissue* refers to any structure in the body apart from bone. This usually refers to structures concerned with movement – the musculoligamentous structures – and does not normally include organs such as the liver, brain and heart (see **panel page 10**).

Whiplash is an injury to the soft tissues of the neck due to an acceleration-deceleration collision-type force, commonly due to a head-on or rear-end collision motor accident. In a head-on collision, the impact causes the neck to suddenly whip into forward bending (flexion) and then into backward bending (extension). In a rear-end collision, the neck is suddenly whipped into backward bending followed by forward bending.

What gets injured in a whiplash case?

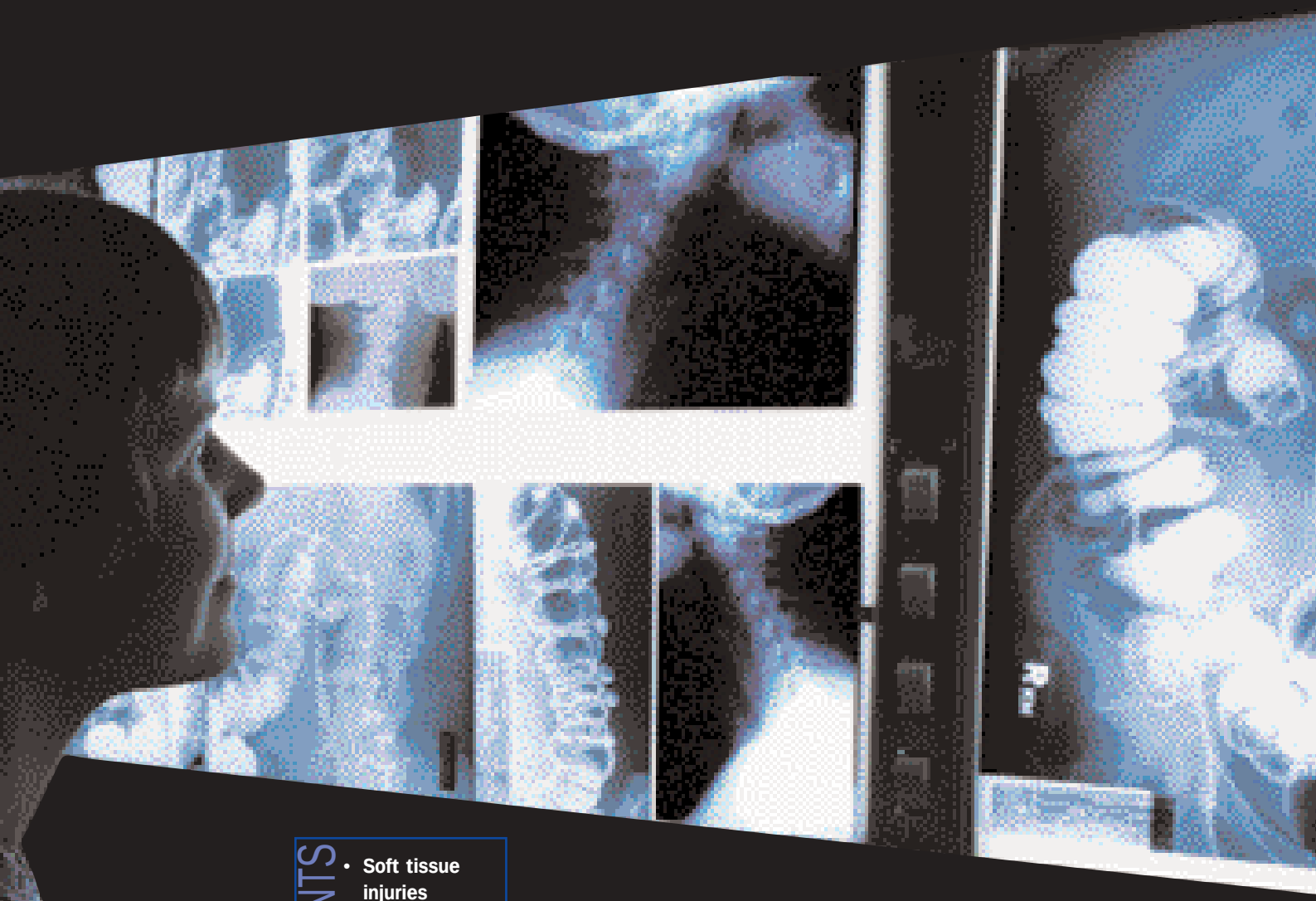
The neck consists of seven bones (cervical vertebrae), C1-C7, held together by muscles and ligaments with intervertebral discs forming a shock-absorbing cushion between each pair of vertebrae. The joints between the vertebrae allow a great deal of neck movement, and nerves pass from the spinal cord to exit between the vertebrae and travel to both arms.

A **mild whiplash** often involves a mild microscopic injury, which causes pain but no movement restriction. A **moderate whiplash** injury involves a sprain to the cervical ligaments, facet joints, intervertebral joints and joint capsule, and injury to the tendons and muscles, greatly restricting neck movements. A **severe whiplash** injury involves a similar pattern of damage as occurs in a moderate whiplash and also includes some damage to the nerve roots, which exit between the vertebrae, causing weakness, tingling and numbness in the arms.

Most symptoms develop within 48 hours of trauma and include:

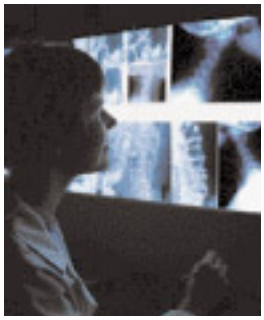
- Neck pain and/or stiffness
- Shoulder and upper-back pain (especially between the shoulder blades)
- Headaches and/or dizziness
- Numbness, tingling, weakness or pins and

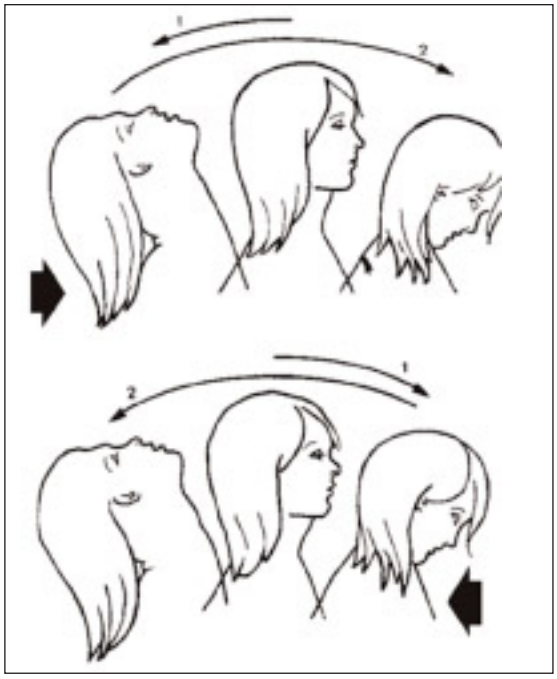
N THE neck



MAIN POINTS

- Soft tissue injuries
- Diagnosing and treating whiplash
- Getting the best medical report





Neck movement upon impact – large arrows indicate the direction of impact

needles in the arms and upper or low-back pain
- It may include difficulty swallowing (*dysphagia*), ringing in the ears (tinnitus), memory disturbance, jaw pain on chewing (tempero-mandibular joint pain), visual disturbance, and giddiness or a sense of spinning (vertigo).

Getting the full picture

A diagnosis of whiplash is based on the full clinical picture: the patient's description of the accident and his symptoms, the clinical examination findings, and results of investigations or special tests. A clinical examination involves:

- **Inspection:** an assessment of gait when the patient is walking and posture when the patient is standing, sitting, talking, dressing and undressing. This gives some information about pain level and movement restrictions. Protective muscle spasm often greatly restricts all movements and makes these activities painful and restricted
- **Range of motion:** the range of motion of the neck and the degree of pain experienced in all six directions of movement is assessed. Range of movement is expressed as a percentage of normal range for that patient's age group. Neck range of movement naturally decreases as we get older, as the joints wear and the soft tissues lose some elasticity. The six movements are flexion (forward bending), extension (backward bending), rotation to right, rotation to left, lateral flexion (side tilting) to right and lateral flexion to left
- **Palpation:** this tests the tenderness to touch – light pressure is applied to all the relevant bones and soft tissues to detect tenderness and muscle spasm
- **Upper limb neurological assessment:** testing the nerve supply from the arm skin and to the arm muscles establishes whether any damage has occurred to the nerves to the arms. Specific tests for muscle weakness, loss of feeling to light touch (loss of sensation) and loss of tendon jerks (reflexes) may indicate nerve damage.

Other special tests or investigations that can be carried out include x-ray, CAT scan, MRI and nerve conduction studies.

Degrees of whiplash

Whiplash can be graded into mild, moderate and severe according to the following criteria:

- **Mild** – pain with normal examination. The patient's symptoms include neck pain and stiffness. A clinical examination will look for the normal, full range of movement, movement that is pain free, an absence of tenderness, and normal arm-neurology testing
- **Moderate** – pain with restricted movement. Patient symptoms include neck pain and stiffness. The clinical examination will look for a reduced and painful range of movement, some tenderness to touch, and normal arm-neurology testing
- **Severe** – pain with restricted movement and nerve compression. Patient symptoms include neck pain and stiffness, in addition to arm weakness/tingling/numbness or pins and needles. The clinical examination will look for a reduced painful range of movement, tenderness to touch, and abnormal neurological tests on the arms.

Treating whiplash

There are many treatment options available, and the choice of treatment will depend on the patient's

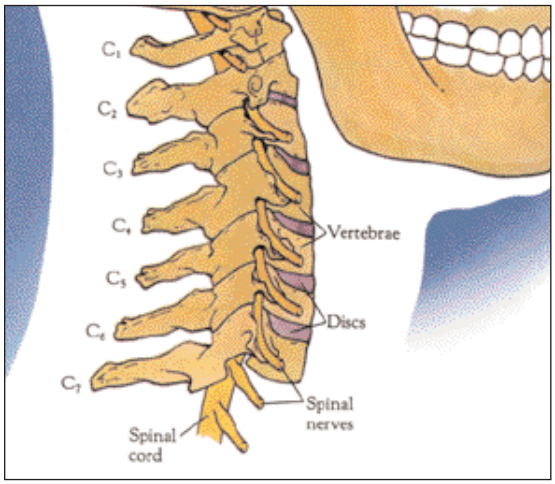
SOFT, STRONG AND VERY LONG

Common usage of the term *soft tissues* usually includes the following:

- Skin
- Subcutaneous fat: the normal layer of fat found under the skin
- Nerve: specialised tissue that acts as a two-way cable to carry messages to and from the brain. For example, touching a hot object carries the message of excess heat to the brain and immediately the brain signals the muscles to activate, to pull the hand away from the heat
- Muscle: contractile structure which by shortening and lengthening its attachment to bones is responsible for body movement
- Tendon: tough non-contractile bands that link muscle to bone
- Cartilage: gristle-like substance that coats the ends of bones in joints and also forms the soft, pliable part of the nose and ear
- Joint: where two bones join to allow movement, normally containing synovial fluid and cartilage
- Capsule: the tough lining of the joint at the edges of the bones that helps hold synovial fluid in place and stabilise the joint
- Ligament: tough band with a consistency of masking tape that joins bone to bone and supports the joint capsule to stabilise a joint
- Bursa: fluid-filled sack normally found between bone and tendon
- Disc: tough cartilage structure found between the bones (vertebrae) in the spine, composed of a soft pulpy centre (*nucleus pulposus*) and an onion-skin surround (*annulus fibrosis*) which can wear (degenerate) and rip, causing the centre to slip out (prolapsed disc).

grade of whiplash. The most common treatment options include:

- Medication – anti-inflammatory tablets and gels (Voltarol, Brufen), muscle relaxants (Diazepam)
- Heat
- Cervical collar
- Neck mobilisation
- Neck mobility exercises
- Neck traction
- Injection of trigger points and of facet joints
- Surgery, particularly if a nerve is trapped.



How long does it take to recover?

Most people fully recover from mild or moderate whiplash injury. One study assessing whiplash patients six months after their injury showed the following results: 55% were pain free, 22% still had mild nuisance-level discomfort, 16% still had intrusive symptoms and 7% were disabled from working because of persistent problems.

There are a number of factors associated with a less favourable prognosis:

- **Lack of awareness of impending impact**. Car occupants who are aware of an impending impact are less likely to have prolonged symptoms than those who are taken by surprise

TREATING SOFT TISSUE INJURIES

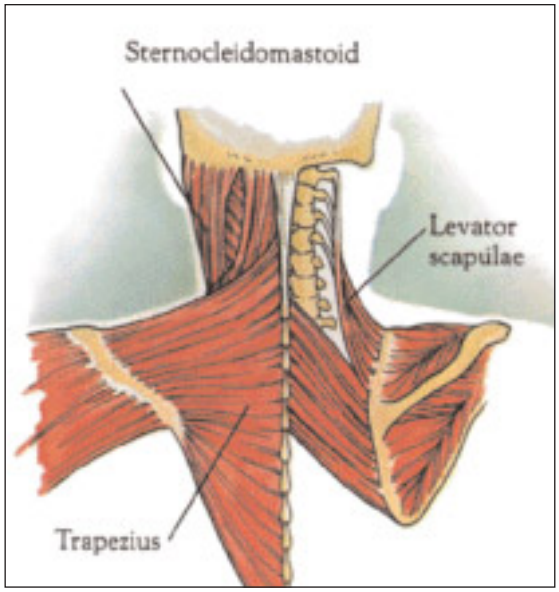
When injured, soft tissues pass through four stages of healing before reaching full recovery:

- **Acute inflammatory stage:** this starts within minutes of the injury and lasts one to two days and is painful. Local chemicals are released by inflammatory cells, which are attracted to the area of injury, to release further chemicals. Blood flow to the injured area increases to cause swelling and sometimes bleeding.
  Treatment: the general approach to follow is termed 'RICE'– rest, ice, compress and elevate – to minimise swelling and accelerate recovery. Anti-inflammatory tablets should reduce the pain
- **Proliferative stage:** this starts within days and involves the manufacture of new tissue to replace the injured soft tissue.
  Treatment: gentle pain-free exercise to increase range of movement is carried out, normally supervised by a qualified professional, such as an orthopaedic doctor or a chartered physiotherapist
- **Remodelling stage:** The new scar matures and strengthens over weeks and months. This lasts at least six months in many soft tissues.
  Treatment: specific and general exercises to strengthen and stretch the scar will help accelerate recovery at this stage. Immobilisation is detrimental to recovery
- **Full healing:** this is reached when the soft tissue that was injured is pain free and has regained full strength and flexibility. The time required to reach full healing differs greatly between different soft tissues.

The optimal conditions required for soft tissue healing differ from those required for bone healing. To optimise soft tissue healing, a programme of graduated exercises increasing to full range of movement and strength will accelerate the recovery process. Immobility or total rest is detrimental to soft tissue healing. A fractured or broken bone, on the other hand, requires immobility for optimal healing because movement prevents bone healing.

When the neck is injured, the neck muscles often go into a protective spasm, which is a contraction that is not released. This prolonged contraction restricts neck movements and causes further pain. When the neck has recovered, hyperirritable areas often remain within neck muscles and can reactivate the neck pain, particularly if the neck is moved forcibly or quickly or held in one position for too long.

Trigger point treatment involves heat, stretching and sometimes soft-tissue injection.



- **Pain distributed to the trapezii muscles**, shoulders and between the shoulder blades (interscapular area). Patients with pain radiating to the shoulders and interscapular area and trapeze have more prolonged symptoms than those patients whose pain is located in the neck
- **Previous whiplash injury**. In general, neck symptoms are more prolonged after the second impact, even if the patient has recovered fully from the first impact
- **Pre-existing cervical spondylosis**. Cervical spondylosis is diagnosis made on x-ray which shows wear and tear in the cervical spine. It is considered a normal part of ageing. Patients with pre-existing cervical spondylosis before their whiplash injury continue to have neck symptoms longer than those patients with normal neck x-rays before their whiplash injury
- **Abnormal neurological signs**. Patients with abnormal neurological signs suffering a trapped cervical nerve are more likely to have pain in the long term than those who have normal neurological assessment
- **Front-seat passengers** have a greater risk of persisting symptoms than rear-seat passengers
- **Rear-end collision**. The risk of persisting symptoms from a rear-end collision is greater than front-on or side-on collision
- **Pain timing and severity**. The earlier the symptoms come on and the greater the severity, the more likely the patient will suffer persisting symptoms

MEDICAL TERMINOLOGY

Idiopathic Disease of unknown origin

Benign Not malignant, non-recurrent, favourable for recovery

Aetiology The cause of a disease

Pathology The study of body changes caused by disease

Prognosis Forecast of probable outcome of disease

Somatic Pertaining to the body

Diaphysis Shaft of a long bone, which is the slender portion between the two wider ends

Epiphysis Ends of a long bone

Acute Recent onset – indicates time, not severity

Chronic Long-standing – for example, days, weeks, months, years

Atrophy Wasting

Hypertrophy Excessive development

Symptoms What the patient describes, for example, pain, swelling, stiffness, numbness or tingling

Clinical signs What the doctor finds on carrying out clinical examination, for example, reduced range of movement, tenderness, loss of feeling (sensation), muscle spasm or reduced muscle power

Flexibility The degree of stretch within a structure before reaching breaking point. All muscles, tendons and ligaments have a certain amount of normal flexibility in them

Effusion Excess synovial fluid within a joint, indicates some injury or disease within a joint

Fracture A break or crack in the continuity of a bone

Palpation Applying pressure to an area with the finger to detect any tenderness or other abnormality

Paraesthesia Pins-and-needles feeling described by the patient.

HIDDEN MEANINGS

Sometimes doctors use expressions that have a specific meaning to other doctors but may be quite different to what a layperson might expect. Here are a few examples:

- **Non-organic:** if a patient is suffering symptoms from an organic source, then the problem is due to some disease process within the body. The term *non-organic* suggests that the source of patient symptoms is not from a body disease process, but from the mind. This may be conscious or unconscious
- **Supra-tentorial:** the *tentorium cerebelli* separates the conscious brain (cerebral hemispheres) from the unconscious brain (cerebellum and brain stem). If a patient's symptoms are described as 'supratentorial', then this suggests that they are from the mind rather than from a disease process in the body
- **Illness behaviour:** illness behaviour is what people say and do to express or communicate their perception of their illness. In most patients, illness behaviour is in proportion to their physical problem. In a small number of patients, illness behaviour gets out of proportion and reflects mental and psychological events more than the underlying physical disorder. Illness behaviour may then aggravate and perpetuate pain, suffering and disability. It becomes part of the continuing problem. Illness behaviour is associated with chronic pain and disability, the amount of failed treatments, and the duration of work. If a patient displays illness behaviour (for example, rubbing, grimacing or sighing during examination, a particular pattern of symptoms and clinical tests), this indicates chronic pain and a behavioural reaction to it, but does not exclude physical injury or disease. 'Psychological overlay' is a term commonly used interchangeably with illness behaviour.

GLOSSARY OF USEFUL MEDICAL TERMS

TERM	DEFINITION	EXAMPLE
Abduction	Moving away from the midline of the body	The hips abduct when the knees are opened apart
Adduction	Moving toward the midline of the body	The hips adduct when the knees are closed together
Superior (cranial or cephalad)	Toward the head end or upper part of a structure or the body; above	The forehead is superior to the nose
Inferior (caudal)	Away from the head end or toward the lower part of a structure or the body; below	The navel is inferior to the spine
Anterior (ventral)	Toward or at the front of the body; in front of	The breastbone is anterior to the spine
Posterior (dorsal)	Toward or at the back-side of the body; behind	The heart is posterior to the breastbone
Medial	Toward or at the mid-line of the body; on the inner side of	The heart is medial to the arm
Lateral	Away from the mid-line of the body; on the outer side of	The arms are lateral to the chest
Proximal	Close to the origin of the body part or the point of attachment of a limb to the body trunk	The elbow is proximal to the wrist (meaning that the elbow is closer to the shoulder or attachment point of the arm than the wrist is)
Distal	Farther from the origin of a body part or the point of attachment of a limb to the body trunk	The knee is distal to the thigh
Superficial	Toward or at the body surface	The skin is superficial to the skeleton
Deep	Away from the body surface; more internal	The lungs are deep to the ribcage

- **Age.** People over 50 years of age are at greater risk of developing persistent symptoms than younger people.

Getting the best from medical reports

Finally, there are some things that members of the legal profession can do to ensure that they receive the best medical reports they can. First of all, doctors like friendly letters. You should remember that the medical world is not adversarial: make sure the tone of your letters to doctors is warm and not too formal.

Another crucial point is to tell doctors what you need. Be clear on what you want dealt with in the medical report. For example, if you require diagnosis, general prognosis and specific prognosis with regard to occupational disability, then you should specifically request these in your letter to the doctor.

If you require a report on a case involving medical negligence, it is important to first establish whether the doctor is prepared to deal with this issue in the report. Many doctors are not happy to deal with medical negligence issues, and their report will often omit comment on the issue of medical negligence altogether.

If you are looking for a prompt medical report, there is a simple but effective way to get it: pay the doctor. The greatest difficulty doctors have with medico-legal reports is the issue of not getting paid. If you need a report quickly, it is worthwhile paying for it up front at the time of requesting it. This will put the doctor under pressure to get the report out to you quickly. If there is any delay, then you can, with justification, put pressure on the doctor's secretary to put your report at the top of the pile.

In conclusion, lawyers should ensure that they choose the best expert witness. Use the most appropriate expert to prepare medico-legal reports in order to get the most accurate and best-informed opinion. Thus, you should select an orthopaedic surgeon for multiple fractures and major trauma, a neurologist for fits or blackouts after head injury, a psychiatrist for psychological symptoms secondary to a personal injury, a respiratory physician for chest complaints in relation to toxic gas inhalation or exposure, or an orthopaedic physician/surgeon for soft tissue injuries. G

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The Internet has become a particularly rich source of legal information for the busy practitioner. John Furlong looks at the growth of on-line legal materials and lists some of the more useful law-related sites to be found on the web

Net GA

Over the past decade, there has been a remarkable growth in the availability and use of Irish legal materials in electronic form (principally through the Internet). It is now possible to get on-line access to the full text of legislation, judgments, explanatory codes and memoranda, details of administrative procedures, Dáil debates, certain secondary legislation, guidance notes and statements of practice.

What has led to this remarkable transformation? What are the principal factors that have encouraged the continuing free flow of official legal materials onto the Internet?

At government level, there has been a clear decision to promote and develop the availability of information in electronic form. The establishment of the Information Society Commission (*www.isc.ie*) in 1997 underlined the desire to promote 'a society and an economy that makes the best possible use of new information and communications technologies'. Various legislative changes (most notably the enactment of the *Electronic Commerce Act, 2000*) have emphasised a commitment to facilitate the conduct of business in electronic form. The subsequent launch of on-line facilities such as the BASIS and OASIS portals referred to later and the development of the electronic tenders website (*www.etenders.gov.ie*) also emphasise the way in which the public sector has embraced the Internet as a way of doing business.

Any review of this area must acknowledge the lead role of the Attorney General's Office when it launched the Irish statutes in electronic form in 1997. The publication, first on CD-ROM and subsequently on the Internet, of all acts of the Oireachtas from 1922 in full text, together with all secondary legislation, was a highly ambitious project which has provided a significant impetus to the on-going development of access to legislative materials.

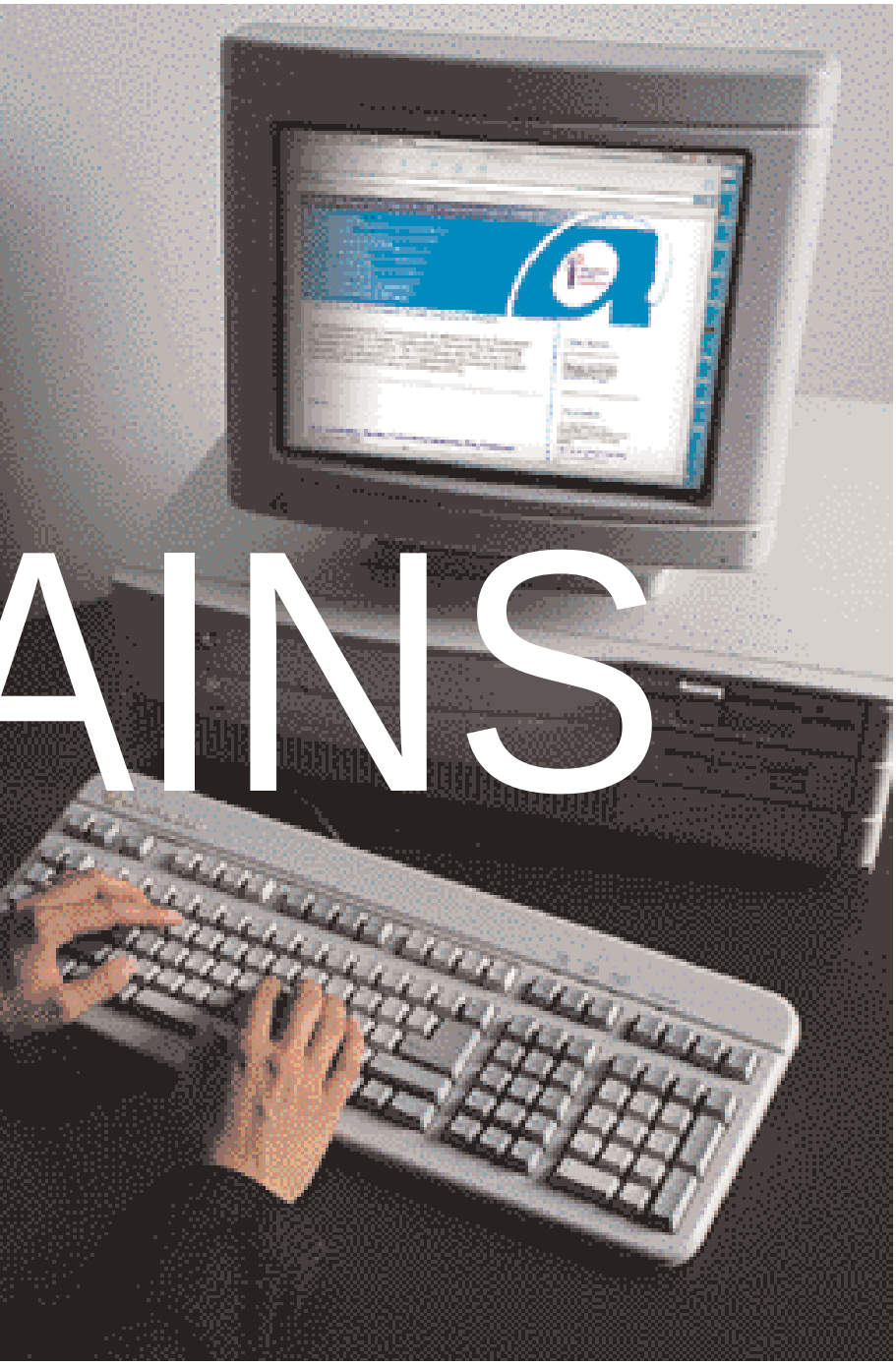
On another public policy level, the *Freedom of Information Act, 1997* has encouraged a more open approach to the provision of materials and information at all levels within the public sector. The act requires government departments and agencies, together with a wide range of public sector bodies, to publish details of their administrative procedures. As most have chosen to do this in electronic form, a substantial number of guidance notes and manuals on the application of law and administrative regulations are now freely available on the Internet. A further effect of the 1997 act has been to develop a more open policy in terms of publishing and making available official information, including primary and secondary legislation.

A basic recognition that electronic publication on the Internet is simple and cheap has also promoted the free availability of material. Giving access to material through a website pushes the costs of access and printing onto the user. It also means that material is available with a degree of immediacy that would be impossible with a traditional paper format. Finally, the growth of Internet use at domestic and business level has increased the demand of users for electronic services.

The result of all this is that substantial and authoritative primary legal material that is of direct relevance to Irish legal practitioners is now available free of charge. For example, it is possible to obtain, electronically and free of charge, the text of any act of the Oireachtas and the full text of most of the recent written judgments of the superior courts. In terms of background research, the full text of Oireachtas debates from 1922 can be accessed to provide detailed background information on the reasoning or thought behind a particular piece of legislation. Many departments and government agencies have taken the further step of providing access to the text of secondary legislation for which they are responsible. What follows is a brief look at the key features of some of the top Irish websites that are relevant to Irish lawyers.

Irish government (*www.gov.ie*). This is the main portal site for connection to a range of government bodies and agencies, local authorities and health boards.

It provides a starting point for access to the individual websites of 50 central government departments and agencies as well as over 20 commercial semi-state organisations. These individual websites contain details of structure and organisation as well as information on areas of responsibility. More importantly, they provide easy access to press releases, publications, guidance materials and practice notes. A small number of



departments and government agencies also host the full text of selected primary and secondary legislation (such as the Department of Finance, the Department of Transport, the Office of the Director of Corporate Law Enforcement, and the Office of the Director of Telecommunications Regulation).

Much of the material on the site can also be accessed through two e-government portals: OASIS (*www.oasis.gov.ie*), aimed at the general public, and BASIS (*www.basis.ie*), which focuses on the requirements of business users. BASIS includes a section giving access to a wide range of official forms required for business purposes, including taxation forms and companies forms.

The attorney general's website provides direct on-line access to all of the acts of the Oireachtas and statutory instruments from 1922 to 1998, together with the chronological tables to the statutes.

The Government Information Service section of the Department of An Taoiseach's site includes the current list of proposed and planned legislation by the Chief Whip's Office at the start of each parliamentary session.

The Revenue Commissioners' site (which can also be accessed at *www.revenue.ie*) is a good example of a major public service making substantial use of the Internet. The site contains a vast amount of detailed material that is freely downloadable. This includes a wide range of interesting materials relevant to tax practice, including statements of practice, chief inspectors' guidance notes, precedents in use, details of double-taxation treaties and access to all forms in use by the Revenue Commissioners.

Houses of the Oireachtas (*www.gov.ie/oireachtas*). The houses of the Oireachtas web pages have full text proceedings of select and special committees and a searchable archive of all parliamentary debates from 1922. These are particularly useful for tracking any changes to bills as they progress through the Oireachtas. By far the most useful service for practitioners is the *Legislative information* section, which provides listings of bills considered before either house of the Oireachtas for each year from 1997. In most cases, the text of the bills as published at each stage will also be available in downloadable pdf format. The section also includes the text of statutes enacted by the Oireachtas since 1997 in downloadable pdf format.

In effect, this service provides a continuation (from an official source) for electronic access to primary legislative material subsequent to the period covered by the electronic Irish statute book (which is maintained and published by the Office of the Attorney General).

BAILII (*www.bailii.org*). This is an on-going ambitious project to establish a British and Irish Legal Information Institute providing free on-line access to legal materials. The system is modelled on the successful AUSTLII database (*www.austlii.org*). The material is presented in a standardised basic presentation format and can be searched globally or by category. The site also contains a selection of

MAIN POINTS

- Easy access to on-line legal information
- Public sector leading the way
- Useful websites to visit

High Court and Supreme Court judgments. In many judgments, hyperlinks within the text will provide links from statutory references arising in case law to the relevant section of the statute. The site also includes all Irish statutes and statutory instruments from 1919 to 1998. In addition, as the site is multi-jurisdictional, it includes a substantial amount of Northern Irish material, including the statutes from 1495 (which will include some statutes still extant in this jurisdiction).

IRLII (*www.irlii.org*). A further development has been the establishment of the Irish Legal Information Initiative (IRLII) by the law faculty at University College Cork. The initiative supplements the involvement of UCC in the provision of Irish legal materials to BAILII. The IRLII website contains material that will eventually be posted to BAILII, including unreported judgments and recent statutes. It includes a listing of leading Irish cases by subject and alphabetically.

Irish law page (*www.irish-law.org*). One of the first dedicated Irish law sites, this portal site provides a wide range of links listed by subject or sector for sources of Irish law, and it is a useful starting point for relevant Irish sites in the areas of both politics and law. The Irish law page also hosts a substantial discussion list on law-related topics.

Other good Irish portal sites providing structured lists of links to relevant law-related websites are Legal Eagle (*www.legaleaglelinks.com*), Legal Island (*www.legal-island.com*), which has a particular focus on employment law, and a more recent entrant E@RL (which can be found at *www.lawcat.com/earl*). It is also worth noting that the *Library* section of the Law Society's website (*www.lawsociety.ie*) provides a substantial list of links to Irish and international law sites.

Murdoch's Irish legal companion. This is an electronic product that comes in CD-ROM format as well as on-line (*milc.lendac.ie*). The *Irish legal companion* incorporates a dictionary of Irish law and the full text of any cited Irish acts or statutory instruments up to the year 2000. This important (if not essential) reference source includes over 6,500 legal definitions relevant to the practice of Irish law, together with a comprehensive bibliography. Two significant aspects of the product are its low cost and ease of use. The dictionary definition for a particular word or term includes hyper-links to any relevant statutory material, together with citation of relevant case law and texts.

FirstLaw (*www.firstlaw.ie*). This is a commercially-run website which provides access, currently at low cost, to a wide range of useful materials. The site includes a current awareness service in relation to Irish legal developments and a search facility. FirstLaw claims to have all written judgments of the superior courts from 1999 onwards, together with Revenue Appeal Commissioner decisions and selected Employment Tribunal determinations. The site also contains the full text of acts of the Oireachtas from 1999. An extremely useful feature of the site is the provision of access to the text of all statutory instruments from 1999. This means it is the only comprehensive source of full-text secondary legislation after 1998.

Courts Service (*www.courts.ie*). The Courts Service website contains a great deal of useful reference information, including the *Legal diary* (in searchable form), the rules of courts (superior, circuit and district) as originally published, with subsequent amendments displayed separately, details of all court fees, dates and sittings of all courts, and substantial details on the workings of all court offices.

Companies Registration Office (*www.cro.ie*). Direct access to the CRO allows free on-line 'public searching' against a limited amount of detail and full 'account/chargeable' access to the CRO database. The chargeable access option also allows scanned documents to be ordered on-line for despatch by e-mail or fax. The site also has a number of outlines of CRO procedures involved in the formation of a company, filing of annual returns and other post-incorporation requirements. All of the CRO forms can be downloaded from the site.

Land Registry (*www.landregistry.ie*). The Land Registry Electronic Access Service (EAS), which operates on a pre-payment subscription basis, allows authorised users to conduct on-line searches of the electronically available register by reference to one or more criteria, including name of registered owner, plan number and so on. Located folios can be printed off. Authorised users can also check for 'dealings pending' on a particular folio. The records will show a summary set of details about the nature of applications pending, who lodged them and when they were lodged. The Land Registry is completing two major projects to enhance the EAS service – one to extend the service to all folios throughout the country and another to allow for electronic filing of the form 17 (see Technology Committee report, *Gazette*, May 2002, page 32). Applications can also be made on-line for certified copies of available folios, folios with copy maps and copy maps showing special features (appurtenant rights, rights of way). The site also contains copies of Land Registry practice notes covering all aspects of registry procedures.

Delia Venables (*www.venables.co.uk*). Delia Venables is a noted UK authority on legal technology and information and maintains this comprehensive portal site with a range of links to legal sites and resources, on-line services available from legal publishers and free legal current awareness and information. Although this is a UK-based site, it has a substantial amount of Irish material and useful links (each with an explanatory overview) to Irish law websites. It also has a comprehensive listing of Irish law firms that have a presence on the web. G

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A level pla

Some recent controversial decisions made under the *Equal Status Act, 2000* have raised a number of important issues. Are the equality officers getting it right, or are their decisions only as good as the legislation under which they operate? asks Mary Redmond

The *Equal Status Act, 2000* has provoked a good deal of controversy during the two years since its enactment. The act puts Ireland in a lead position in anti-discrimination law. Among the 'ground-breaking' decisions under the act is the absurd finding by an equality officer that it is discriminatory on grounds of family status for the proprietor of a licensed premises to refuse to serve a customer accompanied by a young child.

Before the scope of the act is expanded (as has been mooted) and expense incurred appealing decisions under the *Equal Status Act* to the superior courts, certain issues require consideration. We need a debate on at least two fronts: one broad, the other technical.

On a broad front, it is questionable whether, with hindsight, one statute can adequately capture the nuances for claimants in the context of nine forms of discrimination, let alone for 'proprietors' in the several goods and services covered by the act. The issues are not homogenous. Ireland's equality principle in article 40.1 of the constitution does not envisage a 'one-stop-shop' approach. On the contrary, after proclaiming that 'all citizens shall, as human persons, be held equal before the law', it says that 'this shall not be held to mean that the state shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function'.

For example, refusing to sell mood-altering substances that can be consumed over several hours is not the same as refusing to sell soft beverages in a shop. Where there are urgent underlying social concerns, as in the case of alcohol abuse among young people, further refinement of the *Equal Status Act* – if not separate legislation reflecting these concerns – deserves consideration.

Among the technical issues that merit discussion under the act are the comparator issue, the respondent's defence and the burden of proof. The focus in this article will be on these issues in the context of direct discrimination. To set their importance in context, it is useful to recall the elements usually found in a non-discrimination statute (**see panel below**).

Compare and contrast

The *Equal Status Act* is unclear on the comparator – a serious deficiency, as the comparator sets the norm. The act does not make explicit that the

MAIN ELEMENTS IN ANTI-DISCRIMINATION LEGISLATION

There are two main legal models of rights protection: the substantive rights model and the anti-discrimination model. The essential difference between them is that the former broad category concerns fundamental rights that stand alone and are defended by the courts (many constitutions are founded on this model), whereas the latter category concerns procedural justice and is defined by the political process. The *Equal Status Act* belongs here.

Anti-discrimination legislation generally contains the following five characteristics:

- A negative obligation on one party not to discriminate on prohibited grounds
- A correlative (negative) right of the other party not to be discriminated against on those grounds
- Difference in treatment is judged on the basis of comparison between the treatment of the alleged victim and that of a third party, actual or hypothetical
- Comparison is with someone in the same, or not materially different, circumstances
- To constitute discrimination, the effective cause of the difference in treatment must have been on the basis of one or more of the prohibited grounds.

Justice in the anti-discrimination model is procedural. In other words, when determining whether discrimination has occurred, the adjudicator is under no obligation or positive duty to remove the social disadvantage concerned. His function is to examine the evidence and make his decision on it.

Within the anti-discrimination model, there are other sub-categories (described and analysed by Bolger and Kimber in their excellent book *Sex discrimination law*). The 2000 act is based on an anti-discrimination model which is formal and mathematical, requiring strictly identical treatment (like the *Employment Equality Act, 1998*). At its heart lies the Aristotelian principle that like must be treated alike if there is no morally relevant difference between them. It is based on respect for the parties' common humanity.

ying field?

comparison must be such that the relevant circumstances in the one case are the same or not materially different (or were, or would be, the same or not materially different) in the other.

When the *Equal Status Act* was enacted in 2000, two 'precedent' acts in the UK prohibited discrimination in relation to the provision of goods, services and facilities to the public on the grounds of gender, marital status and race (the *Sex Discrimination Act 1975* and the *Race Relations Act 1976*). They provide that a comparison of cases must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

Lack of clarity

The consequences of a lack of clarity regarding the comparator are evident when the question 'who is the comparator?' is asked in the case of a customer who arrives at a pub with a child and is refused service. There are at least three possibilities.

First, if the relevant circumstances in the case of the comparator are required to be the same or not materially different from those of the claimant, it could be argued that the customer also arrives with a child. If the latter is not refused service, there would be a compelling case to refute. But if he is refused, there would be no discrimination, as like cases would be treated alike. (Occasionally, equality officers refer to the circumstances of a case, but not because required to do so by the statute.)

If the circumstances are not relevant, a second possibility involves comparison between a child-accompanied customer and a customer who arrives without his child. To sustain a claim of discrimination on family status, it would have to be established that the publican treated a parent who sought service with his child less favourably than he would a customer who left his child elsewhere. The real difference in this case, however, would not be family status: it would be the respective exercise by the two men of their parental responsibilities (and some would question whether the claimant in such a case was exercising parental responsibility at all).

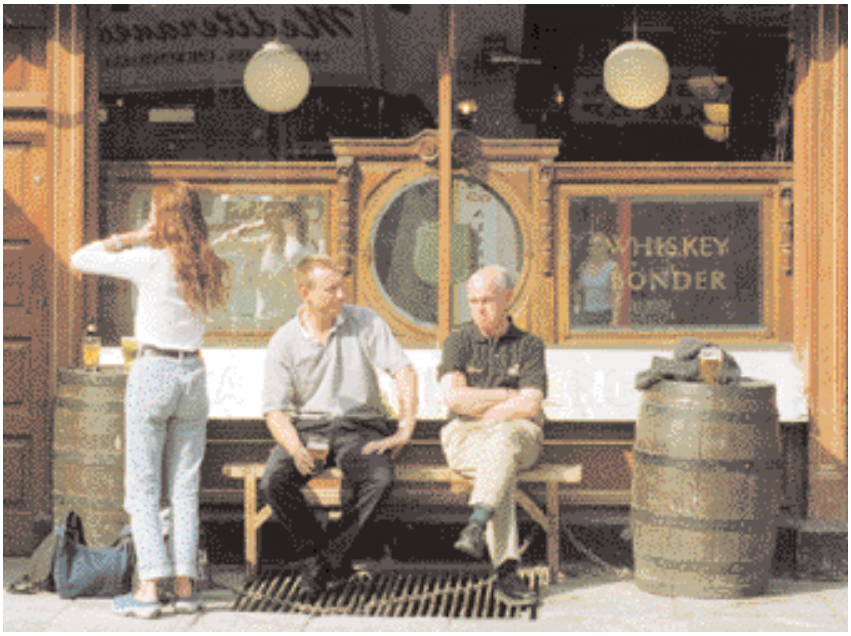
Third, one might consider comparison not with another male parent who has left his child elsewhere, but with a childless male. The claimant would allege that the publican treated him, a child-accompanied customer, less favourably than a childless male customer on the ground of family status. But the publican is most unlikely to treat one customer differently because he has responsibility for a child and another does not. He has several customers with responsibility for children and he serves them all, unless in the exercise of their parental responsibility they bring their children to the pub.

It is incidental whether an adult who arrives with a child is the parent of the child, *in loco parentis* to it, or otherwise. In all probability, the publican will neither know nor care about the status of the child, nor be imprudent enough to ask questions about its parentage.

In sum, the publican refuses service on the basis that the customer is accompanied by a child, irrespective of the customer's family status in relation to that child, and for no other reason. If that were not the case, it would follow that customers arriving with children to whom they bore no parental relationship, actual or *in loco*, would be

MAIN POINTS

- Nature of the *Equal Status Act, 2000*
- How do equality officers reach their decisions?
- Burden of proof in equal status cases



A publican's main obligation is to conduct the premises in a peaceable and orderly manner

outside the act. (The fact that it is not unlawful for a licensee to allow a child to be in the bar if that child is accompanied by his parent or guardian is legally neither here nor there for equal status legislation – there is no legal obligation on a publican to do so.)

The comparator in decided cases

In some decided cases, there is no reference to a comparator at all. Only exceptionally does the claimant refer to a comparator, and then it is mostly in general terms. In most cases, the equality officer takes up the issue of the comparator when considering whether a *prima facie* case has been made out. At some stage in the decision, the equality officer usually describes 'three key elements' which need to be established to show that a *prima facie* case exists, and lists as the third element 'evidence that the treatment received by the complainant was less favourable than the treatment someone, not covered by the ground, would have received in similar circumstances'.

What the equality officer does next is arguably not permitted. In decisions where it is manifest that no evidence whatsoever has been adduced by the complainant as to a comparator, the equality officer is apt to conclude with a formula such as: 'I am satisfied that the complainant was treated less favourably than [say] a non-Traveller would have been in the same circumstances'. On what evidence? A fundamental principle of anti-discrimination law is that the equality officer may not 'pick', still less assume without evidence, who the comparator is for the person bringing the claim. The equality officer is not advocate and judge: his function is to adjudicate on the evidence before him.

Early employment equality law confined the claimant to an actual comparator. Primarily because this meant that women in segregated employment were therefore unable to claim, the notion of a 'hypothetical' comparator was introduced. The hypothetical comparator is not arguably an alternative to an actual comparator. He is a fiction of law where an injustice would result to a claimant because an actual comparator is not capable of being found.

In equal status cases, once again it is the equality officer who introduces the hypothetical comparator into the decision. Typically, he says 'in order to properly evaluate the complainant's case, I believe, therefore, that it is necessary to introduce a hypothetical comparator at this stage'. If no actual comparator exists, however, it is for the claimant and not the equality officer to introduce a hypothetical comparator as part of the evidence.

The respondent's defence

In the usual anti-discrimination model, where discrimination is prohibited on various grounds and judgment is made on a comparative basis, the respondent (once a *prima facie* case of discrimination is established) bears the onus of proving that the difference in treatment was for some other non-discriminatory ground. He or she will attempt to establish that the difference was not effectively caused by a prohibited ground.

The *Employment Equality Act* of 1998, when dealing with equality relating to gender, uses the words, in reference to an employer's defence, 'if the employer proves that the difference is genuinely based on grounds other than the gender ground'. Again relating to non-gender issues, the 1998 act refers to an employer proving 'that the difference is genuinely based on grounds which are not among those specified [as prohibited in the act]'. Similar wording is not found in the 2000 act. It is regrettable that there is no overt reference to the possibility of a respondent proving that the impugned difference is genuinely based on a ground which is other than a prohibited ground.

It would be reasonable to argue that such a defence is impliedly available to a service provider (as some decisions recognise). If it is discrimination within the 2000 act to treat a person less favourably than another person is, has been, or would be treated on any of the discriminatory grounds specified in the act, then it logically follows that if the difference in treatment is proved to be on any ground other than those specified, it is not caught by the act. However, two sub-sections in the same section of the act respectively support and refute this proposition.

The supportive sub-section is s15(2), which provides that action taken 'in good faith' by a licensee for the sole purpose of ensuring compliance with the provisions of the *Licensing Acts 1833 to 1999* shall not constitute discrimination (contrast the latinised *bona fide* in the context of positive discrimination in the preceding section; an example of sloppy drafting). It is sometimes erroneously suggested that this sub-section authorises discrimination by publicans. In *Irish current statutes annotated* (2000), for example, it is observed that 'this subjective approach seems to grant immunity to the publican who believes him or herself to be acting reasonably, regardless of whether it is

objectively the case'.

A publican's main obligation is to conduct the premises in a peaceable and orderly manner. He is liable to penalty if 'he permits drunkenness or any violent, quarrelsome or riotous conduct to take place on his premises, or sells any intoxicating liquor to any drunken person' (*Licensing Act 1872*, s13).

Section 15(2) uses the words 'to ensure' compliance. Where a publican acts honestly (in good faith), motivated by ensuring compliance with the licensing laws, his actions must have to do solely with prevention of drunkenness or violent, quarrelsome or riotous conduct to come within s15(2). In consequence, he may treat people differently but his actions are not discriminatory – that is, on prohibited grounds within the act. Section 15(2) is impliedly akin to the defence in the *Employment Equality Act* of 1998 where the respondent proves that the difference is genuinely based on grounds other than the prohibited grounds.

The 'non-supportive' sub-section is s15(1). Quite why it was drafted as it stands is puzzling. The sub-section ironically begins with the words 'for greater certainty' and provides that nothing in the act shall be construed as requiring a person to dispose of goods or services to a customer in circumstances that would lead an individual 'having the responsibility, knowledge and experience of the person to the belief', on grounds other than discriminatory grounds (the only place the phrase occurs in the act and where it is arguably otiose), that the provision of goods or services to the customer would produce 'a substantial risk of criminal or disorderly conduct or behaviour or damage to property at or in the vicinity of the place' where the goods or services are sought .

This is quite different from providing that a respondent may prove that the difference in treatment is genuinely based on grounds other than the prohibited ground. The risk must be 'substantial'. Case law on 'substantial grounds' in other contexts is helpful, in that it illustrates that 'substantial' means something more than 'reasonable'. If a service provider treats someone differently because she reasonably foresees a risk of criminal or disorderly conduct resulting from that person's presence on her premises, that is not enough. Yet, as against the negative rights and obligations in the act, she has substantive constitutional rights, among them the rights to earn a livelihood and to property.

The burden of proof

The complainant is 'a person who claims that prohibited conduct has been directed against him or her' (s21). This contrasts with the phrasing normally found in anti-discrimination statutes – see the *Employment Equality Act*, *1998*, where s77 describes the complainant as a 'person who claims to have been discriminated against by another in contravention of this act'. The 2000 act could have used such words, but by not doing so presumably 'raised the bar'.

'It is questionable whether, with hindsight, one statute can adequately capture the nuances for claimants in the context of nine forms of discrimination'

The term 'directed' in a statutory context is not defined, and there are no available sources of law to assist. *Black's dictionary* defines 'to direct' as '1) to aim (something or someone), 2) to cause (something or someone), 3) to guide (something or someone) or to govern, 4) to instruct (someone) with authority, 5) to address (something or someone)'.

The mental element

It is arguable that to 'direct' or to aim prohibited conduct against someone requires evidence of *mens rea* or a mental element on the part of the respondent. This is in marked contrast to other areas of anti-discrimination law, where the intention of the person allegedly in contravention is not relevant in cases of alleged direct discrimination.

If so, a complainant bears a heavy burden of *prima facie* evidence. He or she must establish sufficient evidence of conduct on a discriminatory ground, and of differential treatment on a comparative basis, but also that such prohibited conduct was 'directed' against them. In their decisions under the 2000 act, equality officers have applied the standards of the *Burden of proof directive* (council directive 97/80/EC), even though it is not directly applicable to equal status cases. To date, the significance of a claimant as someone against whom prohibited conduct has been directed has not been explored. Arguably the word should be excised.

The objective of anti-discrimination laws should be fairness to both sides. Equality officers are to be commended for the painstaking way in which they have approached this new act. It is no fault of theirs if the legislation has not clearly identified the main issues for decision. In cases under equal pay and employment equality laws (forerunners of the *Employment Equality Act*, *1998*), judgments of the superior courts emphasised the importance of primary findings of fact and the avoidance of dealing with cases on supposition or assumed facts. In one case, a judge of the Supreme Court said: 'I feel I should express a view that it seems to me that this underlines very strongly the necessity for an alteration in the procedures of both the equality officer and the Labour Court so as to provide unequivocal findings of fact made referable to the evidence upon which they have been founded in order to permit, in the event of an appeal to the High Court, of the proper determination of that appeal'. The court went on to criticise as 'highly undesirable' that all the relevant questions of fact should be treated 'in the manner in which they were dealt with, namely assertions without any proof'.

The likelihood of the superior courts similarly criticising decisions under the *Equal Status Act* should – and can – be avoided. G

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The construction industry has always been a dangerous place to work, but that may change with the introduction of the new *Safety, Health and Welfare at Work (Construction) Regulations 2001*. Geoffrey Shannon outlines their main points

BUILDING CO

The *Safety, Health and Welfare at Work (Construction) Regulations 2001* came into force in January and revoke the 1995 regulations (SI no 138 of 1995). The substantive changes are to be found in parts I, II and III of the 2001 regulations, which address the management of safety, health and welfare on construction projects (see the Health and Safety Authority's *Guidelines to the* Safety, Health and Welfare at Work (Construction) Regulations 2001). The 2001 regulations implement EC council directive 92/57/EEC on the minimum safety and health requirements at temporary or mobile construction sites. The regulations came into force on 1 January 2002, though certain requirements do not take full effect until 1 June 2003 (see regulation 1 of SI no 481 of 2001 and appendix 1 of the HSA's guidelines for the 2001 regulations).

Certified training

The 2001 regulations prescribe the principal requirements for the protection of the safety, health and welfare of persons on construction sites and building projects. In light of the large number of deaths on construction sites, the new regulations require that training for construction workers be certified as per regulations 6, 9 and 14 and the eighth schedule of the 2001 rules.

The course content for the *Safe pass* training is specified in the eighth schedule to the regulations. In addition, workers who are obliged to carry out specified critical safety duties are required to be in possession of a construction skills certification scheme registration card, indicating that they have successfully completed training approved by the scheme (**see panel on page 25**).

The project supervisor for the construction stage is responsible, jointly with the contractors, for ensuring that a site worker has a valid *Safe pass* registration card or, where required, a valid skills certificate. Surprisingly, there is no set renewal interval for the specified health and safety courses under the regulations. That said, there is a refresher requirement.

Construction work

'Construction work' and 'structure' are very broadly defined in the 2001 regulations. Construction work includes site clearance, excavation and the erection of a new structure, the demolition and removal of structures, as well as extensions to, and the maintenance of, existing buildings (regulation 2). Window cleaning, painting and decorating projects, as well as routine maintenance works are all, to some degree, affected by these regulations. The erection of a single private dwelling, a development akin to the International Financial Services Centre in Dublin, and all construction sites in between fall within the parameters of the regulations. It should be noted that regulation 2(e) provides that construction work 'does not include drilling and extraction in the extractive industries'.

The regulations impose a mandatory requirement that each construction worker receive a basic health and safety course under the FÁS *Safe pass* training programme and is in possession of a registration card. *Safe pass* is mandatory for all craft and general construction workers, drivers of vehicles delivering building materials on construction sites, and on-site security personnel. While site-office staff, visiting architects or engineers and visiting inspectors are not specifically required under the regulations to receive *Safe pass* training, it is strongly recommended that they do so. The *Safe pass* training is, in summary, a qualification required by workers to be admitted to a construction project site and is to be phased in as specified in regulation 1 of the 2001 regulations (see appendix 1 of the HSA's 2001 guidelines).

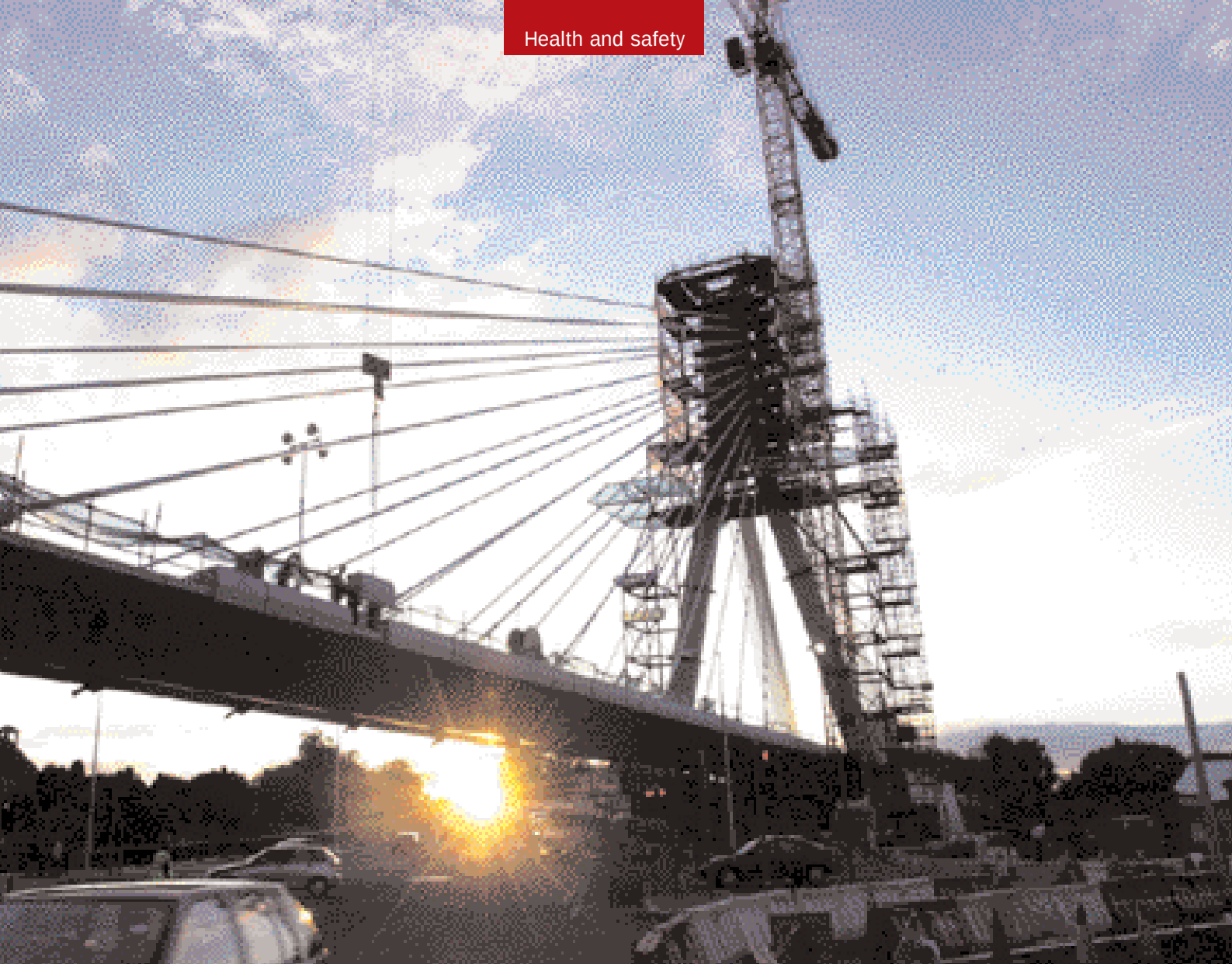
Duties and responsibilities

Parts 2 and 3 of the regulations specify the duties of the client (regulation 3), the project supervisor for the design stage (regulation 4), designers (regulation 5), the project supervisor for the construction stage (regulations 6, 7 and 8) and the contractor (regulation 9).

Clients. Regulation 2 defines a 'client' as 'any person, engaged in trade, business or other undertaking, who commissions or procures the

MAIN POINTS

- New health and safety regulations for construction industry
- Duties of clients, project supervisors, designers and contractors
- Site safety representatives



The new Luas bridge in Dundrum

ONFIDENCE

carrying out of a project or who undertakes a project directly for the purpose of such trade, business or undertaking'.

In summary, the client is, in fact, the consumer. Regulation 3 requires the client to appoint a project supervisor for the design stage and construction stage of every project. One person may hold both positions if suitably qualified (regulation 3[2]). Specific duties are imposed on both the design and project supervisors. Regulation 3(4) requires the client to keep available any safety file prepared (by the project supervisor for the construction stage) under regulation 6 for inspection by any person who may need information in the file, in order to comply with any of the statutory duties imposed. (The safety file is discussed further below.)

Different duties are imposed at the design and construction stages of a construction project. Regulation 2 defines the 'construction stage' as meaning the period of time starting 'when preparation of the construction site begins, including the design of temporary works to facilitate the construction of the project, and ending when construction work on the project is completed'.

Project supervisor (design stage). Regulation 4 specifies the duties of the project supervisor for the design stage, the most significant of which are to:

- Ensure sufficient time is allocated in the project timetable to complete the project in a safe manner (regulation 4(1)a)
- Prepare a preliminary safety and health plan and to pass this on in sufficient time to the project

The International Financial Services Centre: no job is too big or small where the regulations are concerned

supervisor for the construction phase (regulation 4(1)b and 4(1)c). A safety and health plan is required for those projects that are either notifiable (regulation 8) or that involve a particular risk (second schedule of regulations), such as work involving the assembly or dismantling of heavy prefabricated components (regulation 4[2]). Regulation 4(1)b specifies that a preliminary safety and health plan must include:

a) a general description of the project and an estimate of the period of time required for completion of the project
b) appropriate information on any other work activities taking place on the site
c) where appropriate, work related to the project that will involve particular risks to the safety and health of persons at work, as detailed in the second schedule to the regulations

- Co-ordinate the activities of the design team in relation to safety, taking into account the general principles of prevention detailed in the *Safety, Health and Welfare at Work (General Application) Regulations 1993* (regulation 4(1)a).

'Control of the site and of the risks on the site are the responsibility of the contractor'

The project supervisor for the design stage may delegate duties to an appointed health and safety co-ordinator (regulation 4[3]).

Designers. Designers, namely engineers and architects, translate, by means of drawings and specifications, the requirements of the client in respect of the finished product. Regulation 2 provides a very wide definition of 'design', to include not only the preparation of drawings or specifications for the end product but also any other 'expressions of purpose, according to which a project, or any part or component of a project, is to be executed'. Regulation 5 places duties on designers, of which the most significant is to 'take account of the general principles of prevention as specified in the first schedule of the principal regulations'. The general principles of prevention are a generic hierarchy of risk control measures applicable to all places of work.

Consideration of health and safety should form an integral part of the design process. To this end, designers are required to assess the design at the various stages as the project progresses. If any significant hazard is identified, the design should be altered to eliminate the risk where 'reasonably practicable', or otherwise to reduce the risk to an acceptable level.

The Health and Safety Authority guidelines to the 1995 and 2001 regulations provide designers with the following advice on risk assessment: 'The degree of detail involved in the risk assessment need only be proportionate to the nature of the project. For many projects, a simple intuitive assessment will normally be appropriate. For unusual features, an explicit risk assessment procedure – possibly requiring expert advice – may be appropriate'.

Regulation 5(2)a requires designers to co-operate with the project supervisor for the design stage. The HSA guidelines provide that 'where a design feature elicits different risk assessments from different designers, the project supervisor for the design stage must weigh up the various advices and, where appropriate, issue a direction to be taken into account by the designers'.

Significantly, the 2001 regulations do not expressly define whose safety is to be considered by the designer. It should be noted that the duties of designers under the regulations are in addition to those arising under section 11 of the *Safety, Health and Welfare at Work Act, 1989*.

Project supervisor (construction stage). The project supervisor for the construction stage has responsibility for the management of safety on the site. This applies to all aspects of safety, including training, access to and within the construction site, the protection of visitors to the site and the wearing of personal protective equipment (for example, hard hats, safety boots, high visibility jackets and, where required, eye, hand and ear protection, respiratory equipment, and fall, arrest and safety harness equipment: see also parts IV, V and VI of the 1993 regulations).

Safety and health plan. Regulation 6(1) requires

the project supervisor for the construction stage to prepare a safety and health plan, using the plan prepared on a preliminary basis by the project supervisor for the design stage and taking into account the requirements of section 12 of the 1989 act, which imposes an obligation on every employer to prepare or cause to be prepared a safety statement. This statement specifies the manner in which safety, health and welfare shall be secured in the workplace.

Regulation 4(2) provides that a safety and health plan is required in the following situations:

- Where the work is planned to last longer than 30 working days or the volume of work is scheduled to exceed 500 man-days (regulation 8[1]), or
- Where the construction work concerned involves a particular risk (second schedule of the 2001 regulations).

The safety and health plan should address, among other things, discrete site-safety issues and operations with significant hazard potential. Specific risk assessments should be undertaken to control the risks identified in the preparation of the safety and health plan. The plan should include a process by which safety and health concerns can be communicated to site management, and, as such, is a safety management document (see the 2001 HSA guidelines). For larger sites, the safety and health plan should include a formal traffic safety procedure. The life span of the plan is the duration of the construction project.

Safety file. The project supervisor for the construction stage is required, by virtue of regulation 6(2)a, to prepare a safety file where more than one contractor is engaged in a construction project. A safety file is a file containing pertinent health and safety information about the building, to be taken into account during any subsequent construction work following completion of the project. It will contain, for example, electrical circuit diagrams and structural load calculations. On completion of the construction project, the project supervisor for the construction stage should hand over the safety file to the client. This file is to be made available for inspection by any person requiring such information for safety reasons (regulation 3). The file should be passed on to any person that acquires an interest in the property. The foregoing duties do not appear to apply to the average householder, though the courts have not yet adjudicated upon the matter (See *Gazette*, November 1999 issue, page 33).

The project supervisor's other duties at the construction stage are to:

- Co-ordinate the activities of the construction team in relation to safety, taking into account the general principles of prevention (see regulation 6(2)c of the 2001 regulations and the first schedule of the *Safety, Health and Welfare at Work (General Application) Regulations 1993*). On the personal criminal liability of the project supervisor for the construction stage, where a court finds that there has been inadequate co-ordination of safety, health and welfare on a construction project, see *National Authority for Occupational Safety and Health v Inchagoill Contractors (Salthill) Ltd and Christopher Crehan* (District Court, 2001), cited in Byrne's *Safety, health and welfare at work in Ireland: a guide*, p132
- Organise the implementation of regulation 6 of the *Safety, Health and Welfare at Work (General Application) Regulations 1993*, which provides that every employer and every self-employed person sharing a place of work shall co-operate with each other and co-ordinate their activities 'in particular in relation to the provision of information' to each other and their respective employees or safety representatives or both. See also sections 7 and 8 of the *Safety, Health and Welfare at Work Act, 1989*
- Maintain records relating to notifiable accidents and incidents occurring on the site (regulation 6(2)e)
- Co-ordinate arrangements for the provision and maintenance of site welfare facilities for all people at work on the construction site (regulation 6(4) and schedules 4 and 5)
- Co-ordinate arrangements ensuring that persons at work on the site have a valid FÁS *Safe pass* registration card, or, where required, a valid skills certificate, and keep records of these available for inspection (regulation 6(5), (6) and (7) of the 2001 regulations).

CRITICAL SAFETY DUTIES

The critical duties identified in the ninth schedule to the 2001 regulations are as follows:

- Scaffolding – basic
- Scaffolding – advanced
- Tower crane operation
- Slinging/signalling
- Telescopic handler operation
- Tractor/dozer operation
- Mobile crane operation
- Crawler crane operation
- Articulated dumper operation
- Site dumper operation
- 180° excavator operation
- 360° excavator operation
- Roof and wall cladding/sheeting, and
- Build-up roof felting.

The project supervisor for the construction stage may delegate duties to a health and safety co-ordinator (regulation 6[3]).

Site safety representative

Regulation 7 and the tenth schedule to the 2001 regulations provide that the project supervisor for the construction stage must facilitate the election of a site safety representative where 20 or more people are likely to be working on the site. The project supervisor for the construction stage is also required to facilitate the site safety representative in carrying out his duties, including notifying him when a health and safety inspector is undertaking an inspection (regulation 7(1)[c]). Furthermore, the project supervisor for the construction stage must take account of representations made by the site safety representative (regulation 7[3]). A construction site safety representative has the same rights as with other places of work (although these rights are defined in regulation 7[2]). It is to be noted that the role of the site safety representative is distinct from, and in addition to, that of any safety representatives appointed by employers of individual contractors. The project supervisor for the construction stage assumes the role of an employer (on a construction site there can be numerous employers), with the workplace being the construction site.

Notification of projects

A project is notifiable in writing to the HSA by the project supervisor for the construction stage if it has a planned duration of more than 30 days or a total

WHAT DOES 'REASONABLY PRACTICABLE' MEAN?

Asquith LJ classically defined the 'reasonably practicable' standard in *Edwards v National Coal Board* ([1949] 1 AER 743 [CA]) in the following manner: '*Reasonably practicable* is a narrower term than *physically possible* and seems to me to imply that a computation must be made by the owner in which the *quantum* of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other, and that, if it be shown that there is a gross disproportion between them – the risk being insignificant in relation to the sacrifice – the defendants discharge the onus on them. Moreover, this computation falls to be made by the owner at a point of time anterior to the accident'.

In *Daly v Avonmore Creameries Limited* ([1984] IR 131), McCarthy J in the Supreme Court considered 'reasonably practicable' at page 131: 'I am not to be taken as supporting a view that, where lives are at stake, considerations of expense are any more than vaguely material'. (See also *Kirwan v Bray UDC* [unreported, Supreme Court, 30 July 1969].)

The Supreme Court reinforced this view in *Boyle v Marathon Petroleum Ireland Limited* (unreported, Supreme Court, 12 January 1999). In that case, O'Flaherty J affirmed the view of the High Court (unreported, High Court, McCracken J, 1 November 1995) that the burden of proof was on the defendant to show that it was not 'reasonably practicable' to do more than was done to discharge his statutory duty under the health and safety legislation: 'I am ... of the opinion that this duty is more extensive than the common law duty which devolves on employers to exercise reasonable care in various aspects as regards their employees. It is an obligation to take all practical steps. That seems to me to involve more than that they should respond that they, as employers, did all that was reasonably to be expected of them in a particular situation. An employer might sometimes be able to say that what he did by way of exercising reasonable care was done in the "agony of the moment", for example, but that might not be enough to discharge his statutory duty under the section in question'.

See also the Scottish case of *Mains v Uniroyal* ([1995] IRLR 544), heard in the Court of Session before Lords Wylie, Sutherland and Johnston. For the designers' duties under the analogous British *Construction (Design and Management) Regulations 1994*, see *R v Paul Wurth SA* (Court of Appeal, 2000), cited in R Byrne's *Safety, health and welfare at work in Ireland: a guide* (Dublin: NIFAST, 2001), p126.

work volume greater than 500 man-days. This notice should be in the form of the notice detailed in the first schedule of the 2001 regulations (see form CR1, the first schedule and regulation 8). It is to be noted that the first schedule now requires the notification to the HSA to include the dates on which the preliminary and developed safety and health plan were prepared. A copy of the notice should be displayed on the site (regulation 8[3]).

Contractor's duties

Regulation 2 defines a 'contractor' as meaning 'a contractor or an employer whose employees undertake, carry out or manage construction work, or any person who carries out or manages construction work for a fixed or other sum and who supplies the materials and labour (whether his own labour or that of another) to carry out such work or supplies the labour only'.

The contractor decides, among other things, on the method of construction, the number of workers to be employed, the management and supervisory procedures for the construction operations, the plant and equipment to be used, the layout of the building site, and the sequence and programme of the work stages. The contractor, therefore, takes possession of, and has total control of, the construction site. He is responsible for ensuring the day-to-day safety, health and welfare of his employees and/or those whom he supplies as labour to a construction project. As the contractor is in control of the workplace, he must carry out a risk assessment and implement the necessary safety controls and precautions. In summary, control of the site and of the risks on the site are the responsibility of the contractor.

Regulation 9 imposes a number of obligations on contractors, the more important of which are to:

- Provide the project supervisor for the construction stage, without delay, with any information which is likely to affect the health or safety of any person at work on the project or which might justify a review of the safety and health plan (regulation 9(1)c)
- Co-operate with the project supervisor for the construction stage in relation to compliance with the pertinent statutory provisions and notification of accidents and dangerous occurrences (regulations 6 and 9(1)e)
- Ensure the site complies with the minimum requirements as specified in the *Safety, Health and Welfare at Work (Construction) Regulations 2001* (regulation 9[2]).
- Ensure that everyone under their direct control is trained and holds a valid registration card and, where required, a skills certificate and provide written evidence of this to the project supervisor for the construction stage (regulation 9(3), (4) and (5), and schedules 8 and 9).

Any contractor who normally has more than 20 people under his direct control at any one time on any one site is obliged under regulation 10 to appoint a qualified safety officer. This figure includes sub-contractors, the self-employed and direct employees. Where the contractor employs more than 30 people in construction work, a safety officer should also be appointed by the contractor to facilitate compliance with the 2001 regulations (regulation 10[1]).

Particular provision is made in regulation 11(b) in respect of the erection, installation and modification of plant and equipment, and, in particular, scaffolding. (See the HSA's 1999 *Code of practice for access and working on scaffolds* for comprehensive guidance on the requisite standards for scaffolding and access work.) The duties imposed under regulation 11 apply to every contractor. He must ensure that scaffolding is erected, installed and modified by competent scaffolding contractors. Scaffolding should be inspected on a weekly basis or as required.

Contractors are required to provide safety information to employees and safety representatives, and are obliged to ensure that such information is comprehensible (regulation 12). Regulation 13 provides that contractors must also ensure proper consultation with their staff and/or their safety representatives.

Employees must co-operate with the employer in

matters affecting health and safety, report defects in plant and equipment, and make proper use of the protective equipment provided (regulation 14). To comply with the 2001 regulations, employees are required to undertake training in relation to *Safe pass* and construction skills certification without loss of pay (regulation 14[c]) and to produce *Safe pass* and relevant CSCS cards when requested to do so by the project supervisor for the construction stage or by their employer (regulation 14[d]).

Miscellaneous matters

Regulations 15 to 129 are concerned with health and safety requirements relating to the construction site itself, and to specific risks such as the use of lifting equipment or demolition work. These requirements will, in general, be the responsibility of the contractor (regulation 9(1)a). Part 9 of the 2001 regulations is worthy of particular mention, in that it requires that where a person is to be exposed to an unhealthy atmosphere, appropriate preventative measures should be taken against such exposure. It makes specific reference to the disposal of waste and the use of internal combustion engines.

In common with all regulations made under section 28 of the *Safety, Health and Welfare at Work Act, 1989*, unless the regulations specifically provide otherwise, civil and criminal sanctions attach for failure to comply with the 2001 regulations. Obviously, in respect of civil actions, there must be a causal connection between the breach of the duty alleged and the loss or injury sustained.

It should be noted that the provisions of the *Safety, Health and Welfare at Work (Construction) Regulations 2001* are in addition to the provisions of the *Safety, Health and Welfare at Work Act, 1989*, and the *Safety, Health and Welfare at Work (General Application) Regulations 1993*.

The *Safety, Health and Welfare at Work (Construction) Regulations 2001* represent a powerful movement towards greater protection of the safety, health and welfare of employees on construction sites. It is probable that further regulations, affecting all aspects of construction work and all those people connected with it, will be introduced pursuant to section 28 of the *Safety, Health and Welfare at Work Act, 1989*. These regulations will, no doubt, impose more extensive obligations on those involved in the design and construction stages of a construction project. The cost of complying with these regulations will also increase.

With the passage of time, regulations will improve the health and safety standards that employees enjoy on the construction site. This should result in fewer accidents. Consequently, the number and cost of claims should fall. This increased protection may raise the expectations of society as a whole in so far as safety, health and welfare on the construction site are concerned. It may serve, in time, to impact upon the common-law duty of care. In other words, what is reasonable now may not be deemed reasonable in the future. In summary, the greater protection afforded by statute may become no more than merely declaratory of the common-law position.

The new regulations are 'a powerful movement towards greater protection of employees'

Society and the courts are already reflecting this increased awareness of health and safety. The initiation of manslaughter charges in 1999 by the director of public prosecutions against the managing director of a company, arising from the death of two employees on a construction site, was hailed as a milestone. It signposted the fact that construction site deaths can no longer be discounted as a minor matter for the District Court. The case resulted in fines of almost a quarter of a million pounds being imposed; moreover, a sub-contractor with the company received an 18-month suspended prison sentence after he pleaded guilty to a charge of reckless endangerment under the *Non-Fatal Offences Against the Person Act, 1997* (Naas Circuit Criminal Court, 21 November 2001). Mr Tom Beegan, director general of the HSA, commented: 'The message which must go out to employers in all sectors, and not just the construction industry, is that they have a statutory obligation to proactively manage safety in the workplace, including the preparation of an adequate safety statement'.

'Construction site deaths can no longer be discounted as a minor matter for the District Court'

In the future, it is likely that individual members of the construction project will face criminal charges arising out of deaths and injuries on construction sites where it is possible to connect their individual failures with the construction project. It is interesting to note that Jack Straw, the former British home secretary, mooted the introduction of a new offence of 'corporate killing' in the UK. This offence would facilitate the prosecution of those in control of construction projects and render them liable for unlimited fines and imprisonment in circumstances where they are found to have neglected the health and safety of those affected by their activities. Such an offence was proposed in the UK by the Law Commission in 1996 (Law Com no 237, *Legislating the criminal code: involuntary manslaughter*, HMSO, 1996).

It may not be long before a similar approach is adopted in this jurisdiction. G

Geoffrey Shannon is the Law Society's deputy director of education and the author of the forthcoming book Health and safety: law and practice *(Round Hall, 2002).*

Executive

Legal executives play an important role in the work of busy law firms around the country. Now their value looks set to increase even further with the introduction of a new education and training course, as Aidan McGrath explains

MAIN POINTS

- Changing role of legal executives
- Work of the Irish Institute of Legal Executives
- Content of new training course

The role of the legal executive has grown rapidly over the last few years. What was once a small role in a legal practice has developed into a pivotal and essential part of a great number of practices around the country. There are many varying roles for legal executives, who are required to carry out their tasks in a professional and diligent manner under the supervision and guidance of a qualified solicitor.

It is essential that there is a properly maintained register of legal executives and that the quality and experience of those holding themselves out to be legal executives is maintained at the highest standard, as with all other areas of the profession. This not only protects the clients and the employee, but also the reputation of the institute and of the legal profession as a whole.

Over the last number of years, the institute has seen increasing support from members of the judiciary and the legal profession in general.

WHAT IS THE IRISH INSTITUTE OF LEGAL EXECUTIVES?

The Irish Institute of Legal Executives was formed in 1987 and incorporated as a company limited by guarantee in 1992. The institute is a body of members and represents all enrolled legal executives in Ireland. Its aim is to provide a recognised professional qualification for those carrying on the role of legal executive. The institute's members are generally employed in private practice, the legal departments of banks and public or local authorities.

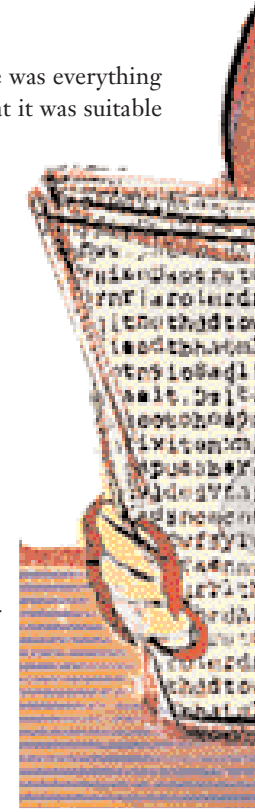
The objectives of the institute are set out in the memorandum and articles of association and the code of rules. The primary purpose is to represent, promote and encourage people identified as legal executives practising in all legal areas of employment. Our ultimate educational goal is to provide a system of qualification and training. The institute also aims to further the highest standards of working practice by its members in all areas.

A council comprising of 15 members, elected at the annual general meeting, directs the affairs of the institute. Each newly-elected council appoints the president of the institute and its officers.

When I was appointed education officer, I undertook the task of formulating an education policy document. We decided to create our own course with its own objectives and this became paramount to our education policy, though it proved far more complex than even we had imagined. As the institute is the focal point for all legal executives in Ireland, we had to ensure that all areas of law were covered. We were aware that this course naturally had to cover the academic study of the law but, in addition, we felt it needed to include the practical elements necessary to work in the law. We had to be certain that our course had all the necessary ingredients to ensure that those who undertook the course would leave with sufficient legal knowledge and practical skills to take up their roles as legal executives.

New era for legal executives

In order to ensure that the course was everything that the institute required and that it was suitable for implementation, the institute joined forces with Philip Burke, head of professional law programmes at Griffith College Dublin, to complete the venture.



The *Legal executive professional legal studies* course marks a new era for the formal education and training of legal executives in Ireland. Essentially, the course is a certificate and diploma in professional legal studies specifically aimed at the education and training of legal executives.

Prior to the implementation of this course, there was no single course in Ireland specifically catering for the education and training needs of those wishing to become legal executives. Now,

action

WHAT DOES THE NEW COURSE INVOLVE?

The *Legal executive professional legal studies* course is comprised of the following topics:

Stage one

- The Irish legal system
- Foundations in the law of tort
- Foundations in contract law
- Civil litigation, procedure and case management
- Criminal law, the constitution and judicial review.

On completion of stage one, students will attempt a two-hour examination in each module.

Stage two

- Legal research, writing and communication skills
- The law of real property, conveyancing and succession
- Business law
- Elements of family law and procedure*
- Criminal procedure and litigation*

(*denotes electives).

On completion of stage two, students will attempt one three-hour examination in each module undertaken.

for the first time, there is a course that will provide an academic and practical base in law for those who wish to enter this career. Our members will no longer be required to obtain the necessary level of education and training through different courses and experience. This is the most significant educational development within the legal executive profession in Ireland to date.

The course should also prove beneficial to employers, as it will allow a graduate to enter the office of a law firm with a reasonable understanding not only of the law but also of the practice and procedures used in legal offices. This should considerably speed up the new employee's ability to settle into an office and reduce the amount of in-house training needed in each case.

The course syllabus has been devised to meet the rather specific educational requirements of today's legal executive. On successful completion of the first year, candidates will be awarded a *Certificate in professional legal studies*. A *Diploma in professional legal studies* will be awarded upon successful completion of the second year.

Diploma graduates will be eligible for enrolment as associate members. Then, after obtaining sufficient practical experience, they can be admitted as full members of the institute. All those enrolled on the course are eligible to become student members.

Everyone involved in this initiative believes that the correct balance has been struck between academic and practical subjects. The aim is to provide students with an academic grounding in the traditional core law subjects, while also focusing on the practical application of those legal principles in the work environment. The study of legal practice and procedure is undertaken specifically with the role, duties and responsibilities of the legal executive in mind.

'This is the most significant educational development within the legal executive profession in Ireland to date'

While there are many objectives yet to be attained by the institute, this is probably the most important. I believe that the current membership of the institute represents about 10% of the total number of legal executives employed in Ireland.

The institute maintains and publishes a directory of all registered legal executives in Ireland and their area of expertise and contact details. In addition, it publishes a quarterly newsletter to help keep our members up-to-date on developments in the law and general matters of interest to the profession.

We hope to increase our membership over the coming years, and we urge you to encourage your employees to considering enrolling on the new *Legal executive professional legal studies* course and to become members of the institute. G

FURTHER INFORMATION

Anyone interested in learning more about the Irish Institute of Legal Executives should visit its website at *www.irishinstituteoflegalexecutives.com*. Alternatively, you can contact the institute at 22/24 Lower Mount Street, Dublin 2 (tel/fax: 01 890 4278, e-mail: info@irishinstituteoflegalexecutives.com).

Aidan McGrath is the education officer at the Irish Institute of Legal Executives.

Book reviews

Forensic accounting

Niamh Brennan and John Hennessy. Round Hall Sweet & Maxwell (2001), 43 Fitzwilliam Place, Dublin 2. ISBN: 1-85800-203-6. Price: €235.

Lord Justice Harman once described accountants as 'the witch doctors of the modern world' (*Miles v Clarke* [1953] 1WLR 537 at 539). This dictum is in fact referred to by the authors in their preface.

A healthy tension exists between the profession of solicitor and accountant. In the past, a mild degree of mutual suspicion has sometimes been exhibited. Some solicitors considered that accountants had 'trespassed' into the legal domain, with the consequence that solicitors may have lost work to accountants. This reviewer considers that, of all the disciplines that he would have benefited from greater exposure to at a formative stage, finance and accounting-related matters are high on that list. The accountancy profession has developed strongly in recent times, and accountants have made their mark in many disciplines.

Mr Justice Ronan Keane, the chief justice, notes in his foreword to the book that the greatly increased role of accountants as witnesses 'is amply demonstrated by the remarkable scope of this admirable book'. He notes the role of accountants in personal injury actions dealing with difficult questions of loss of earnings and profits, the role of the accountant in family law and employment cases, and in commercial disputes where accountants give evidence as to the estimation of damages. These themes are considered in the 1,015 pages of this book.

Among the other themes considered in the book are fraud and forensic accounting and the forensic accounting investigation, civil litigation affecting individuals in the context of personal injuries, loss of earnings cases and fatal accidents, employment law (unfair and wrongful dismissals), and matrimonial disputes – all of interest to lawyers. Breach of contract disputes, breach of warranty, public liability, intellectual property rights and competition law are also topics that are considered in some depth by the authors. The law on damages is a most useful chapter, together with the related chapter on interest, discount and the time value of money.

Niamh Brennan is the Michael MacCormack professor of management at University College Dublin and a chartered accountant, and is the author/co-author of a number of books on financial reporting. John Hennessy is a practising barrister, having spent 18 years with Arthur Andersen, including six years as a partner in the firm's worldwide partnership.

Forensic accounting is an authoritative account of an important and developing area in the context of criminal and civil litigation, company investigations, tribunals of inquiry and alternative dispute resolution. It is a valuable work of reference, combining academic research with the insights of practice. There is a wealth of information in this book, which is written in an engaging style. G

Dr Eamonn Hall is chief legal officer of Eircom plc.

Insurance law in Ireland, vol 2

Austin J Buckley. Oak Tree Press (2002), 19 Rutland Street, Cork. ISBN: 1-86076-233-6 (hardback), 1-86076-235-2 (paperback). Price: €95 (hardback), €60 (paperback).

This is an intimidating book. It has 570 pages with a nine-page index. My first instinct on picking it up was to put it back down again.

My second instinct was to take the time to give a serious work fair consideration. The result: this is a book that deserves to be read by insurance practitioners, litigation solicitors and indeed general practitioners.

Basics first. The book covers significantly more than just the law of insurance. As even a glance through the contents pages will show, Austin Buckley's work arguably complements McMahon & Binchy's seminal volume on the law of torts in Ireland.

There are many relevant and interesting case extracts. Just one such is that of former solicitor, Circuit Court Judge Bryan McMahon (of McMahon & Binchy fame) in *Curran v Cadbury (Ireland) Limited* (17 December 1999). The case involved an employee at Cadbury's factory in Coolock who claimed that she suffered serious psychiatric illness due to the negligence, breach of duty and breach of statutory duty of Cadbury.

A fitter was in a machine out of her sight when she re-started it after an unscheduled stop. She was a participant, and not merely an observer, in the accident which caused her nervous shock.

The extract of McMahon J's judgment should be required reading for all litigation lawyers. It provides a succinct summary of the up-to-date law and its provenance.

The judgment refers to *Mullally v Bus Éireann* ([1992] ILRM 722) and also *Kelly v Hennessy* ([1995] 3 IR 253). McMahon J's four reasons for finding for the plaintiff are worth quoting:

'1) She is owed a general duty of care on proximity and neighbourhood principles and there has been a breach of that duty which caused the plaintiff reasonably foreseeable psychiatric harm;

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BOOKS PUBLISHED

Abuse of process
Desmond Shiels
FirstLaw Electronic Publishing (2002).
ISBN: 1-902354-07-9.
Price: €50

Cassidy on the *Licensing Acts*, 2nd edition
Constance Cassidy SC
Round Hall Sweet & Maxwell (2001), 43 Fitzwilliam Place, Dublin 2.
ISBN: 1-85800-229-X (loose-leaf and CD-ROM set).
Price: €500

The construction of wills
Albert Keating
Round Hall Sweet & Maxwell (2001), 43 Fitzwilliam Place, Dublin 2.
ISBN: 1-85800-231-1.
Price: €110

Criminal justice in Ireland
Edited by Paul O'Mahony
Institute of Public Administration (2002), 57-61 Landsdowne Road, Dublin 4.
ISBN: 1-902448-67-7 (paperback).
Price: €30

The Irish health and safety handbook (updated 2nd edition)
Thomas N Garavan
Oak Tree Press (2001), 19 Rutland Street, Cork.
ISBN: 1-86076-189-5.
Price: €110

Wildlife legislation: 1976-2000
Henry Comerford
Round Hall Sweet & Maxwell (2001), 43 Fitzwilliam Place, Dublin 2.
ISBN: 1-85800-261-3.
Price: €105

Practitioners' court guide 2002
Agnes McKenzie BL (2001), Law Library, Four Courts, Dublin 7.
Price: €19

Social inclusion and the legal system: public interest law in Ireland
Gerry Whyte
Institute of Public Administration (2002), 57-61 Landsdowne Road, Dublin 4.
ISBN: 1-902448-66-9.
Price: €45

further, there are no good policy reasons in her case which should deny the duty of care
2) She complies with the five conditions laid down by Hamilton CJ in *Kelly v Hennessy* on nervous shock
3) She was an "involuntary participant" due to the defendant's negligence, and
4) The defendant was in breach of a statutory duty which resulted in "an impairment of (the plaintiff's) physical or mental condition".'

On insurance law specifically, the development of the law on insurance companies repudiating liability is very clearly and well explained, with references to up-to-date case law. The decision of the Supreme Court in the *Superwood* case (*Superwood Holdings plc v Sun Alliance and London Insurance plc* [1995] 3 IR 303) to set aside the finding of fraud by the High Court suggested that exaggeration of a claim was not conclusive evidence of fraud.

The author also provides extracts from another significant Supreme Court case, *Michael Fagan v General Accident Fire and Life Assurance Corporation plc* (unreported, Supreme Court, 14 October 1998). Michael Fagan claimed that the contents of his dwellinghouse and premises at Kilkerley, Co Louth, were destroyed or stolen during a burglary and fire on the night of 11 March 1989. He claimed £46,585 on his insurance policy with General Accident. In the Supreme Court appeal by Mr Fagan, Lynch J said that an 'insurer can hardly be expected to spoon-feed an insured as to whose honesty and reliability the insurer has doubts'. Lynch J went on to say that 'insofar as the appellant (Mr Fagan) relies on the *Superwood* case, it seems to me that it does not extend that far'.

It was no longer necessary for the insurance company to prove fraudulent intent on the part of the insured for it to successfully repudiate liability. The requirement of Mrs Justice Denham in *Superwood* was overturned.

The duties of insurance brokers, the meaning of 'utmost good faith', and general principles of insurance (including insurable interest and subrogation by insurers) are clearly explained and updated in this book. There are helpful extracts from cases on policy terms and conditions.

The book will also benefit a broader audience, as the author writes on professional liability, employers' liability and motor insurance. Long sentences are usually worth wading through: 'In Ireland, in a recent High Court decision (*Rothwell v MIBI*, unreported, 6 July 2001), Mr Justice McCracken held that a small isolated patch of petrol or diesel fuel oil on a road, alleged to have caused a motorist to skid into the path of an on-coming vehicle, entitled the claimant to bring a claim for compensation under clause 6 of the MIBI agreement, as the source of the oil on the road was unknown and if it came from another vehicle the identity of that vehicle was also unknown'.

Solicitors reading the book will view chapter 12, on professional liability, with particular interest, not to say concern. We are reminded that an action against a professional advisor may remain viable in tort long after it is statute-barred in contract. We are told that, while the duty of care in tort may sometimes be less onerous than that imposed by contract, such duty may be wider (*Holt v Payne Skillington and Anor*, unreported, Court of Appeal, 18 December 1995).

In the foreword, President of the High Court Mr Justice Finnegan notes that this second volume provides a highly valuable source of information on the most up-to-date insurance law concepts and 'will be of great interest to those within the insurance industry, law students and legal practitioners alike'.

This is a very worthwhile work that should be read. But reading through it is not an unmixed blessing. There is a sense that some of the case extracts are excessively long. Comments made by the author are usually, but not always, well made and helpful. A serious work deserves careful editing, so that simple typing errors such as 'subroagtion' (sic) or sub-editing errors like 'there are can be a breach' should be rare to non-existent. When reading it, remember that just because the pilot's overhead light is blinking does not mean that the engines are going to fall off at 40,000 feet.

There is a lot of material. A large volume is inevitably a book of reference. It should be easy to find a point. But the nine-page index hardly reflects the breadth of just-off-the-presses information within the covers. So, if you are looking for a point and don't find it immediately, persevere. It's worth it. G

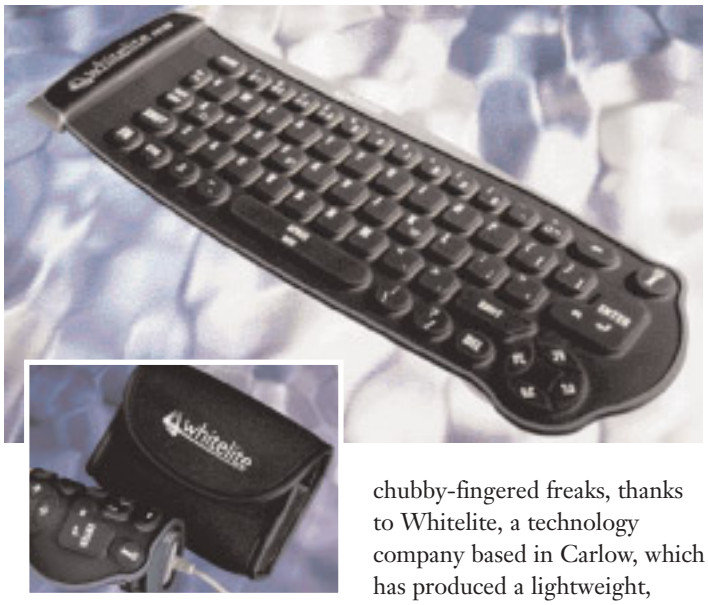
Patrick Igoe is principal of the Dublin law firm Patrick Igoe and Company.

Tech trends

The kids are all write

Now that the kids are out from under your feet and back to school, this might be the right time to invest in an entry-level printer for them. After all, they're bound to get higher marks if their teacher doesn't have to read their appalling handwriting. Epson's new Stylus C42 might just fit the bill. This four-colour inkjet printer is aimed at the first-time user and produces fast, high-quality colour pages (five-and-a-half per minute, 11 if you print in black and white). This is ideal for projects, essays and homework, but you wouldn't want to rely on it for important presentations at work. If you're interested, the technical specifications include 1,440 x 720dpi resolution, 6pl ultra-microdot for finer resolution and USB connectivity with Windows and Macintosh programs. At €95, it's a small price to pay to keep the loveable little rascals locked up in their rooms 'til tea-time. *Available from computer stores nationwide.*

Relief for chubby-fingered technophiles



No-one knows how long the current fad will last for PDAs (that's 'personal digital assistants', thank you for asking), but one thing's for sure: if they get any smaller, you'll need fingers thin as twigs before you can operate them. Now help is at hand for all chubby-fingered freaks, thanks to Whitelite, a technology company based in Carlow, which has produced a lightweight, flexible PDA keyboard that can be rolled up and carried around in your pocket. The FX100 has the full 64-button QWERTY keyboard, including shortcut keys, and is compatible with most pocket computers. Its water-resistant sealed-silicone design means that it's solid enough that you feel as if you're typing on a proper keyboard. And, even better, it doesn't require any batteries to use. If you're going to stick with your PDA, then the FX100 seems like a much better idea than putting your fingers on a diet. *Available from MCI (tel: 021 497 5020) and computer outlets, price €89.95.*

Help stop this evil craze!

Picture the scene. You stumble across an illegal monkey knife-fight and want to take a picture of the simian swordplay to use as evidence in a future court case. But how can you get away with it without the organisers going ape on you? Simple. Use your new wristwatch camera from Casio. This quite unnecessary invention actually does function as a wristwatch and stopwatch as well, but also takes nifty colour photographs. The WQV-10D2 holds up to 100 colour images at a time in its 1MB memory, and these can be viewed on your watch or downloaded to your computer in JPEG format. A text editor allows you to add notes to the pictures. The camera has a zoom facility, three lighting settings to choose from – indoors, outdoors and dusk – and can also be set on timer delay to give yourself a chance to run for your life. The Casio WQV-10D2 may be of little practical benefit, but it will help you feel big and clever if you've got more monkey than sense. *Available from* www.gizmos-uk.com *for stg£249.99.*

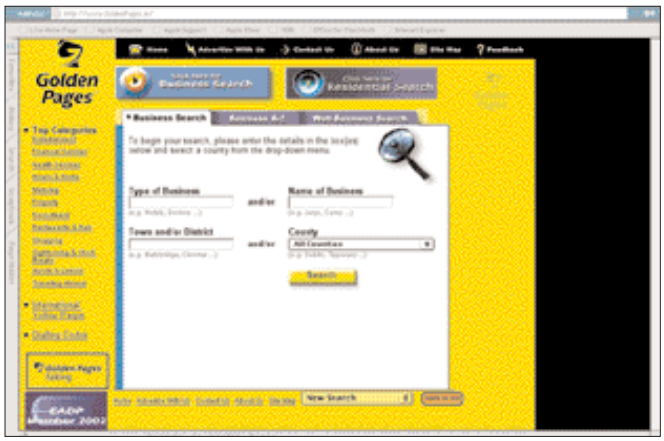
A nod in the right direction

'Never judge a man until you've walked a mile in his shoes', the Duke of Wellington was prone to say, 'because then you're a mile away, you have his shoes and you can say whatever the hell you want'. Of course, the good duke would never have lost the battle of Trafalgar if he'd had the new Nokia GPS module to tell him where he was. This clever little device uses global positioning software to turn your Nokia phone into a colour map and route planner. You can call up every street in a city and even find the shortest route to take to get there. You may never have to miss an appointment again. That's a big enough drawback in itself: an even bigger one is that the GPS module only works with the Nokia 9210 Communicator (that's the delightfully expensive mobile phone that flips open to double as a pocket computer). *For more information visit the Nokia website at* www.nokia.com.

Sites to see

Power Phillips, Attorneys (*www.ppbfh.com*). Possibly the most entertaining law firm website in the world. Powers Phillips could even teach Alanis Morissette what 'ironic' means. Take this nugget: 'Prospective clients should be assured that the woman-controlled nature of the firm in no way lowers the quality of legal services'. This site is a gem. Irish firms, look and learn!

Spoof newspaper (*www.framleyexaminer.com*). If you're fed up reading the serious newspapers and can't take one more po-faced editorial from the *Irish Times*, then try the *Framley examiner*. This spoof local newspaper is addictive and a far better read than anything currently coming out of either D'Olier Street or Middle Abbey Street.



Golden Pages (*www.goldenpages.ie*). Let your fingers do the walking but avoid the paper cuts. This easy-to-navigate site lets you search for products and services nationwide or in specific areas much quicker than you could do by flicking through the directory. You can also do searches for residential phone numbers, if you're in a stalking frame of mind.

Movie news (*www.cinescape.com*). This website for *Cinescape* magazine is packed full of news and reviews of forthcoming films, television series, books, comics and games. Tell your boss you're investigating intellectual property rights, then spend the afternoon downloading the first pictures from *The two towers*. A great place to visit if you're a sci-fi fan or movie buff.

Hedging your bets

Hedge funds are often portrayed as risky investments, but this is not necessarily true, argues Brian Weber

Brian Weber: hedge funds are really only suited to the high net-worth investor

It is becoming a very strong probability that global equity markets will end the year in negative territory. In light of this, many investors are actively looking elsewhere. A consequence of this has been an increase in the popularity of hedge funds.

Hedge funds are collective investment schemes that encompass a wide range of investment strategies, styles, techniques and assets. They were born out of the desire to obtain real, absolute or positive returns regardless of how an investment benchmark performs. This means that regardless of which way markets are going, the aim of a hedge-fund manager is to always produce a positive return rather than to outperform a chosen index, which is the aim of most traditional fund managers.

Media stories relating to the hedge-fund industry have created an inaccurate picture. Those that received extensive negative media coverage include George Soros' currency bets in the early 1990s, particularly on sterling's exit from the exchange rate mechanism, and the collapse and subsequent bail-out of Long Term Capital Management in 1998/89 with losses of more than $3 billion.

But hedge funds are not necessarily the risky investments the press frequently portrays them to be.

Many hedge funds are run by conservative managers aiming to produce steady, absolute returns with low volatility – in other words, equity-type returns for bond-type risk. A diversified fund of hedge funds can significantly enhance a client's portfolio, if it is evaluated and employed in the correct way.

Sourcing hedge-fund talent requires a proactive effort. Access to funds, due diligence and on-going portfolio risk management are the key alpha generators for a fund of funds. As a result, the supply of good fund managers to meet the growing demand from investors will become a more relevant issue as time goes on.

The hedge-fund industry in general generated positive returns throughout the 1990s. But it was primarily fund inflows rather than organic growth that drove expansion. There are three principal reasons for this:

- Strong growth in the number of high net-worth individuals and sophisticated private client investors
- Empirical and academic evidence that hedge funds can offer superior returns while displaying a low correlation to other asset classes
- Increased respectability and acceptance of alternative investment vehicles – including hedge funds, private equity and venture capital – as a recognised and separate asset class.

Principal fund categories

There are a number of different styles or categories of hedge fund. Each fund manager uses his expertise within each category to try to achieve absolute returns for investors.

Examples of different categories/styles of hedge funds range from equity short bias to fixed-income arbitrage, and global macro to convertible arbitrage and event-driven hedge funds.

To explain the different types and styles of hedge funds available would require more than one article. However, for the purpose of this month's piece, we'll use an equity short bias to demonstrate how hedge funds work.

A hedge-fund manager who thinks shares in company X will fall will borrow shares from a broker. For this, the broker will charge a lending fee. The fund manager then sells company X's shares in the market. If company X's share price falls, the hedge-fund manager buys back the shares and makes a profit on the difference between the selling price and the purchase price. However, if the share price rises instead of falls, or remains unchanged, the fund manager will make a loss.

ADVANTAGES OF HEDGE-FUND INVESTMENT

- Alignment of hedge-fund managers' and investors' interests, as the managers are often also investors in the fund
- Management are incentivised through performance – bonus management fees for outperformance
- Historic superior risk/reward profile – a higher ratio of return to risk
- Adding hedge funds to stock and bond portfolios increases returns for the same amount of risk
- Can be used to protect against market volatility.

A fund of funds

An increasingly popular way of investing in hedge funds has been the development of funds of funds. These are single investments with a unified structure and simplified reporting and administration that invest in a number of different types of hedge funds.

The benefits of investing in a fund of hedge funds are increased diversification across categories and styles and the reduced volatility they can offer (although the cost of reduced volatility is a reduction in returns).

Managers of funds of funds will use complementary styles or categories to optimise the risk/reward of the constituent funds. The main objective is to maximise returns while minimising risk through professional selection, monitoring and on-going portfolio management. A fund of funds should comprise at least 15-20 different types of hedge fund to provide diversification.

Funds of funds offer value by finding new talent early, constructing portfolios using different styles to optimise returns, and completing due diligence and risk control.

Investors who place money with hedge-fund managers require a high level of investment. Typically, an initial investment minimum of €125,000 is required. As a weighting within a portfolio, hedge funds usually make up approximately 5-10%, so they are really only suited to the high net-worth investor. G

Brian Weber is a portfolio manager with Davy Stockbrokers' private clients unit.

Committee report

BUSINESS LAW

***European Communities (Late Payment in Commercial Transactions) Regulations 2002* (SI no 388 of 2002)**

These regulations came into effect on 7 August 2002, giving effect to directive no 2000/35/EC. Their purpose is to combat late payment in commercial transactions by imposing an interest penalty equal to the European Central Bank rate plus seven points, where payment is not made within a period specified in a contract or, where no period is specified, within 30 days of receipt of the invoice or the goods or services. If a purchaser purports to waive or vary these regulations and the supplier considers it grossly unfair, the supplier may apply to the Circuit Court or to an arbitrator for an order to that effect or that the terms are unenforceable or substituting them with the provisions of these regulations or directing payment of compensation, costs and expenses. A similar application may be made by a representative body, being an organisation having a legitimate interest in representing small and medium-sized enterprises generally or in a specific sector of the economy or geographical area. The regulations do not apply to consumer contracts. The *Prompt Payment of Accounts Act, 1997* (no 31 of 1997), which had provided for payment of statutory interest in the event of payments not being made by public bodies within 45 days of the due date of payment, has been amended by these regulations. G

Business Law Committee

PRACTICE NOTE

Health board days in Children's Court

Certain portions of the *Children Act, 2001* were brought into effect by way of a commencement order (SI 151 of 2002). A section which is of particular relevance to those practitioners dealing with childcare is section 267(1)(a). This section amends section 17(2) of the *Child Care Act, 1991*, which only authorised the District Court to make or extend an interim care order for more than eight days with parental consent.

Section 267(1)(a) states that the District Court can now make an interim care order or extend that order for a period of 28 days in the absence of parental consent.

It is of note that in the Children's Court in Dublin, the Court Services Board, on the basis that this amendment should reduce the frequency with which applications need to be renewed, has withdrawn the second health board day every second week. G

Family Law and Civil Legal Aid Committee

LEGISLATION UPDATE: 23 JULY – 19 AUGUST 2002

SELECTED STATUTORY INSTRUMENTS

Courts and Court Officers Act, 2002 *Sections 19 to 21 (Commencement) Order 2002*
Number: SI 407/2002
Contents note: Appoints 1/10/2002 as the commencement date for the following sections of the *Courts and Court Officers Act, 2002*: section 19 (extension of jurisdiction of Circuit Court and District Court under s21A of the *Family Law (Maintenance of Spouses and Children) Act, 1976*), section 20 (extension of jurisdiction of Circuit Court and District Court under s23 of the *Family Law (Maintenance of Spouses and Children) Act, 1976*) and section 21 (extension of jurisdiction of the Circuit Court and District Court under the *Guardianship of Infants Act, 1964*)

European Communities (Late Payment in Commercial Transactions) Regulations 2002
Number: SI 388/2002
Contents note: Implement directive 2000/35/EC on late payment in commercial transactions in both the public and private sectors and amend the *Prompt Payment of Accounts Act, 1997*. 'Commercial transactions' are defined as transactions between undertakings or between undertakings and public authorities for the purposes of providing goods or services for remuneration. Provide that interest shall be payable in respect of a late payment after 30 days have elapsed unless an alternative payment period is specified in an agreed contract. Provide that compensation may be claimed for debt recovery costs, that the use of terms that are grossly unfair may be unenforceable and that such terms may be challenged in court, and that grossly unfair terms may also be challenged by organisations representing small and medium-sized enterprises
Commencement date: 7/8/2002

Health (In-Patient Charges) (Amendment) Regulations 2002
Number: SI 367/2002
Contents note: Amend the *Health (In-Patient Charges) Regulations 1987 and 2001* by increasing the daily charge for in-patient services from €33 to €36 and by increasing the maximum amount payable in any period of 12 consecutive months from €330 to €360. Exemptions for medical card holders and hardship provision continue to apply
Commencement date: 1/8/2002

Health (Out-Patient Charges) (Amendment) Regulations 2002
Number: SI 366/2002
Contents note: Amend the *Health (Out-Patient Charges) (Amendment) Regulations 2001* by increasing from €31.70 to €40 the charge in respect of attendance at accident and emergency or casualty departments, where the person concerned has not been referred by a medical practitioner. The charge shall not apply where such attendance results in hospital admission. Exemptions for medical card holders and hardship provision continue to apply
Commencement date: 1/8/2002

Motor Insurance (Provision of Information) (Renewal of Policy of Insurance) Regulations 2002
Number: SI 389/2002
Contents note: Require insurers to give motor insurance policyholders: a) 15 working days' notice in writing of the renewal of the policy and the terms of the renewal, and b) a no-claims bonus certificate as a separate document in addition to the renewal notification
Commencement date: 31/10/2002. G

Prepared by the Law Society Library

Personal injury judgment

Road traffic accident – collision between car and camper van – fatal injury of driver of car – issue of liability – dispute among engineers – negligence of both drivers – apportionment of liability – appeal to the Supreme Court – role of appellate court – observations of Supreme Court concerning written submissions in personal injury cases that were not straightforward – importance of preserving all photographs and sketches which were before the trial court – question of whether there should be a retrial

CASE

***Theresa Furey v Hans Otto Suckau*, High Court, judgment of Ó Caoimh J; Supreme Court, Murphy, Hardiman and Geoghegan JJ, judgment of Hardiman J for the court of 26 April 2002.**

THE FACTS

On 8 May 2000, James Furey was driving his almost new Astra motor car at Barrymore, Kiltoom, Athlone. This is on the main road between Athlone and Roscommon, about five miles from Athlone. Mr Furey had been driving towards Athlone. A sergeant in the Defence Forces, he was returning with two colleagues to his home in Cork from Donegal, where he had participated in the All-Army Orienteering Championships.

At a junction of the main road with the road leading to the Hodson Bay Hotel, where the width of the road is about 23 feet, Mr Furey's car collided with a camper van driven by Hans Otto Suckau. Mr Suckau had been for some weeks on a touring holiday in Britain and Ireland. He had driven from Athlone and intended to turn right into the Hodson Bay complex. Mr Furey died as a result of the collision of the two vehicles. The two passengers in Mr Furey's car had no recollection of the events and there were no witnesses at the scene of the accident. The only eyewitness testimony of the accident in which Mr Furey died came from Mr Suckau and his wife.

Theresa Furey instituted High Court action on her own behalf and on behalf of other dependants of her husband against Mr Suckau.

THE HIGH COURT JUDGMENT

The case came before Ó Caoimh J in the High Court. In the High Court, Mr Suckau testified that he drove along the road from Athlone and saw the sign for the Hodson Bay complex, where he planned to go. He testified that he approached the centre line of the road and, while doing so, applied his brake. He put the vehicle into neutral and kept his foot on the brake because there were two or three on-coming cars, which he let pass. Mr Suckau testified that the camper van was at an angle to the centre line of the road because the vehicle was very large and one could not 'go parallel' when one had to come across at an angle.

In evidence, Mr Suckau stated that he saw Mr Furey's car when it was about 50 metres away from the junction. It was travelling at a very high speed, which he estimated was about 85 miles an hour. The car drove at his vehicle without stopping, slowing down or swerving and struck it, according to Mr Suckau. Subsequently, the same account was given by Mr Suckau's wife.

Ó Caoimh J in the High Court held:

a) A major contributing factor to the accident was the excessive speed of the car being driven by Mr Furey
b) The camper van was stationary at impact 'very much at an angle to the road centre and not parallel to the white line in the middle of the road'
c) The portion of the vehicle on the passenger side of the road would have been over the white line at the centre of the road and occupying a position of at least three feet on the carriageway in which the vehicle being driven by Mr Furey was travelling, and
d) The debris was carried forward after impact and did not indicate the point of impact.

Ó Caoimh J held that the principal liability for the accident rested with Mr Furey. The High Court held that both Mr Suckau and Mr Furey had been negligent and that the degrees at fault were apportioned at 20% against Mr Suckau and 80% against Mr Furey.

THE AWARD IN THE HIGH COURT

Damages on the basis of full liability had been agreed in the amount of £247,000. The High Court granted Mrs Furey a decree against Mr Suckau in the sum of £49,400 to include the statutory sum payable in respect of mental distress.

THE SUPREME COURT JUDGMENT

Mrs Furey appealed the decision of the High Court, claiming that the trial judge in the High Court had misconstrued the evidence of two of the garda witnesses and two experts. In particular, the notice of appeal challenged the finding that the camper van was stationary at the time of the accident, that the accident happened near the centre of the road, that the camper van was occupying a portion of only about three feet of the other carriageway and that the absence of debris in the centre of the road was not material.

It was claimed on appeal that the alleged finding that the accident did not occur on Mr Furey's side of the road was contrary to the weight of evidence. The apportionment of liability was also challenged.

The appeal came before the Supreme Court, composed of Murphy, Hardiman and Geoghegan JJ. Hardiman J delivered the judgment of the court on 26 April 2002. The appeal related solely to the question of liability.

Hardiman J set out the facts of the case as above and said it was an unfortunate aspect of the case that in cross-examination no specific version of the accident had been put to Mr Suckau. He noted that it was, of course, essential that the plaintiff's case be put to the defendant so that the defendant could comment on it. Hardiman J stated that there was clearly scope for considerable comment on a suggestion made to Mrs Suckau in the witness box in the High Court that her husband had made a mistake and had driven across the road in front of Mr Furey's car when it was very close to the camper van and in fact he (Mr Suckau) caused the crash. The judge noted that no particular point of impact was ever suggested to Mr Suckau or Mrs Suckau. He noted the omission was significant, having regard to the circumstantial evidence.

The judge then referred to the circumstantial evidence which was established by members of the Garda Síochána who attended the scene and who gave details as to the location of both vehicles, where the glass and debris were found, the location of the scrape marks on the road and the nature of the damage to the two vehicles. He also considered where the point of impact appeared to be, based on the evidence of the gardaí. Hardiman J stated that the plaintiff naturally bears the burden of proof and in this case Mrs Furey had a manifest difficulty arising from the absence of direct evidence on her side. Confronted with the evidence of two witnesses whose veracity was not in doubt, her case depended on a view of the circumstantial evidence.

In approaching the appeal, the Supreme Court must apply the principles set out in *Hay v O'Grady* ([1992] IR 210). The role of an appellate court was set out in the *Hay* case. In the context of the role of the Supreme Court in a case on appeal from a judge sitting without a jury, the role of the Supreme Court was stated as follows:

a) An appellate court did not enjoy the opportunity of seeing and hearing witnesses or observing the manner in which the evidence was given or the demeanour of those giving it
b) If the findings of fact made by the trial judge were supported by credible evidence, the Supreme Court was bound by them, however voluminous and weighty the testimony against them
c) An appellate court should be slow to substitute its own inference of fact where this depends on oral evidence or

recollection of fact and a different inference has been drawn by the trial judge. But in the drawing of inferences from circumstantial evidence, an appellate tribunal was in as good a position as the trial judge

d) As regards the conclusion of law to be drawn from the combination of primary fact and inference if, on the facts found and either on the inferences drawn by the trial judge or the inferences drawn by the appellate court in accordance with the principles already set out, it was established to the satisfaction of the appellate court that the conclusion of a trial judge was erroneous, the order of the trial judge would be varied accordingly

e) Accordingly, it was important that the judge should make a clear statement of his or her findings of primary fact, the inference to be drawn from them and the conclusion that followed.

In his conclusions, Hardiman J stated that the High Court judge's findings in relation to the excessive speed of Mr Furey's vehicle were rationally open to him on the evidence and he was of the same view in relation to the findings about the camper van being stationary and about the debris. Hardiman J would not upset this aspect of the judgment. However, he stated that he was more dubious about the findings in relation to the point of impact.

The Supreme Court referred to evidence which had been given on behalf of Mrs Furey. This was to the effect that the post-accident position of the vehicles, and particularly the camper van, was uniquely consistent with the point of impact much further on Mr Furey's side of the road than might otherwise be thought. This conclusion was hotly disputed by an engineer called on behalf of Mr Suckau. Hardiman J stated that the evidence on each side of this important issue was somewhat vague. He said it was particularly difficult to appreciate on a transcript, because the engineers in the High Court all engaged in illustration by hand movements, the making of sketches which had not been preserved for the Supreme Court, and the moving of objects about on the courtroom table, which was equally inaccessible to the Supreme Court.

Mrs Furey's expert's core position was that a vehicle in the position as described in Mr Suckau's evidence, if struck in the manner alleged, would have been propelled directly backwards and not spun around to 180 degrees and moved across the road. This was stated to be obvious to anyone with a schoolboy appreciation of physics. However, Mr Suckau's engineer said this simply failed to take a number of factors into account, including the fact that the two vehicles merged with each other, the car being at one point under the front of the camper van, causing the latter to rotate on its back wheels. The judge noted that one of the engineers expressed the confident view that computer simulation would support his position on this issue, but neither he nor anyone else had attempted anything of the sort.

The position of the High Court judge was not helped, according to Hardiman J, when the judge of the High Court asked counsel whether they wished to make any submissions, only to be told: 'It is an issue of fact for your lordship to decide'. Hardiman J stated that the Supreme Court had already, in at least two written judgments, expressed the opinion that in personal injuries actions which are not straightforward, the court should be assisted by brief submissions from each side and that opinion was reiterated in this present case. Hardiman J said it was also essential that all documents, including photographs and sketches which were before the trial court, should be available to the Supreme Court on the hearing of an appeal. That did not occur in the present case. The court was initially given only one set of photographs. During the hearing, more were produced but the court never saw all that had been before the High Court. Still worse, there were missing maps, including three which had been marked by witnesses during the hearing. Hardiman J stated it was obviously essential that all exhibits be preserved for an appeal.

Hardiman J said that on a perusal of the judgment of the High Court, it appeared that certain issues pertaining to a dispute between the engineers and the issue relating to the scrape or gouge mark on the road were not considered. Since on the expert evidence for Mrs Furey these might, if accepted, be regarded as establishing the proposition that the impact took place much further into Mr Furey's carriageway than the other evidence suggested, this was a matter of importance. Hardiman J said he was very conscious of the force of the point made by the High Court judge that, had the impact occurred close to the yellow lines, one would expect the damage to the camper van to be on its left side. The significance of this depends on how one resolves the ambiguity in the PSV inspector's evidence. This did not appear to have been addressed and indeed was easy to miss. This issue, combined with the unresolved dispute between the engineers, led Hardiman J to propose setting aside the order of the High Court and to remit the matter for retrial. He noted, however, that this may not lead to a different result, but, in fairness to Mrs Furey, it was important that all relevant issues be properly considered. G

This judgment was summarised by solicitor Dr Eamonn Hall.

First Law Update

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Compiled by Karen Holmes for FirstLaw

CHILDREN AND YOUNG PERSONS

Health board powers

Family law – powers and duties of health boards – functions of District Court – whether health board can authorise placement of child into residential care outside the state – Child Care Act, 1991, *sections 36, 47*

The proceedings concerned the placement of a child in residential care outside the jurisdiction by a health board.

Finnegan J held that there was nothing in section 47 or in the statute as a whole to distinguish a child who is the subject of a care order being sent abroad to a relative and/or foster parents from such a child being sent abroad into residential care. Accordingly, following the Supreme Court decision in *Western Health Board v KM* [FL5016], the health board was not entitled to place a child into residential care outside the state under section 36. The powers contained in section 47 included the power for the District Court to direct the placement of a child into residential care outside the state and the period for which the child is placed in a residential unit could be unlimited or limited.

***East Coast Area Health Board v MM*, High Court, Mr Justice Finnegan, 5/2/2002** [FL5543]

Family law, adoption

Consent – children – refusal to consent to adoption – medical evidence – fostering – medical health of natural mother – whether parental rights abandoned – whether appropriate to make adoption order – Adoption Act, 1988, *section 3*

The proceedings concerned an application by the foster parents of a child ('J') seeking to have the child adopted. The application was opposed by the mother ('P'). Evidence was given by a number of medical specialists as to the health of P. She had a history of depression and had been diagnosed as being mildly mentally handicapped. Evidence was also given that P had very poor self-care skills. From the age of nine months, J had been placed with the present foster parents. J had been diagnosed as suffering from cerebral palsy and had received specialist care. J was now leading a normal childhood. P opposed the proposed adoption on the grounds that this would curtail her right to visit J. It was also contended by P that she was happy that J remain in foster care and that if she got her full health back she could look after J. The health board supported the application of the foster parents. Evidence was also given by J that she would like to be adopted.

Mr Justice Herbert made the order of adoption. The applicants had to discharge the onus, on the balance of probabilities, of satisfying the court that the natural parents of J would not resume the discharge of parental duties before the child was 18 years old. There was no evidence that J had been physically abandoned by her mother. However, the weight of evidence obliged the court to find that P, for physical reasons, had failed in her duty towards J. This did not involve a finding of blameworthiness but was due to mental illness, severe depression and impairment of mental function. On the balance of probability, there was no likelihood of P resuming her parental duty towards J before J reached 18. P's principal reasons for not consenting to the adoption were due to a fear that she would not be permitted to see J. P had given control of J's life to the foster parents for a period of almost 12 years. The conduct of P amounted to an 'abandonment' of J in its special legal sense. The foster parents had provided J with a loving, caring and stable home in which she had thrived in every possible way. It had been unequivocally established that it was in the interests of J that an order be made authorising the adoption of J in favour of the foster parents. It was unlikely that the foster parents would change their attitude to visits by P to see J, as they had encouraged this in the past.

***Area Health Board v An Bord Uchtála*, High Court, Mr Justice Herbert, 3/5/2002** [FL5734]

COMPANY

Agency, defamation

Landlord and tenant – company law – agency – negligent misstatement – defamation – telecommunications – claim for possession of premises – relief against forfeiture – litigation – expiry of lease – claim of defamatory phone calls – whether agent of company liable for telephone calls made – whether damages should be awarded – whether company vicariously liable for the actions of employee

The plaintiff, as landlord, had originally sought an order of possession against the defendant in relation to the lease of a hotel. A previous court order had determined that the defendant should discharge gales of rent as they fell due and pay a certain sum by way of an interest payment per month on the outstanding balance due. The plaintiff sought an order for summary judgment for a sum of £588,605. The defendant had counterclaimed that the plaintiff had made defamatory phone calls concerning the defendant to UK authorities. The defendant sought relief against forfeiture of the lease and damages for the alleged defamatory phone calls. In the High Court, McCracken J dismissed the defendant's claim concerning the phone calls. The court was satisfied that a named party who worked for the plaintiff company had made the telephone calls, despite her denials to the contrary. This person was a director of the plaintiff company at the time of the making of the calls. A company could be held vicariously liable for wrongs committed by its servants or agents. However, it could not be said that her allegations contained in the phone calls were made as agent for the plaintiff company for the purpose of damaging the defendant company. The defendants appealed against the order regarding the responsibility for the phone calls.

The Supreme Court (Murray J delivering judgment, Hardiman J and Geoghegan J agreeing) allowed the appeal and remitted the matter to the High Court. The only proper inferences to be drawn from the actions of the party making the phone calls was that this was done in furtherance of the interests of the plaintiff company. The finding of the High Court judge on the counterclaim would be set aside on the grounds that the plaintiff company must bear responsibility for the telephone calls and their contents. The order for possession would be set aside,

which would fall to be determined in the High Court. A stay would also be put on the amount ordered to be recovered by the plaintiff company from the defendant company.

***Crofter Properties Ltd v Genport Ltd*, Supreme Court, 9/7/2002** [FL5781]

Duties of receiver

Sale of assets – duties of receivers – power of sale – credit and security – conflict of interest – confidentiality – valuation of assets – fair market value – current market value – whether court should approve sale of assets of company – whether assets of company undervalued – whether bidding process flawed – Companies Act, 1963

The proceedings concerned the sale of the main assets, an ore body, of a company (Bula) which was in receivership. The receiver of the company brought an application pursuant to section 316A of the *Companies Act, 1963* seeking court approval for the sale of the ore body for the sum of £27.5 million to a neighbouring company (Tara Mines). The application was opposed by the directors of Bula on a number of grounds. The directors contended that the receiver had a conflict of interest in acting as receiver. In addition, it was claimed that the assets of the company were grossly undervalued and that the value of the ore body was over £60 million. It was submitted that the receiver should sell the shares of Bula and not the assets. Furthermore, it was claimed that the receiver should await the final resolution of related litigation. It was argued that the receiver's bargaining position was all the greater given that the prospective purchaser, Tara Mines, was a neighbour.

Mr Justice Murphy approved the sale. The receiver's duty was to sell on the open market. The role of the court was to examine whether the receiver had exercised all reasonable care to get the best price reasonably obtainable. The receiver had a power, of sale and was entitled to exercise that power. The courts could not fetter that power which arose out of contract. There was no evidence before the courts that would indicate a conflict of interest. The receiver was not the receiver of the shares of the company and was not obliged to consider a sale of the shares. A receiver was not obliged to wait for a rising market before selling. The outstanding litigation was capable of being evaluated. There was no statutory requirement for an independent valuation nor to have more than one buyer. Section 316 dealt with price and not value. The value to a purchaser was immaterial. Ultimately, one realistic bid had emerged from an adjoining owner (Tara Mines). There had been no breach by the receiver of his duty owed under section 316 and the court would accordingly allow the receiver's application.

***Bula (in receivership)*, Supreme Court, 3/7/2002** [FL5840]

CONSTITUTIONAL

Medicine, mental health

Administrative law – practice and procedure – mental health – locus standi – *amendment of proceedings – whether detention in hospital unlawful and unconstitutional – whether premises properly designated to receive temporary patients – whether substantial grounds for contending that defendants acted in bad faith or without reasonable care* – Mental Treatment Act, 1945, *sections 185, 260* – Mental Treatment Act, 1953, *section 5*

The applicant sought leave

under section 260 of the *Mental Treatment Act, 1945* to institute proceedings in relation to being detained in a psychiatric hospital. The applicant sought a number of declarations and claimed that proper procedures had not been followed in relation to the procurement of an order for his detention. The applicant also contended that the institution in question had not been properly designated to receive temporary patients as required under the relevant legislation. O'Sullivan J held that the applicant had failed to adduce substantial grounds in relation to his complaints and dismissed the application. The applicant appealed to the Supreme Court. The applicant also sought to raise the constitutionality of section 260 of the *Mental Treatment Act, 1945*.

The Supreme Court (McGuinness J delivering judgment, Denham J and Geoghegan J agreeing) dismissed the appeal. As no exceptional circumstances existed, the court would not consider issues relating to the constitutionality of the 1945 act. The applicant had been detained in accordance with the procedures set out in the legislation. The grounds of appeal adduced by the applicant had not been made out and the appeal would be dismissed. The applicant's challenge to the constitutionality of the 1945 act must first be fully argued in the High Court. The applicant's *prima facie* right of access to the court had been affected by the operation of the section in question and he was in a position to argue that he had *locus standi* to maintain constitutional proceedings.

***Blehein v St John of God Hospital and the Attorney General*, Supreme Court, 31/5/2002** [FL5522]

CONTRACT

Conveyancing, property

Property – conveyancing – solicitors – practice and procedure – time limits – failure to furnish title deeds – service of completion notice – whether purchaser entitled to rescind contract

The plaintiff had entered into a contract with the defendants for the purchase of a premises. The plaintiff, in the course of the negotiations, indicated dissatisfaction with the details of title furnished. The vendors served a completion notice on the plaintiff, calling on the plaintiff to complete the sale within 28 days. The plaintiff refused to complete the contract and sought the return of the deposit paid, together with interest and costs. The defendants replied that previously missing deeds had been located. The defendants asserted that the vendor was at all times ready, willing and able to assert title in accordance with the contract.

Mr Justice Smyth found in favour of the plaintiff. A party serving a completion notice must be ready to fulfil its own outstanding obligations under the contract. There were too many inconsistencies in the documents proffered by the defendants to oblige a purchaser to accept the title. The plaintiff was entitled to terminate the contract because of the failure by the defendants to make good title and also their inability to complete the contract. The right to rescind the contract was exercised promptly. At the date of the service of the completion notice, the vendors were not ready, willing and able to comply with their obligations. The purchaser unequivocally exercised the right of election to rescind. The plaintiff was entitled to recover the deposit together with interest.

***Tyndarius Ltd v O'Mahony*, High Court, Mr Justice Smith, 25/6/2002** [FL5715]

CONVEYANCING

Injunction, land law

Injunction – interlocutory – whether serious issue to be tried – conveyance – whether damages an alternative remedy – balance of convenience – land law – restrictive covenant – Conveyancing Act 1882, *section 3(1)*

The plaintiff sought to rely on a restrictive covenant contained in a deed of conveyance to obtain an injunction to prevent a building on certain lands. The covenant was made between the vendor of the lands and the plaintiff in 1954. The plaintiff was an artist and required good light and calm to do his paintings, and therefore it was important to him that the lands surrounding the property which he bought would not be built on. In 1968, the vendor conveyed the sterilised land to his son and in 1991 the son conveyed part of this land to the defendant. In March 2001, the defendant applied for planning permission for the construction of a house and the plaintiff objected, but permission was granted in January 2002. Work had commenced by March 2002 and the plaintiff had viewed the work. His application before the court was to seek a declaration that he was entitled to rely on the restrictive covenant against the defendant, a third party to the covenant.

Mr Justice Kelly held that in an application for an interlocutory injunction, on the basis of traditional interlocutory injunction principles, it must be considered whether there was a serious issue to be tried, whether damages would be an adequate remedy and whether the balance of convenience lay in favour of the grant rather than the refusal of the injunction. The application before the court was not the trial of the action and the court was precluded from making any final or binding determinations of either fact or law. However, on the application before the court, Mr Justice Kelly granted the interlocutory injunction and certified the case as fit for early trial.

***Carrick v Morton*, High Court, Mr Justice Kelly, 13/6/2002** [FL5779]

COSTS

Practice and procedure, taxation

Application to dismiss for want of prosecution – jurisdiction– whether defendants acquiesced in delay – whether defendants estopped from application

In a long-running case, the defendants had received an order of the High Court in 1992 for costs when taxed and ascertained against the plaintiff. The plaintiff objected to the taxation, claiming there were errors, and had applied to the High Court for a review. Delays caused this not to occur until 1997. The applicant solicitor applied in June 1997 to come off the record and the proceedings were adjourned generally with liberty to re-enter. As the case was not re-entered, the application before the court was to strike out, for want of prosecution, the plaintiff's case for contesting the taxation of costs.

Mr Justice Ó Caoimh held that the balance of justice did not favour the defendants in granting the relief they sought and the plaintiff was given three months to re-enter his review of the taxation of costs. The court held that it had jurisdiction to hear the matter by virtue of *Primar plc v Stokes Kennedy Crowley* ([1996] 2 IR 459). There was delay by the plaintiff in pursuing his case, but this was acquiesced in by the defendants in that they did not pursue any action when knowing the plaintiff was pursuing an application to the European Court of Human Rights.

***McMullen v Farrell*, High Court, Mr Justice Ó Caoimh, 5/7/2002** [FL5682]

CRIMINAL

Dismissal of charges

Case stated – road traffic offence – drink-driving charge – dangerous driving – amendment of summons – direction sought at conclusion of prosecution's case – oral warning – registration of vehicle incorrect –

whether relevant – Summary Jurisdiction Act 1857, *section 2* – Courts Supplemental Provisions) Act, 1961, *section 51*

A District Court dismissed on directions charges in relation to driving prosecutions where no warning had been given or notice served on the defendant and the vehicle's registration number was incorrect. The opinion of the High Court was sought by the DPP as to whether the District Court judge was correct in law in dismissing the charges. The DPP argued that the absence of an oral warning and of notice of appeal in relation to the drink-driving charge was not necessary under amended legislation.

Mr Justice Murphy held that this matter had been dealt with by the legislature and the District Court rules in *Gannon v Conlon* (20 December 2001) and having regard to the failure to service notice on the respondent, which had not been contested, the court ruled it had no jurisdiction to deal with the case stated.

***DPP v McMahon*, High Court, Mr Justice Murphy, 27/6/2002** [FL5578]

Delay, judicial review

Right to expeditious trial – sexual offences – prejudice – dominance – stress and anxiety caused to accused – whether order of prohibition should be granted – whether real risk of unfair trial

The applicant sought an order of prohibition to prevent a trial for sexual offences from proceeding. The charges related to offences allegedly committed against a family member. The applicant claimed that there had been excessive delay in the prosecution of the offences. In the High Court, Ms Justice Carroll held that no risk of an unfair trial had been shown and the application would be refused. The applicant appealed the judgment, arguing that the delay between the dates of the alleged offences and the dates of the charges was excessive and unconscionable. In addition, it was contended that there was no evidence that the complainant had been psychologically inhibited from making a complaint. The delay in making a complaint to the gardaí was due to the anticipation of problems that would arise within the family. Furthermore, there was no question of dominance between the applicant and complainant which would have explained the delay in making the complaint. On behalf of the respondent, it was contended that the applicant had not shown that there was a real risk that he could not obtain a fair trial. The alleged prosecutorial delay subsequent to the laying of charges was not so significant as to warrant the staying of the trial.

The Supreme Court (Keane CJ delivering judgment, McGuinness J and Hardiman J agreeing) allowed the appeal, holding that it was not the delay in bringing a person to trial that was crucial, it was the effect of that delay. In this case, there was no significant disparity in age between the complainant and the applicant and no question of dominion had arisen. The sole ground advanced for deferring the complaint was the complainant's concern that it might cause problems within the family. This was not an appropriate ground for denying the applicant the right to a reasonably expeditious trial. In determining whether to grant an order of prohibition, a court was entitled to not only to take into account the delay that had arisen subsequent to the laying of charges but also the delay that had occurred prior to being charged. A period of inordinate delay had occurred between the report of the social worker and the subsequent arrest of the applicant. The unnecessary and inordinate delay had caused the applicant unnecessary stress and anxiety. The constitutional right of the applicant to a reasonably expeditious trial outweighed any conceivable public interest there might be in the prosecution of the alleged offences. The order of prohibition sought would be granted.

***M(P) v Malone*, Supreme Court, 7/6/2002** [FL5767]

Money laundering

Appeal against conviction – whether two different and distinct offences disclosed on indictment – whether conviction bad on its face for duplicity – Criminal Justice Act, 1994, *section 31*

The applicant was convicted on six counts of money laundering contrary to section 31 of the *Criminal Justice Act, 1994*. Counts 1, 3 and 5 related to money laundering contrary to section 31(2) and counts 2, 4 and 6 related to charges of money laundering contrary to section 31(3) of the act of 1994. The prosecution case was that the money was derived from illegal tobacco importation up to 1995 and thereafter derived from drug dealing. The applicant applied for leave to appeal his convictions on the ground that the conviction was bad on its face for duplicity, as two different and distinct offences were disclosed on the indictment and did not relate to different ways of committing the single offence of money laundering.

The Court of Criminal Appeal held that the question as to where the line lay between a single offence committed in different ways and the creation of two different offences often fell to be decided on a case-by-case basis. An examination of the definitions and provisions of the act of 1994 as amended was necessary in order to determine whether the relevant sub-sections of section 31 created two different offences or merely described the commission of one in two different ways. Numerous provisions of the act of 1994 maintained the distinction between proceeds of drug trafficking and proceeds of other crimes. A conviction based on the count containing the two alternatives of drug trafficking and other criminal activity was therefore not merely uncertain and unworkable from the point of view of the administration of the act but was patently unjust, in that the applicant should have recorded against him a conviction comprising of a reference to drug trafficking when the trial court was not satisfied as to the existence of evidence against him on that issue. Accordingly, the conviction on all counts was quashed.

***People (DPP) v Meehan*, Court of Criminal Appeal, 27/6/2002** [FL5591]

DAMAGES

Liability, medical negligence

Personal injuries – liability – damages – whether defendant surgeon negligent – whether breach of duty of care occurred

The plaintiff had undergone surgery which the defendant, a cardiothoracic surgeon, had carried out. The plaintiff alleged that the defendant had caused a bleed which had exposed the plaintiff to post-thoracotomy pain syndrome. The claim of negligence related solely to the positioning of surgical ports by the defendant.

In awarding damages to the plaintiff, Johnson J held that the court did not accept the defendant's evidence in relation to any of the disputed facts. The defendant was negligent in placing the second port where he did. The plaintiff was exposed to a danger of pain that she should not have been exposed to. The pain suffered was as a result of the negligence of the defendant. A total of €311,953.39 in damages was awarded.

***Carroll v Lynch*, High Court, Mr Justice Johnson, 16/5/2002** [FL5554] G

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

Eurlegal

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

The transposition of the *Electronic commerce directive* into Irish law

The *Electronic commerce directive* (2000/31/EC) is another piece of EU legislation that aims to regulate certain aspects of electronic commerce in the EU. At the outset, it is important to distinguish between this directive and the *Electronic signatures directive* (1999/93/EC), which has already been transposed into Irish law by the *Electronic Commerce Act, 2000*. It is unfortunate and slightly confusing that the domestic legislation which incorporates the *Electronic signatures directive* into Irish law is not named the *Electronic Signatures Act*, but rather is named after another directive, most of which has not been implemented into Irish law.

The *Electronic commerce directive* is quite broad in scope and tackles a number of different aspects of on-line and electronic commerce. This directive should have been implemented into Irish law prior to 17 January 2002, but has not as yet been implemented.

The directive relates to and regulates 'information society services', which includes any service normally provided for remuneration, at a distance, by means of electronic equipment and at the individual request of a recipient of a service. The recitals to the directive show that this includes most on-line activities, including the on-line selling of goods.

The objective of the directive is to create a legal framework to ensure the free movement of information society services between member states of the European Union. It aims to provide a favourable legal framework for electronic commerce while ensuring that consumers are protected when transacting on-line.

One of the key features of the directive is that a provider of information society services, once established in one member state of the European Union, is entitled to provide services into any other member state. This principle, which is embodied in article 8 of the directive, affirms the single market principle and overrides possible national barriers to trade that could potentially inhibit the growth of electronic commerce.

In August 2001, the Department of Enterprise, Trade and Employment published a document containing the government's proposal for implementing this directive into Irish law. While this document is described as a discussion document, it contains a draft of the regulations which the department hopes to ultimately implement in order to transpose the directive into Irish law. It has been indicated that the draft regulations (as amended as a result of the consultation procedure) should be signed into law in or around September or October 2002. It is important to stress that, since the draft regulations are part of an on-going drafting process, they may be amended prior to final implementation.

The draft regulations propose to create a series of new obligations for businesses trading on-line and for Internet service providers.

Certain parts of the *Electronic commerce directive* have already been implemented into Irish law. In particular, article 9 of the directive, which obliges member states to provide for the electronic conclusion of contracts, has been implemented in the *Electronic Commerce Act, 2000*. However, the bulk of the directive has yet to be implemented.

At this juncture, it might also be noted that neither the *Electronic commerce directive* nor the draft regulations aim to harmonise member states' laws in relation to the formation of contracts.

Country-of-origin principle

The directive aims to solve the problem of the multitude of applicable rules by the adoption in the directive of the so-called 'country-of-origin rule'. This principle is embodied in article 3 of the directive and provides that (subject to certain exceptions) information society service providers and their services will only have to comply with the rules of the country in which those service providers are established and from where the services therefore 'originate'.

Information prior to contract

One of the fundamental principles of the directive and the draft regulations is transparency in Internet dealings. Draft regulation 10 proposes to implement article 5 of the directive. This draft provision proposes to introduce requirements for businesses operating on-line to provide important information to users of their websites.

Draft regulation 10 contains a list of information that businesses operating on-line will have to provide 'in a manner which is easily, directly and permanently accessible'. It might be noted that concluding a once-off contract by e-mail correspondence would seem to fall outside these requirements.

The following information must be provided by 'service providers' under draft regulation 10:

a) The name of the service provider
b) The geographic address at which the service provider is established
c) The details of the service provider, including his electronic mail address
d) Details of how natural persons can register their choice regarding unsolicited commercial communications. This information should be prominently displayed on each page of a service provider's website
e) Where the service provider is registered in a trade or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification, in that register
f) Where the activity is subject to an authorisation scheme, the particulars of the relevant supervisory authority
g) Where the service provider is a member of a regulated profession, information in relation to the relevant professional body is required

h) VAT number
i) Where the service provider refers to prices, these are to be indicated clearly and unambiguously and, in particular, must indicate whether they are inclusive of tax and delivery costs.

'Service providers' are defined in the draft regulations as 'persons providing an information society service'.

Of particular note is item (d) above, dealing with unsolicited commercial communications, as there is no mention of this requirement in article 5 of the directive and this requirement is being included in the draft regulations as a requirement over and above those set out in the directive. This requirement seems to be particularly onerous and impractical, since it requires a notice in relation to unsolicited commercial communications to appear 'on each page of a service provider's website'. This requirement becomes even more problematic when one bears in mind that any failure to adhere to these information requirements shall be a criminal offence.

Thus, in the event of these draft regulations being implemented in their current form, on-line service providers established in Ireland will have to conduct legal audits of their websites in order to ensure that they are complying with these provisions. Most websites will need to be revised by their owners in order to comply with these requirements and to ensure that they are not committing any offence. It remains to be seen whether this provision will survive the consultation and drafting process leading up to implementation.

Unsolicited commercial communications

Draft regulations 11 and 12 attempt to address the issue of unsolicited commercial communications (UCCs), which are colloquially referred to as 'spam' (although direct marketing companies will argue that there is a distinct difference between spam and UCCs).

The draft regulations define 'commercial communications' as meaning any form of communication designed to promote – directly or indirectly – the goods, services or images of a company, organisation or person pursuing a commercial, industry or craft activity or exercising a regulated profession. The definition is subject to certain exceptions. Thus, e-mails sent for promotional or marketing purposes and pages of websites devoted to promoting or marketing a company would be caught by this definition. Draft regulation 11 goes on to provide that commercial communications that are part of an information society service shall comply with, at least, the following conditions:

- The commercial communication shall be clearly identified as such
- The natural or legal person on whose behalf the commercial communication is made shall be clearly identifiable
- Details of how natural persons can register their choice regarding unsolicited commercial communications shall be prominently displayed on each web page of the commercial communication
- Promotional offers, such as discounts, premiums and gifts, shall be clearly identifiable as such, shall comply with existing legislation covering such activities, and the conditions which are to be met to qualify for them shall be easily accessible and be presented clearly and unambiguously, and
- Promotional competitions or games, where permitted under law, shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented clearly and unambiguously.

Draft regulation 11 aims to ensure a high level of transparency in relation to e-mails that contain or offer promotional services. As in the case with draft regulation 10, this draft regulation goes beyond what was required by article 6 of the directive that it implements.

This new draft regulation creates a further hurdle that on-line businesses will have to overcome in order to carry out on-line promotional activities. Again, any failure to comply with this draft regulation shall result in an offence being committed.

Draft regulation 12 contains further provisions in relation to UCCs. It requires every on-line service provider to establish a register known as an 'opt-out register' to record the electronic mail address or addresses of natural persons not wishing to receive unsolicited commercial communications.

Draft regulation 12 also requires that all UCCs sent by on-line service providers based in Ireland shall be identified clearly and unambiguously as such as soon as they are received by the recipient. The draft regulation also requires service providers to confirm by e-mail to the relevant person who has opted to join the register that they will not receive any further unwanted e-mails.

Any failure to comply with these provisions will result in a criminal offence being committed.

This draft regulation, if implemented, will constitute an important step in tackling the growing problem of unwanted spam communications being sent to individuals. However, individuals arguably have this right already under section 2(7) of the *Data Protection Act, 1988*, which permits an individual to request that personal data about him kept for the purposes of direct marketing should not be used for that purpose. Notwithstanding this, the creation of a criminal offence for failing to operate an opt-out register should represent a welcome step in the task of tackling unwanted spam. However, since most spam received by individuals based in Ireland is sent from outside the state, and often outside the EU, further measures will have to be adopted in order to tackle this problem.

Special rules for regulated professions

Draft regulation 13 contains specific rules in relation to the use of commercial communications by members of a regulated profession. It provides that such communications must be subject to the professional rules of that profession in relation to independence, dignity and honour of the profession, professional secrecy, and fairness towards clients and other members of the profession.

Again, failure to comply with this new draft regulation rule will result in a criminal offence being committed.

Additional information requirements

Draft regulation 15 contains further information requirements in relation to consumer contracts concluded on-line. This draft regulation provides that, prior to the conclusion of any consumer contract on-line, the on-line service provider must provide the following information clearly, comprehensively and unambiguously:

- The different technical steps to follow to conclude the contract
- Whether or not the concluded contract will be filed by the service provider and whether it will be accessible
- The technical means for identifying and correcting input errors prior to the placing of the order, and
- The languages offered for the conclusion of the contract.

This draft regulation goes on to create yet further information requirements which the on-line service provider must adhere to on entering into contracts on-line. For example, this draft regulation provides that the terms and conditions of an on-line service provider must be made available to recipients of the service in a way that will allow them to store and reproduce them.

It should be noted that the provisions mentioned above would not apply to contracts concluded exclusively by exchange of e-mail.

Again, any failure to adhere to the provisions of this new draft regulation will result in a criminal offence being committed.

Contracting with consumers on-line

Draft regulation 16 provides that where a consumer of on-line services places his order over the Internet, the following principles shall apply:

- The service provider has to acknowledge the receipt of the order of the recipient of the service without undue delay and by electronic means
- The order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them.

This provision will serve to increase consumer confidence in on-line trading by ensuring that the consumer will receive an acknowledgement after entering into an on-line transaction.

Again, failure to comply with the provisions of this draft regulation results in a criminal offence being committed. Undoubtedly, all service providers will need to carefully review their procedures for on-line commerce when these draft regulations are adopted, to ensure compliance.

Liability of Internet service providers

The draft regulations refer to Internet service providers (ISPs) as 'intermediary service providers'. Draft regulations 17, 18 and 19 propose to transpose articles 12, 13 and 14 of the directive. These provisions attempt to define the status and the limits of liability of ISPs. Generally, these provisions provide that where the ISP can be shown to have acted as a 'mere conduit,' it will be exempt from liability. However, it is first necessary to establish that the ISP is acting as a 'mere conduit'. Draft regulation 17 defines this concept: it provides that an ISP will be deemed to be a mere conduit where it did not initiate a transmission, it did not select the receiver of the transmission and where it did not select or modify the information contained in the transmission.

Draft regulation 17 goes on to provide that where an ISP is acting as a mere conduit, then it shall not be liable for the information that it transmits as part of its service. In this regard, it is critical that the ISP acts as a passive transmitter of the information only.

Draft regulation 18 goes on to deal with a common practice of ISPs known as 'caching' information. Caching can be described as the automatic, intermediate and temporary storage of information by ISPs for the purposes of making their operations more efficient and expedient. Draft regulation 18 provides that ISPs cannot be liable for the automatic, intermediate and temporary storage (caching) of information provided that the sole purpose of such caching is to make the ISP's network more efficient.

Again, this exemption from liability will only apply where the ISP does not modify the information and where certain other conditions are met.

Draft regulation 18 goes on to provide that the ISP shall only benefit from this exemption of liability where it acts expeditiously to remove and disable access to information that it has stored in cache upon obtaining knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

Draft regulation 19 extends this exemption of ISP liability to the hosting of information by ISPs on behalf of third parties. This is a critical exemption from liability, since one of the principal activities of ISPs is the hosting of websites and web content on the Internet on behalf of third parties.

Again, this exemption from liability is subject to certain conditions. For example, an ISP will not benefit from this exemption from liability where the ISP has actual knowledge that the information being hosted by it concerns illegal activities.

Finally, draft regulation 20 should be mentioned, as it creates an important obligation on ISPs to report any illegal activities that they become aware of to the relevant authorities.

These exemptions of liability for ISPs are hugely important in the context of expanding and continuing the operation of the Internet. For example, ISPs will take comfort and be assured that they may not be sued for copyright infringement where they cache information which is the subject of a third-party copyright. They will also be exempt from liability where they transmit information which infringes copyright. G

Philip Nolan is a solicitor with the Dublin law firm Mason Hayes and Curran.

CREDIT WHERE IT'S DUE

Anna Molony, a trainee solicitor with the Dublin law firm LK Shields, assisted with the writing of the two-piece article on *Procurement law as it applies to public/private partnerships*, which appeared in *Eurlegal* in the June and July/August issues of the *Gazette*.

Recent developments in European law

COMPETITION

Case C-218/00 *Cisal di Battistello Venanzio & C Sas v Istituto Nazionale per l'Assicurazione contro gli Infortuni sul Lavoro (INAIL)*, 22 January 2002. Mr Battistello is an Italian crafts worker. Under Italian law, he was required to have insurance against accidents at work with INAIL. He failed to pay subscriptions between 1992 and 1996 and INAIL sued his company for these unpaid contributions. He argued that he had been insured against work accidents with a private insurance company since 1986. He further argued that obliging him to take out insurance with INAIL created a monopoly for it and induced it to abuse its dominant position. This breached articles 90 and 86 of the treaty. The Italian court asked whether a body entrusted by law with the management of a scheme providing insurance against accidents at work and occupational diseases is to be treated as an undertaking within the scope of EU competition law. The ECJ held that the concept of an undertaking covers any entity engaged in economic activity, regardless of its legal status or the way it is financed. Any activity consisting in offering goods and services on a market is an economic activity. EU law does not affect the power of member states to organise their social security systems. However, the social aim of an insurance scheme is not in itself sufficient to preclude the activity being classified as an economic one. However, in this case there were a number of elements that indicated that INAIL was discharging a purely social function. The scheme it administered did not have any direct link between the contributions paid and the benefits granted. This ensured solidarity between better-paid workers and lower-paid workers who would be deprived of proper social cover if such a link existed. In addition, INAIL is subject to supervision by the state and the amount of benefits and contributions are, in the last resort, set by the state. Given that the activity of INAIL was not economic, it could not be considered as an undertaking within the meaning of articles 81 and 82 of the treaty.

EMPLOYMENT

Transfer of undertakings

Case C-51/00 *Temco Service Industries SA v Samir Imzilyen, Mimoune Belfarh Abdesselam Afia-Aroussi, Khalil Lakhdar*, 24 January 2002. The respondents had worked for GMC, a company with the cleaning contract for the Volkswagen plants in Brussels. Its cleaning contract was terminated. They argued that their employment contracts were automatically transferred to Temco, which now held the cleaning contract for the plants. GMC had discharged its entire staff except for these four employees, who were retained on foot of a collective labour agreement. When Temco took over the cleaning contract, it wrote to GMC indicating that it was taking this over and asking for a list of staff assigned to that contract. When the list was forwarded, Temco re-engaged some of the staff. At the same time, GMC tried to dismiss the respondents using Belgian law procedures. The ECJ first considered whether article 1(1) of the *Transfer of undertakings directive* applied to a case such as this. For article 1 to apply, three conditions must be met. The transfer must result in a change of employer; it must concern an undertaking, business or part of a business; and it must be the result of a contract. To consider whether the criteria for the transfer of an economic entity are met, the facts characterising the transaction have to be examined. In certain labour-intensive sectors, a group of workers engaged in joint activity on a permanent basis can constitute an economic entity. This entity can maintain its identity after a transfer, where a new employer does not merely pursue the same activity but also takes over a major part, in terms of numbers and skills of the employees specially assigned by his predecessor to that task. The fact that the staff were dismissed a few days before the employees were taken on again by the transferee, and it was indicated that the reason for the dismissal was the transfer, does not deprive them of their right to have their contact of employment maintained by the transferee. In those circumstances, such staff are regarded as still in the employ of the undertaking on the date of the transfer. The directive provides that the transfer can concern merely part of a business. Temco had argued that there had not been a legal transfer as there was no contractual relationship between the transferor and transferee. The ECJ held that the absence of a contractual link did not preclude a transfer within the meaning of the directive.

ESTABLISHMENT

Case C-31/00 *Conseil National de l'Ordre des Architectes v Nicolas Dreessen*, 22 January 2002. Dreessen is a Belgian national who holds a diploma in engineering, which had been awarded in Germany in 1966. He worked in Belgium for 24 years for various firms of architects. The last company that employed him was wound up. He applied for his name to be entered on the register of the local association of architects so that he could practice as an architect on a self-employed basis. This application was rejected on the ground that his diploma did not correspond to one awarded by an architecture department. Thus, he could not avail of directive 85/384 on the mutual recognition of diplomas. The case was ultimately referred to the ECJ. It held that the diploma in question is not entitled to the automatic recognition that would be accorded to diplomas in architecture under directive 85/384. However, it then moved on to consider whether his qualifications could be recognised on the basis of article 43 of the *EC treaty*. It held that when national authorities are considering an application from an EU national to be authorised to practice a profession, they must take into consideration all of the diplomas, certificates and other qualifications into account, together with relevant experience. This must be compared with the knowledge and qualifications required by national legislation. This process must be undergone even if the qualification is subject to the directive and ordinarily a qualifying diploma would be required. The ECJ relied on article 43 of the treaty as underpinning this ruling. Thus, directive 85/384 was of no relevance.

FREE MOVEMENT OF GOODS

Case C-302/00 *Commission v French Republic*, 27 February 2002. France imposes higher taxes on light tobacco cigarettes than dark tobacco cigarettes. Light tobacco cigarettes are almost exclusively imported and dark tobacco cigarettes are almost exclusively home produced. The commission took the view that these measures were discriminatory in nature and contrary to EU law. It took an infringement action against France. The ECJ held that France was in breach of its treaty obligations. The treaty prohibits a system of taxation that favours domestic products over similar imported ones. Member states cannot protect their domestic production to the detriment of other member states. The ECJ examined whether the two kinds of cigarette possess similar characteristics and whether their usage is similar. It concluded that they were similar and did have the same intended use. This is evidenced by their identical tax treatment in EU law. G

Faith, hope and charity

Law Society President Elma Lynch with members of the society's Law Reform Committee and charity law sub-committee at the launch of the committee's recent report on charity law (see July/August *Gazette*, p5). *From left:* committee member Philip Smith, committee secretary Alma Clissmann, sub-committee member Oonagh Breen, president Elma Lynch, committee chair John Costello, and sub-committee member Nicola Keogh

Home run

The final tally for this year's Calcutta Run for the homeless was €190,000, bringing the amount raised over four years to €600,000. GOAL – specifically its orphanage in Calcutta – and Fr Peter McVerry's Arrupe Society, which runs projects for homeless boys in Dublin, each benefited to the tune of €85,000 from this year's event, thanks to the participation and contributions of so many solicitors and firms and the support of the event's main sponsor, Vodaphone. Pictured at the presentation of the cheque are *(from left)* GOAL's Lisa O'Shea, Eoin MacNeill of A&L Goodbody, snooker star Ken Doherty, Vodaphone's Niall O'Sullivan, Law Society Director of Finance and Administration Cillian MacDomhnaill, and Fr Peter McVerry

Here comes the summer

Paul O'Connor, dean of UCD's law faculty, Justice Sandra Day O'Connor of the US Supreme Court, Law Society President Elma Lynch, and High Court judge Mella Carroll pictured at a dinner in UCD's Newman House to mark Justice O'Connor's participation in the second Fordham Summer Law School, which is run in conjunction with the law schools at UCD and Queen's University Belfast

Index linked

Ms Justice Susan Denham, judge of the Supreme Court, launched the Law Reform Commission's *A report on the indexation of fines: review of developments since 1991*. The report calls for the introduction of a standard fines system to keep pace with inflation. Pictured at the launch are *(from left)* the LRC's Patricia Rickard-Clarke, Mr Justice Declan Budd, president of the LRC, Ms Justice Susan Denham, and Professor David Gwynn Morgan, the LRC's director of research

Have a chair

Michael Greene *(pictured above, with managing partner Paul Carroll on left)* has been appointed chairman of the Dublin law firm A&L Goodbody. A commerce law specialist, Greene joined the firm in 1979. He became a partner in 1983 and managed the firm's New York office for three years

Brightest and best

Recruitment specialist BrightWater Selection has added Sharon Swan to its legal recruitment team. BrightWater specialises in recruitment in the areas of legal, executive, taxation, accountancy and finance, banking, sales and marketing, and human resources. Pictured above are *(from left)* new consultant Sharon Swan, manager Brian Carroll, consultant Michael Grenham and director Wendy Hodgson

Brought to account

Patrick Dorgan *(centre)*, president of the Southern Law Association and partner in the Cork law firm Coakley Moloney Solicitors, officially opens the new offices of forensic accountants James Hyland and Company at 5 Union Quay, Cork. The company is one of the leading forensic accountancy firms in Ireland, providing expertise and a range of litigation support services. Also pictured at the opening are *(from left)* company directors Paul Murray, David Hyland, Peter Johnson and James Hyland

SADSI
Solicitors Apprentices Debating Society of Ireland

Come dancing

After much speculation, not to say agonising, as to where this year's SADSI ball should be held, we are now very pleased to announce that it will be held on Saturday 2 November in the Conrad Hotel, Earlsfort Terrace, Dublin. Julie Brennan, eastern representative, is the event co-ordinator. We look forward to sending out invitations in mid-September.

For those of you who were hoping to combine the ball with a weekend away, fear not! Please drop a line to 2002@sadsi.ie – if the demand is strong enough, we will organise a SADSI weekend trip.

Martin Hayes, auditor

Solicitors v trainees Gaelic football challenge

We are currently in the process of arranging the 2002 fixture of the solicitors versus trainees Gaelic football challenge match. Last year's event was a great success and was thoroughly enjoyed by the large number who attended the match itself and, of course, the post-match reception. We hope to build upon the success of previous years, and, with this in mind, we are compiling a list of those who would be prepared to put their reputations on the line by representing the trainees' team. All those interested in playing for, or indeed supporting, the team, please contact 2002@sadsi.ie. Once suitable numbers are recruited, we can begin finalising a date and venue. Further details will follow.

Noel Devins, sports officer

SOUTHERN COMFORT

Cork trainees may be interested to hear that on Tuesday 10 September, at 5pm in courtroom 1 in the Cork District Court, there will be an introductory talk by Judge Uinsin MacGruairc.

Judge MacGruairc will outline the various procedures and rights afforded to trainee solicitors in the Cork District Court. The talk should take about 30 minutes and should prove most beneficial to all in attendance.

Details of SADSI social events for southern trainees are currently being confirmed, and I hope to make an announcement in relation to this in the near future.

Ken Hegarty, southern rep

SADSI career development day

SADSI eastern rep Christian Victory, Johnnie McCoy, vice-chairman of the Chartered Institute of Arbitrators (Irish Branch), solicitor James MacGuill, Michael Benson of Benson Legal Recruitment, SADSI auditor Martin Hayes, SADSI vice-auditor Áine Matthews, and Ronan Feehily, SADSI's debate co-ordinator, pictured at the event

Another boozing story

Trainees in the eastern region have had very active social calendars recently. A second eastern regional event took place in the Q Bar on O'Connell Bridge on 15 August. There was a great turnout and the night was a success. The PPC1 exam results party was held in the same venue on Friday 23 August. Many thanks to the management and staff of the Q Bar, who looked after us so well.

Julie Brennan, eastern rep

Wild, wild west

All those in need of good company and a bit of crack are invited to join their colleagues in Galway for drinks on Friday 20 September in Tí na nÓg, Middle Street, at 8pm. As always, all are welcome, and SADSI would like to particularly welcome those of you who will be attending the October PPC1. Hope to see you all there.

Dawn Carney, western rep

LOST LAND CERTIFICATES

Registration of Title Act, 1964

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

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

(Published 6 September 2002)

Regd owner: Bridie Holland and Patrick Oliver; folio: 13399F; lands: Moanavoth and barony of Rathvilly; **Co Carlow**

Regd owner: Sean Smyth; folio: 16725; lands: Lecks; area: 19.3642 hectares; **Co Cavan**

Regd owner: Kenneth W James; folio: 51049; lands: a plot of ground situate in the townland of Goleen and barony of Carbery West; **Co Cork**

Regd owner: Kenneth W James; folio: 51050; lands: a plot of ground situate in the townland of Goleen and barony of Carbery West; **Co Cork**

Regd owner: Colm and Christina MacBride; folio: 26423; lands: Convoy Townparks; area: 0.17199 hectares; **Co Donegal**

Regd owner: Aileen Kavanagh; folio: DN86183F; lands: property situate in the townland of Clonsilla and barony of Castleknock; **Co Dublin**

Regd owner: Michael Costello; folio: DN113288F; lands: property situate in the townland of Farranboley and barony of Rathdown; **Co Dublin**

Regd owner: Paul and Susan Ryan; folio: DN7585F; lands: property situate in the townland of Haroldsgrange and barony of Rathdown; **Co Dublin**

Regd owner: Frances Shrage and Joseph Lewis; folio: DN2673; lands: the property known as no 9 Capel Street situate on the east side of the said street in the city of Dublin and in the north central district; **Co Dublin**

Regd owner: Des Farren; folio: DN26398F; lands: property known as 48 Griffith Avenue situate in the parish of Clonturk and district of Clontarf; **Co Dublin**

Regd owner: Margaret Barron and Henry Patrick Barron; folio: DN18972; lands: a plot of ground situate on the east side of Lambay Road in the parish and district of Glasnevin and city of Dublin; **Co Dublin**

Regd owner: Lena Burke; folio: 7418F; lands: townland of Carrowroe West and barony of Moycullen; area: 2.023 hectares; **Co Galway**

Regd owner: Peter and Philomena Murrayhill; folio: 12797; lands: townland of Alasty and barony of South Salt; **Co Kildare**

Regd owner: Norman and Elaine Foley; folio: 29196F; lands: townland of Monread South and barony of Naas North; **Co Kildare**

Regd owner: John T Duffy; folio: 9443; lands: townland of Clogheen and barony of Offaly West; **Co Kildare**

Regd owner: Brendan O'Connell; folios: 6134, 6135, 6142 and 6143; lands: townlands of Kilcullenbridge and baronies of Naas South; **Co Kildare**

Regd owner: Leonard O'Connell, Edward Doyle, Noel Lyons, Edward Irwin and Irene F Mogg; folio: 7675; lands: townlands of Stratford Lodge and Baltinglass and baronies of Talbotstown Upper; **Co Kildare**

Regd owner: Elaine Hickey and Damian McGowran; folio: 12395F; lands: Borris Little and barony of Maryborough East; **Co Laois**

Regd owner: James Peter Sweeney; folio: 17691; lands: Moneyballytyrrell and barony of Maryborough East; **Co Laois**

Regd owner: Michael McNulty, Hillside Road, Greystones, Co Wicklow; folio: 6800; lands: Cornabarrack; area: 5.3039 hectares; **Co Leitrim**

Regd owner: Michael McTeigue, Moher, Aughnasheelin PO, Co Leitrim; folio: 10727; lands: Moher; area: 11.988 hectares; **Co Leitrim**

Regd owner: Ellen Carey; folio: 4289F; lands: townland of Ardnamoher and barony of Coshlea; **Co Limerick**

Regd owner: Cox Plant Hire Limited; folio: 15974; lands: townland of Singland and barony of Clanwilliam; **Co Limerick**

Regd owner: Michael Ahern; folio: 21442; lands: townland of Tuogh and barony of Kenry; **Co Limerick**

Regd owner: James Keenan, Croshea, Edgeworthstown, Co Longford; folio: 6116; lands: Crossea South; area: 7.0718 hectares; **Co Longford**

Regd owner: Francis McKiernan, Ardnacassa, Longford, Co Longford; folio: 8527; lands: Ardnacassagh; area: 3.8445 hectares; **Co Longford**

Regd owner: Declan Gibson, Point Road, Dundalk, Co Louth; folio: 9411; lands: Point; area: 0.2175 hectares; **Co Louth**

Regd owner: Rose Traynor of Sicily, Duleek, Co Meath and John Traynor of Brownstown, Navan, Co Meath; folio: 6186F; lands: Sicily; **Co Meath**

Regd owner: Ann and Francis O'Reilly, 29 Laurence Street, Drogheda, Co Louth; folio: 6285F; lands: Platin; **Co Meath**

Regd owner: Michael Murtagh, Tusker, Laragh, Castleblayney, Co Monaghan; folio: 2270; lands: Tusker; area: 7.2337 hectares; **Co Monaghan**

Regd owner: John McKenna, Carrowhatta, Scotstown, Co Monaghan; folio: 20381; lands: Carrowhatta; area: 2.819 acres; **Co Monaghan**

Regd owner: IDA (Ireland); folio: 2327L; lands: townland of Gortnafleur and barony of Iffa and Offa East; **Co Tipperary**

Regd owner: John Hayden; folio: 22750; lands: townland of Milltown St John and barony of Middlethird; **Co Tipperary**

Regd owner: Patrick James Flood, Corlanna, Lismacaffrey, Co Westmeath; folio: 4010, 4011; lands: Corralanna; area: 6.096 hectares, 1.113 hectares; **Co Westmeath**

Regd owner: Leonard O'Connell, Edward Doyle, Noel Lyons, Edward Irwin and Irene F Mogg; folio: 7675; lands: townland of Stratford Lodge and Baltinglass and baronies of Talbotstown Upper; **Co Wicklow**

WILLS

Cassells, Peter (deceased), late of 17 Simmons Place, North Circular Road (also referred to as 'off Summerhill'), Dublin 1. Would any person having any knowledge of a will executed by the above named deceased who died on 22 March 2001, please contact Lawlor O'Reilly Solicitors, 43 Upper Gardiner Street, Dublin 1, tel: 878 7255 or fax: 836 3203

Early, Patrick John Mary (retired garda, Blackrock Station) and late of 35 Woodlawn Park Grove, Firhouse, Dublin 24. Would any person having knowledge of a will executed by the above named Patrick John Mary Early who died on 22 July 2002, please contact O'Driscoll and Company, Solicitors, 7 Argyle Square, Morehampton Road, Donnybrook, Dublin 4

Fitzgerald, Kevin (otherwise known as Thomas or Thomas Kevin) and Patricia, his spouse (both deceased), both late of 14 Marian Place, Glin, Co Limerick. Would any person having knowledge of wills made by the above named deceased who died on 29 April 2002 and 2 May 2002 respectively, please contact Philip J Culhane & Co, Solicitors, The Mall, Glin, Co Limerick, tel: 068 34444 or fax: 068 34022

McDonnell, John, late of Carrowmore, Barnatra, Ballina, Co Mayo. Would any person having knowledge of a will made by the above named who died on 4 April 2002, please contact Durcan Solicitors, Castlebar, Co Mayo; DX: 33 011, fax: 094 23780, tel: 094 21655; reference C/JD/11763

Maguire, James, 6 Main Street, Julianstown, County Meath. Would any person with information concerning the next of kin of James Maguire, labourer, deceased, late of 6 Main Street, Julianstown, County Meath who died on 13 December 1999 (aged 72), and/or his mother Rosemary Maguire (née Quinn), widow, deceased, also of 6 Main Street, Julianstown, Co Meath who died on 18 April 1987 (aged 97), and/or his father Bernard Maguire, retired serviceman, deceased, also of 6 Main Street, Julianstown, Co Meath who died on 19 February 1933 (aged 43), please contact McKeever Taylor, Solicitors, 34/35 Laurence Street, Drogheda, Co Louth

Nolan, Joseph (deceased), late of Gortaboy, Kinvara, Co Galway. Would any firm of solicitors holding a will or having knowledge of a will made by the above named deceased who died on 24 March 1988, please contact Colman

Sherry, Solicitors, The Square, Gort, Co Galway, tel: 091 631383 or fax: 091 631993

O'Reilly, Gertrude (deceased), late of O'Connell Court Nursing Home, Cork. Would any person having any knowledge of a will made by the above named deceased who died on 6 November 2001, please contact Eamon Murray & Company, Solicitors, 6 Sheares Street, Cork, tel: 021 427 6163, fax: 021 427 4801

Tangney, Robert (Bob) (Joseph) (deceased), late of Lahard, Beaufort, Killarney, Co Kerry. Would any person having knowledge of a will being made by the above named deceased who died on 1 June 2002, please contact Padraig J O'Connell, Solicitors, Glebe Lane, Killarney, Co Kerry, tel: 064 33278 or fax: 064 34286

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Conveyancing and probate solicitor required for Wexford-based firm. One to two years' PQE preferable. Apply in writing to James P Coghlan and Company, Solicitors, 2 Donovan's Wharf, Crescent Quay, Wexford

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Solicitor required for busy, well-established Longford practice. PQE desirable but not essential. Excellent terms and prospects for the right candidate. Contact Catherine Corcoran, HR manager, Ryan Glennon & Co, Chartered Accountants, Trinity House, Charleston Road, Ranelagh, Dublin 6, e-mail: ccorcoran@ryanglennon.com, tel: 01 496 5388

Busy Monaghan town firm seeks newly-qualified solicitor. Experience preferable but not essential. Apply in writing to Barry Healy & Company, Solicitors, 'Laurel Lodge', Hillside, Monaghan, Co Monaghan

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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

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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

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Wanted: ordinary seven-day publican's licence. Please contact James P Sweeney and Company, Solicitors, Falcarragh, Co Donegal; ref: RX0049/BJT, tel: 074 35121 and fax: 074 35704

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TITLE DEEDS

Cassells, Peter (deceased). Would any person knowing the whereabouts of deeds to the property of the late Peter Cassells at 17 Simmons Place, North Circular Road, Dublin 1, please contact Lawlor O'Reilly Solicitors, 43 Upper Gardiner Street, Dublin 1, tel: 878 7255 or fax: 836 3203

In the matter of the *Landlord and Tenant (Ground Rents) Acts, 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) No 2 Act, 1978*: an application by Nora Field-Corbett
Take notice that any person having any interest in the freehold estate of the following property: 22 Pine Valley Avenue, Grange Road, Rathfarnham, Dublin.

Take notice that Nora Field-Corbett intends to submit an application to the county registrar for the city of Dublin for the acquisition of the freehold interest in the aforesaid properties, and any party asserting that they hold a superior interest in the aforesaid premises (or any of them) are called upon to furnish evidence of title to the aforementioned premises to the below named within 21 days from the date of this notice.

In default of any such notice being received, Nora Field-Corbett intends to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for the city of Dublin for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in the aforesaid premises are unknown or unascertained.
Date: 30 July 2002
Signed: Eoin O'Connor and Company, Solicitors, 16 South Main Street, Naas, Co Kildare

In the matter of the *Landlord and Tenant (Ground Rents) Acts, 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978*: an application by Ann Marie Leamy
Take notice that any person having any interest in the freehold estate of the following property: all that and those the hereditaments and premises known as number 66 Barrack Street (now Kenyon Street) in the town of Nenagh, barony of Lower Ormond and county of Tipperary, formally held on a yearly tenancy at the yearly rent (£18) on the expiration of a lease dated 29 April 1958 and made between Patrick Cleary of the one part and Katherine Boland of the other part for a term of 100 years from 29 April 1858 at the yearly rent of £18 and the applicant is the successor entitled to the leasee's interest therein.

Take notice that Ann Marie Leamy intends to submit an application to the county registrar for the county of Tipperary for the acquisition of the freehold interest and any intermediate interest in the aforementioned premises, and any parties asserting that they hold a superior interest in the property or any of them are called upon to furnish evidence of title to the aforementioned property or to the below named within 21 days from the date of this notice.

In default of any such notice being received, the applicant intends to proceed with the application before the county registrar for Tipperary at a hearing at the county registrar's office, Court House, Clonmel, on 7 October 2002 at 2.15pm for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion on the property are unknown and unascertained.
Date: 23 August 2002
Signed: Flanagan and Company Solicitors (solicitors for the applicant), 5 O'Rahilly Street, Nenagh, Co Tipperary

In the matter of the *Landlord and Tenant (Ground Rents) Acts, 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978* and in the matter of premises known as 88 Summerhill, Dublin 1: an application by Tim Martin of 66 Grosvenor Lane, Rathmines, Dublin 6
Take notice that any person having an interest in the freehold estate or of the leasehold estate or the superior interest in the premises: all that and those the lands and premises and house known as 88 Summerhill, parish of St George, Dublin 1, city of the county of Dublin and which premises in consideration of the sum of £270 are held under a lease dated 12 July 1898 and made between Catherine Whelan of the one part and Margaret Bridgeman of the other part for a term of 125 years from 12 July 1898 subject to a yearly rent of £4.17s.6d.

Take notice that the applicant, Tim Martin, being the person under sections 9 and 10 of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978*, intends to submit an application to the county registrar for the county and city of Dublin for the acquisition of the freehold interest and any intermediate interests in the aforesaid properties, and any party asserting that they hold a superior interest in the aforesaid property are called upon to furnish evidence of title to the aforementioned premises to the below named within 21 days from the date of this notice.

In default of any such notice being received, Tim Martin intends to proceed with the application before the county registrar for the city of Dublin for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in the aforesaid premises is unknown or unascertained.
Date: 23 August 2002
Signed: Leo Buckley and Company (solicitor for the applicant), 78 Merrion Square, Dublin 2

In the matter of the *Landlord and Tenant (Ground Rents) Acts, 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) Act, 1967*: an application by Michael Egan
Take notice that any person having any interest in the freehold estate of the following properties: all that and those the hereditaments and premises formerly known as number 76 Harold's Cross Road aforesaid in the barony of Upper Cross and parish of St Peter in the city of Dublin and now known as 210 Harold's Cross Road being part of the premises described in the lease dated 18 May 1871 made between John H Parker of the one part and John Byrne of the other part and then described as 'all that and those the plot of ground on the west side of road at "Harold's Cross" leading from Dublin to Roundtown containing in front to Harold's Cross 60 feet in the rear alike number of feet in depth from front to rear of Harold's Cross Terrace situate in the barony of Upper Cross of St Peter and county of Dublin be the said several admeasurements more or less' and held for term of 190 years and subject to the yearly rent of £12 and subject to the covenants on the part of the lessee to be performed in conditions therein contained.

Take notice that Michael Egan intends to submit an application to the county registrar for the county of the city of Dublin for the acquisition of the freehold interest in the aforesaid properties, and any party asserting that they hold a superior interest in the aforesaid premises (or any of them) are called

upon to furnish evidence of title to the aforementioned premises to the below named within 21 days from the date of this notice.

In default of any such notice being received, the applicant intends to proceed with the application before the county registrar for the county and city of Dublin for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in the aforesaid premises in unknown or unascertained.

Date: 23 August 2002

Signed: Kent Carty Solicitors, 47/48 Parnell Square, Dublin 1

In the matter of the *Landlord and Tenant (Ground Rents) Acts, 1967-1984*: an application by Regina Power and Mary Curran, administrators in the estate of Annie Wallace (deceased)

Take notice that any person having an interest in the freehold estate as successors in title to Michael J McDonnell, deceased, of 88 Bridge Street, Dundalk or otherwise in all that and those the shop and premises situate at Corn Market Square, in the parish of Dundalk, barony of Upper Dundalk and county of Louth, held under an indenture of lease dated 10 August 1901 and made between John William Horan of the one part and MacArdle Moore & Company of the other part for the term of 99 years from 1 May 1901 subject to the yearly rent of £10.15s.4d and subsequently be re-apportioned to £3 and to the covenants on the part of the lessee to be performed and conditions therein contained.

Take notice that Regina Power and Mary Curran have made an application to the county registrar for the county of Louth for the acquisition of the freehold interest in the aforesaid property, and any party asserting that they hold a superior interest in the aforesaid property is called upon to furnish evidence of title of the aforementioned property to the below named within 21 days from the date of this notice.

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

Date: 15 August 2002

Signed: Mason Hayes & Curran (solicitor for the applicants), 6 Fitzwilliam Square, Dublin 2; ref: SR

In the matter of the *Landlord and Tenant Acts, 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978* and in the matter of premises known as nos 4 and 5 Glentworth Street, Limerick, now forming part of the premises known as Hanratty's Hotel, Glentworth Street, Limerick: an application by Hi-Tech Dry Cleaners Ltd

Take notice any person having any interest in the freehold estate of or the superior interest in the following premises: firstly, all that and those the lands, premises and hereditaments formally known as no 4 Glentworth Street, Limerick, in the parish of St Michael in the city of Limerick now forming part of the premises known as Hanratty's Hotel, Glentworth Street, Limerick, held under a lease dated 22 July 1947 and made between Agnes KM Lady Nash of the one part and Hanora Cregan of the other part for a term of 99 years from 1 November 1946, subject to the yearly rent of £65, and secondly all that and those the lands, premises and hereditaments consisting of the premises formally known as no 5 Glentworth Street in the parish of St Michael in the city of Limerick now forming part of the premises known as Hanratty's Hotel, Glentworth Street, Limerick, held under a lease dated 22 July 1947 and made between Agnes KM Lady Nash of the one part and Edward Cregan and Hanora Cregan of the other part for a term of 99 years from 1 November 1946, subject to the yearly rent of £105.

Take notice that the applicant, Hi-Tech Dry Cleaners Limited, being the person entitled under sections 9 and 10 of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978*, intends to submit an application to the county registrar for the county and city of Limerick for the acquisition of the freehold interest and any intermediate interests in the aforesaid properties and any parties asserting that they hold a superior interest in the aforesaid premises or any of them are called upon to furnish evidence of title to the aforementioned premises to the below within 21 days from the date of this notice.

In default of any such notice being received, Hi-Tech Dry Cleaners Ltd intends to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for the county and city of Limerick for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in the aforesaid premises are unknown or unascertained.

Date: 6 September 2002

Signed: Thornton Solicitors (solicitors for the applicant), 52 O'Connell Street, Limerick

In the matter of the *Landlord and Tenant (Ground Rents) Acts, 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act, 1978*: an application by Verney Investments Limited

Take notice that any person having any interest in the freehold estate of the following properties: all that and those the yard being part of the premises known as number 1A Carlingford Road, Drumcondra, Dublin 9, situate in the parish of St George, barony of Coolock and city of Dublin, held under indenture of lease dated 16 March 1917 and made between Samuel Smith Sherlock of the one part and Frances Allen of the other part for a term of 100 years and subject to the yearly rent of £3 and the covenants on the part of the lessee to be performed and conditions therein contained.

Take notice that Verney Investments Limited intend to submit an application to the county registrar for the county of the city of Dublin for the acquisition of the freehold interest in the aforesaid properties, and any party asserting that they hold a superior interest in the aforesaid premises (or any of them) are called upon to furnish evidence of title to the aforementioned premises to the below named within 21 days from the date of this notice.

In default of any such notice being received, the applicant intends to proceed with the application before the county registrar for the county and city of Dublin for directions as may be appropriate on the basis that the person or persons beneficially entitled to the superior interest including the freehold reversion in the aforesaid premises is unknown or unascertained.

Date: 19 August 2002

Signed: Michael O'Shea & Company, Solicitors, 291 Templeogue Road, Dublin 6W