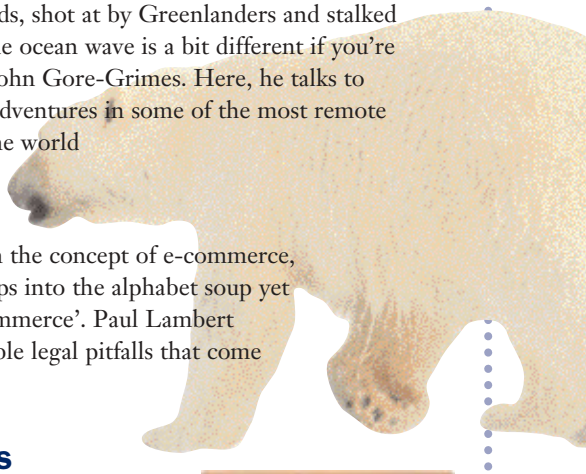
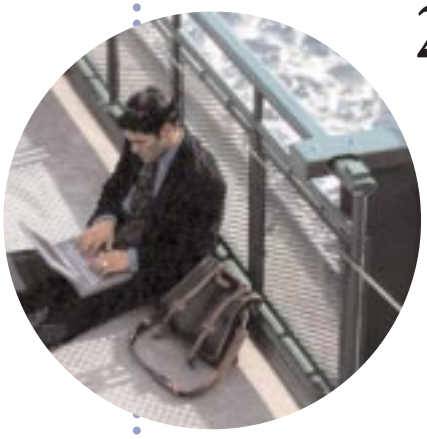
Law Society Gazette

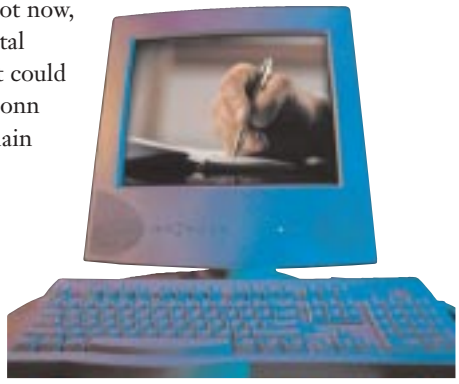
Regulars

COVER PICTURE:
JOHN GORE-GRIMES

Cover Story







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Published at Blackhall Place, Dublin 7, tel: 01 672 4800, fax: 01 672 4877.
E-mail: c.oboyle@lawsociety.ie Law Society website: www.lawsociety.ie

Volume 97, number 2
Subscriptions: €57.15

REVENUE ANNOUNCES REGIONAL CAT TEAMS

New regional divisions of the customer services branch of the Revenue's capital acquisition taxes (CAT) division are now dealing with gift and inheritance tax matters. The new divisions are handling the following areas: processing of Inland Revenue affidavits, processing of CAT returns, issuing of certificates of discharge and all matters relating to the collection of CAT.

The five regional teams and the counties for which they are responsible are: east region (tel: 01 6748685, 6748314) – Kildare, Louth, Meath, Westmeath and Wicklow; south east (tel: 01 6748196, 6748195) – Carlow, Kilkenny, Laois, Tipperary, Waterford and Wexford; midlands/north west (tel: 01 6748439, 6748689) – Cavan, Donegal, Galway, Leitrim, Longford, Mayo, Monaghan, Offaly, Roscommon, and Sligo; south west (tel: 01 6748585, 6748688) – Clare, Cork, Kerry, Limerick; Dublin (tel: 01 6748592, 6748594) –Dublin, non-Irish and domicile. The disponer's place of residence determines the region.

US courts crack down on spammers

A man who sent millions of unsolicited e-mails to consumers and businesses is facing $98,000 in fines and costs following a precedent-setting ruling in the US courts, *writes Paul Lambert*.

Jason Heckel's bid to appeal his conviction under a Washington State law prohibiting unsolicited electronic and wireless e-mails or 'spam' (see *Gazette*, March 2002, page 21 and October 2001, page 22) recently failed. He had argued that the law was unconstitutional on the basis that it hindered interstate commerce. But the Washington courts held that the law was constitutional. Heckel sought to appeal to the US Supreme Court, but was unsuccessful. The Washington King County Superior Court recently heard the case against him.

While there were many allegations of spamming against Heckel, the court only heard one sample charge. He was found guilty and fined the maximum penalty of $2,000. Costs were also awarded against Heckel for the Washington State attorney general. The total award against him was US$98,197.74.

In a separate spam case in the UK, the Independent Committee for the Supervision of Standards of Telephone Information Services fined a company known as Moby Monkey a record £50,000 for spamming.

In Ireland, a draft statutory instrument to implement the *Electronic commerce directive* contains provisions in relation to how persons can register their objection to receiving unsolicited commercial e-mail. Article 13 of the *Privacy data protection directive 2002* also sets out new obligations in relation to spam. For example, it bans the sending of spam with misleading headers or without a valid address at which the recipient may request that such communications cease.

SOLICITORS' BENEVOLENT ASSOCIATION AGM

The Solicitors' Benevolent Association (SBA) will hold this year's annual general meeting at the Law Society, Blackhall Place, Dublin 7, on Monday 14 April at 12.30pm. The main items on the agenda are to consider the annual report and accounts for the year to 30 November 2002 and to elect directors.

ONE TO WATCH: NEW LEGISLATION

The Criminal Justice (Public Order) Bill, 2002

This column is usually about recently-enacted legislation, but lacking a suitable act, this time the subject is a bill which completed committee stage in the Dáil on 11 February. It still has to go to report and final stages, and then through the Seanad. It is likely to be enacted by Easter and will come into force one month later.

The bill has its origins in the problems of late-night drunkenness and disorderly behaviour, which often occur where people congregate at fast food outlets and pubs. When enacted, it will give the courts and gardaí powers to deal with these problems.

These are the main provisions:

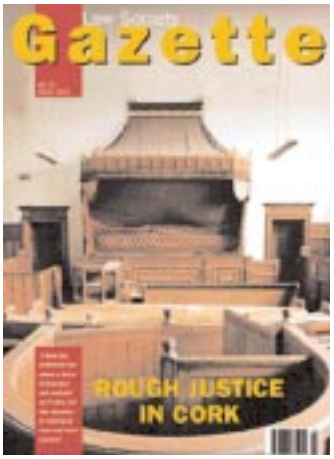
- Section 2 sets out definitions of catering premises, licensed premises, licensee, manager and vicinity. The bill applies to pubs, off-licences, night clubs, dancehalls, amusement arcades, fast food outlets, take-aways and food vans. 'Vicinity' in relation to catering premises means land within a reasonable distance, not more than 100 metres, of the premises
- Section 3 creates exclusion orders. They may be used by the District Court as an additional penalty in relation to offences under the *Criminal Justice (Public Order) Act, 1994*, including intoxication in a public place, disorderly conduct, threatening, abusive, insulting behaviour, distribution or display of offensive material, failure to comply with a Garda direction or wilful obstruction. The court may by order prohibit the convicted person from entering or being in the vicinity of specified catering premises between such times, and for a period that the court may specify. The maximum period is 12 months, and it can be ordered to start when the convicted person is released from prison. Breach of an exclusion order may be punished by a fine of up to €650 or three months' imprisonment. The legislation will only apply to offences committed after it comes into effect
- Part 3 deals with closure orders. A garda inspector or higher ranking officer may apply to the District Court for a closure order on notice to the licensee, after a warning. The grounds are disorder on, or in the vicinity of, the premises (by people who were on the premises) or noise from the premises or the vicinity (caused by people who were on the premises), and the likelihood of recurrence
- If the District Court is satisfied that there has been disorder or noise and that closure is necessary to prevent it recurring, the court must make a closure order. The order may close the premises at certain times on certain days, or for up

Work on Cork court to start this month

Work on renovating Cork's Washington Street courthouse is due to begin this month following a city council vote to approve €25 million for the project. And if all goes to plan, the refurbished and refitted building will be open for business by the beginning of 2005.

The local authority formally approved the finance package at its meeting in late February. Civil engineering firm Rohcon has the main contract and is ready to begin work as soon as it gets the formal go-ahead, which is likely to be this month.

It will mark the beginning of the end of a crisis that has affected lawyers and their clients since 1999, when the courthouse closed for '12 months'. The High and Circuit Courts, which normally sat at Washington Street, were temporarily shifted to a building on



Camden Quay. The result was that justice was administered in the city in overcrowded and unsafe conditions. The *Law Society Gazette* highlighted the situation (see March 2002, page 10) and reported that, at one point, jurors had to be moved from a flooded courtroom by boat.

Cork City Council owns the building and will lease it to the Courts Service over the next 20 years. This will allow the local authority to recoup its €25 million investment.

According to Southern Law Association (SLA) president, Fiona Twomey, the deal was only made possible by a quirk of fate. During last year, it was discovered that ownership of the building had not transferred to the Courts Service (which supposedly took over all courts buildings in the country from the local authorities in 2000).

Twomey said this made it possible for the local authority to take control of the project. 'If the building had been vested in the Courts Service, we could still be in a situation where there was no money for the work', she remarked. She added that the association is relieved that the work is finally going ahead – but she pointed out that Cork had been waiting four years for its courthouse to be re-opened.

DSBA SEEKS MEETING WITH DOWLING

The Dublin Solicitors' Bar Association (DSBA) is seeking a meeting with Personal Injuries Assessment Board (PIAB) interim chair Dorothea Dowling. An association spokesman said this month it had requested the meeting following Dowling's call for submissions on the new mechanism for dealing with motor and employment liability claims.

FAMILY LAW CONFERENCE

Judge Elizabeth Dunne will chair a conference covering key developments in family law at the Stillorgan Hotel, Dublin, on 27 March. Publisher Jordans will host the conference, which will cover the impact of *K v K* and *T v T* on ancillary relief, unmarried couples and children, and case preparation, evidence and advocacy. The conference will be addressed by a number of experts, including solicitors Muriel Walls and David Bergin, Gerry Durcan SC, Maire Whelan and Judge Michael White. More information is available from *www.jordanpublishing.co.uk*.

to seven days on the first occasion and up to 30 days in the event of a subsequent order. The District Court may make conditions for the renewal of a licence, including the installation of closed circuit television (CCTV), what may be sold on the premises, or the number of people to be admitted. Presumably this power will not apply to premises which are not operated under a court-granted licence, such as chip shops or pure food outlets. The court may also take into account the conduct of the licensee, manager or people involved in running the premises. When a closure order is in force, it must be displayed on the outside of the premises. No employee is to be disadvantaged by the making of an order

- Appeals lie to the Circuit Court, but generally do not affect the operation of a closure notice. A garda inspector or more senior member may apply to have a closure order extended before it expires, and if the District Court is satisfied that this is necessary to prevent the repetition of the disorder or noise, the court can do so
- Breach of a closure order by a person who permits catering premises to be open is punishable by a fine of €3,000 or six months' imprisonment, or both. A person who is on the premises when a closure notice is in force is guilty of an offence, punishable by a fine between €70 and €125, unless he or she can show that the external notice was not affixed
- Section 9 makes provision for companies and personal responsibility on the part of the people in charge.

The Criminal Law Committee of the Law Society has made a submission in relation to the bill. Among its concerns is the fact that by seeking to pin responsibility for off-premises behaviour on the managers of premises, the legislation will be encouraging self-policing by security guards, bouncers and doormen. There are recognised problems in this sector, and legislation is proposed. The committee also noted that in many cases all that a closure order or exclusion order will do is move the problem on elsewhere. However, in that event, it may be anticipated that the next premises will be very careful not to transgress by serving too much drink or permitting undesirable elements to congregate.

The legislation is unusual in that a licensee can be made responsible for actions which are not his own. It will depend upon the District Courts to wield this blunt instrument with finesse. G

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

High Court strikes off solicitor

The High Court 2002 no 12 SA: In the matter of Dermot Kavanagh, solicitor, and in the matter of the *Solicitors Acts, 1954 to 1994*

On 3 February 2003, the president of the High Court made an order striking the name of Dermot Kavanagh from the roll of solicitors and ordering that the said Dermot Kavanagh make restitution to the Compensation Fund of the society of €194,152.74.

The president had before him the report of the Disciplinary Tribunal dated 16 July 2002 in which the tribunal report that they had found that the said Dermot Kavanagh was guilty of misconduct tending to bring the solicitors' profession into disrepute in that he had:

a) Misappropriated funds in the sum of £30,000 in relation to certain named estates and sought to conceal the misappropriation by recording the withdrawal of the monies with a false description in the books of account
b) Allowed claims to be made on the Compensation Fund totalling £64,934.78 in respect of certain estates
c) Sought to mislead the society's investigating accountant by stating that no other funds were missing during the investigation when this was untrue
d) Failed to afford co-operation to the investigating accountant in breach of regulation 29(1) of the *Solicitors' accounts regulations*
e) Sought to mislead the Compensation Fund Committee on 2 March 1995 by stating that the only dishonesty in the practice was in relation to the said estates and that there was no cover up when this was subsequently found to be completely untrue
f) Between the times when the first and second investigation reports were prepared on 1 March 1995 and 16 May 1995 allowed a further deficit of at least £8,649.58 to arise in relation to client funds
g) In relation to a further estate failed to apply for a grant of probate in a timely manner or at all and failed to account to the estate for assets of £24,296.02 as of 9 October 1986 and interest thereon and allowed a final deficit of at least £7,296 in the estate
h) Failed to stamp and register deeds in a timely manner or at all allowing a deficit of at least £37,860 in client funds paid to cover stamp duties as of 19 October 1995 to arise
i) In relation to client account cheque 501,190 dated 21 September 1995 in the amount of £8,300 produced this cheque to the bank ostensibly signed by his reporting accountant when the signature on that cheque was a forgery
j) Sent a client account cheque to a building society as a payment towards his own personal mortgage for £6,834 which cheque was not countersigned in accordance with conditions placed on his practising certificate and knowing or expecting that it would not be honoured
k) Allowed claims totalling £229,350.71 up to 24 January 2000 to be paid from the Compensation Fund
l) In relation to a named client misappropriated her money totalling £46,564.66 by presenting an application form to An Post which purported to bear the signatures of the client and her husband who at the time of presenting the form was dead and thereby claiming monies due to her in respect of savings certificates and misappropriating same for his own use
m) In relation to a named client converted monies in relation to this client totalling £10,894.11 for his own use including £4,000 of this money which was misappropriated while the solicitor was an employee with another firm of solicitors and during the on-going society investigation
n) In respect of a named client misappropriated £12,000 paid to the solicitor for stamp duty but never used those funds to stamp the deeds and instead converted same to his own use
o) Misappropriated £3,000 belonging to two named clients
p) Misappropriated £4,200 belonging to two named clients in respect of an overpayment of stamp duty repaid to the solicitor but never passed on to the clients
q) Misappropriated £3,150 belonging to a named client, the amounts furnished to the solicitor for stamp duty and registration fees but never used by the solicitor for that purpose which funds were given to the solicitor in 1989 and 1991
r) Misappropriated funds of £6,430 belonging to a named client
s) Misappropriated funds of £5,150 belonging to a named client in respect of monies paid to the solicitor for stamp duty which monies were never used to stamp deeds but were instead converted by the solicitor for his own use
t) Failed to account to a named client for funds held on her behalf and caused a claim of £7,050 to be paid out of the Compensation Fund
u) Was convicted of three criminal offences on 24 March 1998 on count number two with fraudulent conversion, on count number four with forgery and on count number nine with fraudulent conversion and received a four-year suspended prison sentence
v) Was in breach of the *Solicitors' accounts regulations* by failing to keep proper books of account at all times; in many cases, his books of account did not reflect his true dealings with clients
w) Allowed a net deficit to arise on his client account quantified at £152,907.71 as of 24 January 2002, being the date of swearing of the society's disciplinary affidavit, allowing for claims paid of £229,350.71 and recoveries of £76,443.00.

Costs were awarded to the society.

Access denied: Dublin loses out on District Court legal aid

The lack of any outcry over the virtual abandonment of the legal aid system at District Court level illustrates the absence of commitment to even a basic civil legal aid system in this country, writes Keith Walsh

The Legal Aid Board (LAB) removed funding for access, custody, guardianship and maintenance cases in Dublin under its *Private practitioner District Court scheme* last month. The cuts in funding do not apply outside the capital. The abolition of the main element of the scheme was reported in the *Irish Times* of 7 February and would have surprised most of the 45-50 solicitors in Dublin on the panel. Proceedings under the *Domestic Violence Act* are still covered and essentially remain the only part of the scheme still operating in Dublin.

Those on low incomes in Dublin seeking legal aid for custody, access, guardianship or maintenance cases in the District Court must now apply to a law centre in the city and take their place on the waiting list. Their applications will be assessed according to the priority of the type of case. As domestic violence, judicial separation or divorce cases take priority over custody, access, guardianship and maintenance, it will be a very long wait. Clients may eventually get their day in court only to find that their case has been prejudiced by the delay involved.

The increase in applications to law centres in Dublin will put them under more pressure. It is difficult to see how waiting lists will not return to the (even more) ridiculous levels of a few years ago, thus further frustrating the civil legal aid system for all involved.

The Law Society's Family Law and Civil Legal Aid Committee launching its *Report on civil legal aid* in June 2000

The *Private practitioner District Court scheme* was first introduced in 1993 on a pilot basis for six months and was confined to Dublin until 2000, when it became nationwide. There has never been any doubt that the scheme has increased clients' access to legal services. However, the Society's Family Law and Civil Legal Aid Committee severely criticised it, and, as recently as three years' ago, unanimously recommended that the Law Society should not endorse solicitors' participation in the scheme because the fees payable 'did not reflect in any way the amount of time involved'. The *Report on civil legal aid in Ireland*, published by the Law Society in 2000, recommended 'that the level of remuneration payable to private solicitors participating in the service should be an economically viable one'.

The LAB's response to the report ignored mention of any increase in private practitioners' fees to a reasonable level, but stated: '*The board looks forward to co-operating with the Law Society on the use of private practitioners, with a view to providing legal services within a reasonable period of time and to increase access to the service by using private practitioners to complement the law centre service*'.

This response is contained in the board's most recently published annual report – for the year 2000 – and seems to indicate an increase rather than a decrease in use of private practitioners. More importantly, the LAB itself has highlighted the reason for using private practitioners: they are quicker and they increase access to legal services for those on low incomes – surely one of the core objectives of the LAB?

The savings to the LAB resulting from the reduction in the private practitioners' scheme have been reported as being in the region of €200,000 this year. The costs of this saving to the staff in the frontline of law centres in Dublin will be increased pressure from clients, longer waiting lists, and more time in Dolphin House family law court waiting for their cases to be called.

The District Court practitioner in family law is now more likely to be opposed by someone either still on a waiting list and seeking to adjourn the matter before the court, or a lay litigant. He or she may well retire in frustration from family law at this level, thus further reducing the pool of solicitors available to clients. The biggest loser in all this is, of course, the potential client. Already on a low income and experiencing family difficulties, he or she must endure a bureaucratic maze followed by a long wait before receiving justice in the District Court.

The lack of any political or media outcry over the virtual abandonment of the meagre system of legal aid in the District Court best illustrates the true level of commitment to even a basic civil legal aid system in Ireland, and signals an unwelcome return to queuing for your rights for those on low incomes. Family lawyers in the District Court will have plenty of time to consider these and other issues over the coming months as they take their own place on the list in Dolphin House. G

Keith Walsh is a solicitor with the Dublin law firm Fawsitt.

Letters

Safe storage of land certificates

From: Catherine Treacy, chief executive, registrar of deeds and titles, Land Registry

I would like to draw the attention of practitioners to a new service which the Land Registry has recently introduced, I feel will be of considerable interest, and indeed benefit, to them.

Land certificates are becoming something of an anachronism with the advent of the electronic age and a number of jurisdictions have already abandoned paper-based land certificates. While there are no plans currently to terminate the availability of land certificates, it seems inevitable that this issue will come under review as the profession moves towards electronic conveyancing.

The safe storage of land certificates is a problem for the legal profession and financial institutions. That a large number goes missing is evidenced by the monthly spread of advertisements in the *Gazette*.

There are, of course, considerable costs and inevitable delays associated with this problem. In addition to the risk of loss and misplacement of land certificates, there are also storage and maintenance overheads and handling costs. These risks were highlighted in England recently when a fire destroyed all of the land certificates of a financial institution. The ensuing cost to the institution of dealing with the lost land certificate applications must have been significant.

The Land Registry has now launched an initiative that will enable solicitors to avoid these risks and costs. Instead of having a new paper land certificate issued for the first time, or an existing land certificate re-issued on completion of a dealing, it is now possible to have the land certificate stored in the Land Registry on your behalf. No fee is payable for this service (other than the standard fee payable if a new land certificate is required for the first time) and, if the paper land certificate is subsequently required, it will be issued at no additional fee.

The simplest way to avail of this service is to use the Land Registry's electronic *Application for registration (incorporating form 17)* which is available as an interactive application on our electronic access service (EAS). It is also open to a solicitor to complete the application on the paper form, which is available from the Land Registry, or from our website where it can be downloaded and printed (*www.landregistry.ie*).

I would encourage practitioners to fully avail of this service. Land Registry staff have discussed the subject of land certificates with the profession through various fora, in particular, at a number of meetings with the Technology Committee of the Law Society, the Land Registry customer group and the recently formed Irish Mortgage Council, which is a representative body for mortgage lenders. The view expressed at all of these meetings was that the financial institutions and the legal profession would welcome a move away from paper-based land certificates.

We feel that this initiative can resolve an on-going difficulty and risk for the legal profession.

THANKS FOR PAYING FOR OUR PRACTISING CERTS

From: Ballymun Community Law Centre, Dublin

Please accept my sincere thanks for the society's generosity in paying for our practising certificate for Ballymun Community Law Centre. You should be aware that it is greatly appreciated.

From: Coolock Community Law Centre, Dublin

On behalf of the board of directors of Coolock Community Law Centre, we would like to express our gratitude at the Law Society's decision to cover the cost of practising certificate's for two of our solicitors. This constitutes considerable saving for the Law Centre and your continued support to the law centre is very much appreciated.

From: Free Legal Advice Centres, Dublin

I am writing to you on behalf of the Free Legal Advice Centres (FLAC) to convey our sincere gratitude to the Law Society for once again paying for our solicitor's practising certificate. The provision of a practising certificate to us is particularly appreciated this year as the underwriters for the Solicitors' Mutual Defence Fund were no longer in a position to provide us with professional indemnity insurance at a nominal cost.

The fact that FLAC is in a position to employ a full-time solicitor allows the organisation to provide representation in test cases which not only benefit litigants but also effectively tackle social disadvantage. This also enables us to advise and represent needy applicants in social welfare cases, and to campaign and lobby on legislative and other developments that impact on human rights and access to justice.

The support of the Law Society has been a constant factor over the years in allowing FLAC to maintain and develop its services, and the continued generosity of the society and its members is particularly important to us at a time when government funding is difficult to access.

Monumentally senseless slaughter

From: Frank MacGabhann, Skerries

I was shocked to learn through Mr McCoy's letter in last month's *Gazette* (page 9) that the Law Society has installed a monument/memorial in the public area of the Four Courts which glorifies the senseless slaughter of 14 million people during the 1914-1918 war, including those solicitors and apprentices 'who gave their lives for King (sic) and country'. This installation was apparently not decided by, or even discussed by, the Council.

By doing this, the Law Society has publicly endorsed the senseless carnage instigated by British rulers who manipulated and deluded those brave but tragic solicitors and apprentices. My shock was all the greater when I was at the Four Courts recently and saw the nature of the memorial and, in particular, read the obscene inscription on it extolling those:

'Who ventured life and love and youth
For the great prize of death in battle'

That is nihilism of the worst kind and disgusting in the extreme. As the Law Society officially encouraged solicitors and apprentices to enlist in the Imperial Army in 1914, it was to some extent complicit in their senseless death.

The most tragic figure of the time was Francis Ledwidge, who came to terms with his delusion in 1916. He realised that he was wearing the uniform of the very army that had shot his own friends in Dublin who, along with other Irishmen and women, had fought in a different army, an army of liberation, to free his and their own country from the bonds of British colonialism, the cause of which he was then serving.

The Bar's Great War commemoration committee apparently wishes to 'congratulate' us individual members on the installation of the memorial. I, as an individual member, have no wish to be congratulated by them. Indeed, there is no cause for congratulation or celebration, but great sadness for these and other victims, and outrage that, in 2003, lawyers would laud this 'great prize of death in battle'. It was not a sacrifice, supreme or otherwise. It was just senseless slaughter.

In my view, if the Great War commemoration committee wants to honour these men, it should soberly reflect on what it is doing, disband and then perhaps re-constitute itself with a totally different *raison d'être*, that of ensuring that young men of today do not waste their lives by fighting senseless wars. This would be a true memorial to those whose names are so heartbreakingly inscribed.

By installing the memorial now, especially at the most used entrance to the Four Courts, the Law Society is making a public statement that it endorses the senseless butchery of World War I.

In line with Mr McCoy's call to name the corridor, I suggest that it be called 'Slaughter Corridor'. I suggest that the memorial and its counterpart for the barristers be placed in a legal museum, where they can be viewed as extinct relics of an imperial genus and a colonial species.

I would respectfully call on the Council to remove the memorial, which was put up without consultation.

CALL OF

Running through minefields, shot at by Greenlanders and stalked by polar bears. A life on the ocean wave is a bit different if you're solicitor and arctic sailor John Gore-Grimes. Here, he talks to Conal O'Boyle about his adventures in some of the most remote and inaccessible parts of the world

The ice cometh man: John Gore-Grimes and *Shardana* meet a glacier

So you think that Ireland of the Welcomes is losing its sheen? Forget it. You haven't seen hostile until you've been shot at by irate fishermen in Greenland. Just ask solicitor and arctic sailor John Gore-Grimes.

His 31-foot boat, the *Shardana*, had just pulled into Scorsby Sund, the northernmost settlement on the east coast of Greenland. Instead of a red carpet, the crew were greeted by a hail of bullets from rifle-toting locals. Obviously tourism wasn't big business there in 1985. But Gore-Grimes had just spent several exhausting days navigating his way through the ice floes and was in no mood to budge.

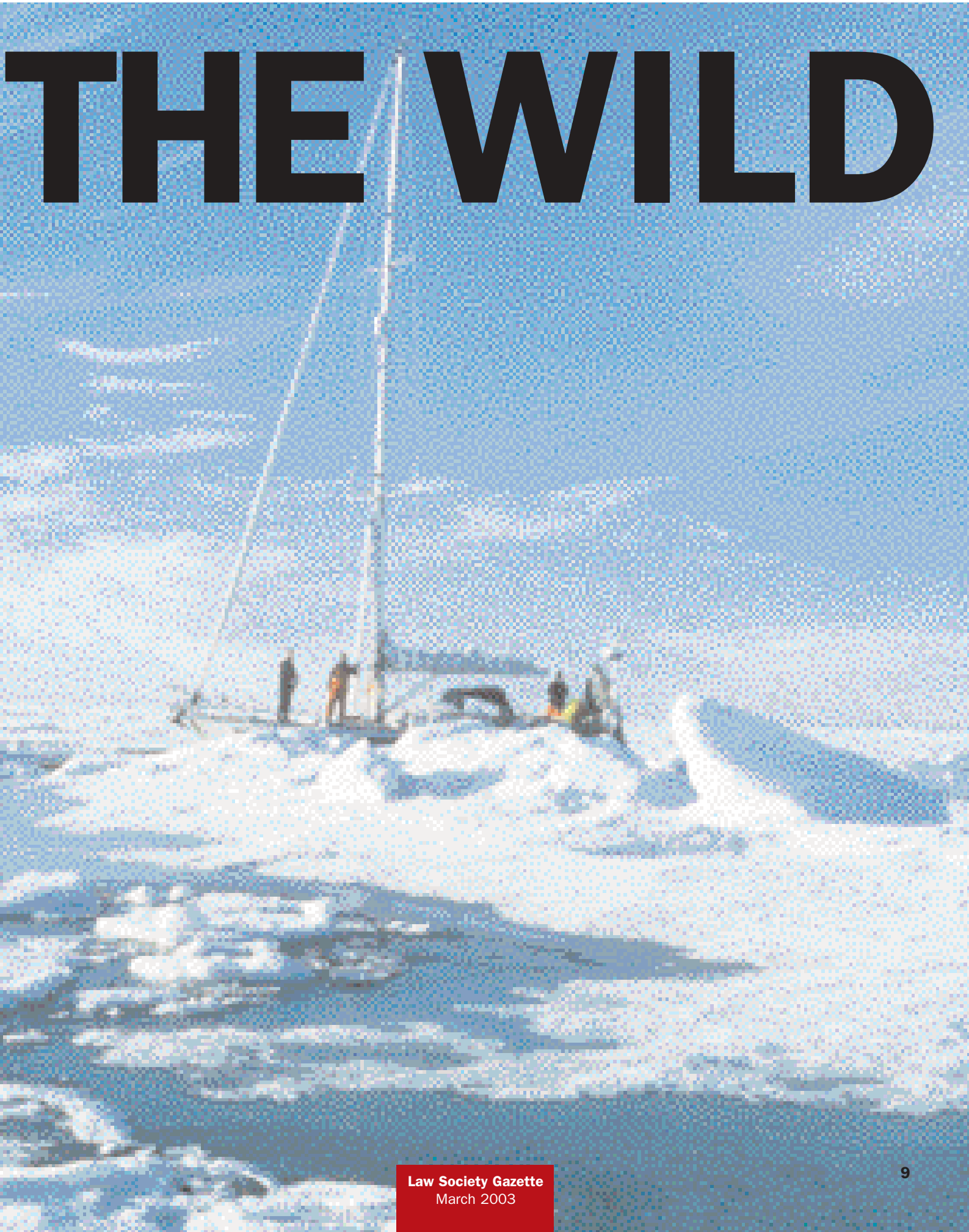
'We just went down below and waited until they stopped', he says. 'Those guys were very good shots, and if they had wanted to hit us they would have. I know that now, but I didn't know it at the time. It was a little bit alarming'.

That was pretty much how the locals greeted any visiting boat. In fact, three weeks earlier they'd fired on the supply ship from Denmark, which did a swift about-turn and headed straight home. The inhabitants of Scorsby Sund found themselves short of supplies that winter.

As it turns out, the Greenlanders had a fairly good reason for opening fire on visiting ships: they were afraid that the sailors would sleep with their women. And they were right.

'We never drink when we're at sea, only at anchor', says Gore-Grimes, 'so when we arrived, we opened the whiskey bottle and had a good old session. We were just turning in, when there was a knock on the side of the boat and three women came

THE WILD



'I tried to shout but I was under water and my hands no longer held the helm. I reached up and for a split second felt the cockpit floor above me'

looking for drink – and more. All I can say, without naming anyone, is that some of the crew obliged'.

All this bizarre behaviour, he explains, has a sociological basis. Scorsby Sund has a population of around 300 and, as you might imagine, it's a very harsh place to live. The people there are tough and rugged, and women are treated particularly badly. One of their few routes of escape is to get pregnant, because the Danish government guarantees a house to single parents. But it's not just about housing.

'In-breeding has taken a terrible toll', he says, 'so they are anxious to try to mix blood. That's why the rifles opened fire, because the men knew bloody well what was going to happen – and it did happen'.

Life on the ocean wave

Sailing is in his blood. His father Christopher, who died in 1977 after 46 years in Gore and Grimes, was a sailor of some considerable skill, whose boat criss-crossed the Mediterranean and the Atlantic oceans without the aid of the detailed charts, global positioning systems and satellite phones that modern mariners take for granted. 'He used to navigate with a piece of string, which always impressed me – but funnily enough he got it right, and he was lucky. He was a very lucky man and he seldom made mistakes. He always arrived where he wanted to'.

John Gore-Grimes appears to have inherited his father's luck. Although he is generally regarded as one of the world's foremost Arctic sailors, he has also explored the Antarctic and sailed extensively in almost every other major body of water. But it's high latitude sailing that holds the biggest attraction for him – and it's what nearly killed him in 1980, when his boat capsized on the way back from Spitzbergen. His as-yet unpublished book of his Arctic adventures contains a gripping account of this near disaster (see **panel** opposite).

Yea, though I run through the valley of death

There have also been close shaves in Antarctica, when he fell through a crevasse on Deception Island and was only saved by a ledge of ice that was rapidly melting as a result of his body heat (he was eventually rescued by Erling, his Norwegian climbing companion), and a short jog through a minefield on Cape Horn (again with Erling). 'We were determined to see the lighthouse so we went rushing off, even though the lighthouse keeper was waving furiously and shouting at us in Spanish. We finally got the message that we had wandered into a minefield. The whole place was mined because the Argentineans think that Cape Horn is theirs and so do the Chileans. So, there we were in this bloody minefield and it was pouring rain, and we finally got the message that the keeper was telling us in Spanish to "follow your footsteps out, the way you came in". Now, we couldn't see the footsteps, because they were submerged in rain, so I said "What the hell do we do?" And Erling said "You turn around and you run like hell!". And off he went with his huge strides because he was a big, tall fellow. I couldn't match his footprints, but we didn't get the legs blown off us, so I suppose it was quite exciting'.

Not surprisingly, many people have asked him why he continues to put his life in danger by heading off to the most far-flung parts of God's green Earth. The answer is simple. 'I've been able to see nature the way God created it, at its most magnificent and without

FACT FILE

JOHN GORE-GRIMES

Born: 1942

Occupation: Solicitor. Partner in Dublin law firm Gore and Grimes

Education: St Gerard's School, Bray and Glenstal Abbey, County Limerick. BA and LLB from Trinity College, Dublin. Admitted to roll of solicitors Michaelmas Term 1964

Former president of Irish Council for Civil Liberties. Lecturer in planning law for the Law Society's continuing legal education department since 1983. Author of the recently-published *Key issues in planning and environmental law* (Butterworths, 2002)

any interference from man – not a footprint, not a tractor mark, nothing. It really is very beautiful. It's also very dangerous. But it gets to you. I'm not a very religious person, but there's a spirituality to it.

'When you get back, you quickly forget the slog and hardship – and there is plenty of it – and you only remember the good points. My memories are fantastic. These are the things I treasure'.

Of course, it's not always plain sailing. Gore-Grimes has been frustrated in three attempts to reach

'I SAW MY LIFE PASS BEFORE MY EYES'

On our third day, the wind started to increase with sudden gusts which soon turned into a prolonged gale. The seas were running from the southwest, but as we passed through the centre of a low pressure system the wind followed us straight from the polar ice-cap – fairly whistling through our clothing to chill our bones. We had some exhilarating sailing, but by midnight the wind and seas started to cause problems and we were falling into deep troughs – deep enough literally to take the wind out of our sails.

We were sailing under fully-reefed mainsail only, and when I came on watch at two in the morning it was perfectly bright. The sea washed over the boat constantly and I took the helm from Bob, who went below for a rest at the chart table.

I was just about to settle in and click on my safety harness when the boat suddenly fell from the top of a wave and crashed downwards. It was as if somebody had dropped the boat from a two-storey building. My stomach came right to the top of my head and then there was a sickening thud as the hull hit the water's surface below. Within an instant, the wave from which we had fallen broke over the boat and turned her upside down. I tried to shout but I was under water and my hands no longer held the helm. I reached up and for a split second felt the cockpit floor above me. Then it was gone and I saw my first communion, my wife, children, parents, the grey-walled stone towers of Glenstal Abbey.

The life-jacket in my oil skins was inflated so I knew I would come to the surface eventually, but did not know where. I was still under water and quickly running out of air when inexplicably some ropes came into my hands. I grabbed them and realised that I was holding on to the strands of the main sheet. I pulled myself along the ropes and then felt an almighty bang upon my chest. As the boat righted, I was scooped back onboard by the stainless steel safety rail on the stern and landed head first on the cockpit floor with my head still under water. I picked myself out of the flooded cockpit and held firmly onto the safety rails as we were hit by a second wave which washed clean over the boat, but this time she did not go over.

Ice blue water gushed into the cabin. Below was a shambles, with solid water above the level of the bunks and bodies strewn everywhere. Those below had been thrown from their bunks and had landed on the cabin roof before falling together, in a heap, into the water on the cabin floor. Bob had left his seat beside the chart table and had somehow ended up seated on top of the gas cooker on the opposite side. If the situation had not been so serious, one might have found time to laugh. Bob looked a little dazed on top of the cooker but still held the sodden pages of his book in his hand. The heavy ships' batteries which had been beneath him, as he sat at the chart table, joined him in his flight across the cabin roof and now lay by his feet. The men in their bunks had been completely submerged in water.

We surveyed the damage and got to work with buckets and pumps to reduce the level of water in the cabin. Two men went on deck and hauled down the mainsail. They set a trisail and lashed down the helm so the boat would lie more comfortably to the wind instead of across it. Where the port-hand cabin window had been, there was now a gaping hole and water kept slopping in. We took some planks from the floor and made a temporary repair. We worked hard for two hours before changing from cold sodden clothing into cold wet clothing. Outside, the northeast winds brought heavy driving snow which added a few more degrees of misery to our condition. We remained battened down in this storm for 36 hours before we could set sail again. Our dingy had been washed away and all of our spare fuel cans had gone. Much damage had been done to our food stocks.

On Saturday morning, the sun came out and the seas abated. The wind filled in from the northwest and we set the spinnaker and had a fast and mercifully uneventful passage for the rest of the way home. In the words of that renowned traveller, Samuel Johnson: 'Folks who go a-pleasuring need not expect comfort'.

Extract from John Gore-Grimes' unpublished account of his arctic expeditions

the remote arctic archipelago of Franz Josef Land, an icy wasteland uninhabited except for 4,000 polar bears. The major stumbling block on each occasion has not been the ice floes but the Russian authorities, who have consistently refused visa applications to enter their territorial waters. Their attitude may have had something to do with Gore-Grimes' repeated incursions into Russian waters, whether they gave their permission or not.

Russian roulette

He is not exactly unknown to the authorities, and a Russian friend recently advised him that 'it would be most unwise ever to set foot in Russia again'. Previous visits to Russian territory have netted him a Soviet policeman's fur hat and five pistol bullets – an apparent and hazily recalled exchange after a prodigious night's carousing in the eastern Siberian town of Providenia – and a massive bust of Lenin from the town centre of a Russian coal mining town in Spitzbergen two years ago.

'We had been there before in 1980, and in the main square there was a statue of Lenin, a big gold bust. When we came back 20 years later, the square had been bulldozed when they were changing the layout of the place. So we met some fellows down on the pier and shared some whiskey with them, and eventually one of them invited us back to his house for dinner. We came laden with six or seven bottles of whiskey and a box of Cuban cigars. We also had chocolate and bags of other stuff that we gave them – it was one hell of a party. And in the corner of one of the rooms was this bust of Lenin that I remembered from the square. We were all getting drunker, and eventually we started to negotiate for it. I gave him $100, and he said "it's yours!"

'So we loaded it on to a truck – the Russians were in tremendous form at this stage – and drove down the hill. And it was only when he got to the bottom of the hill that he remembered that the brakes on the truck had gone. We were heading towards the pier and, just before we get to it, he sees another truck and slams right into it to slow us down. Of course, we nearly go through the windscreen. The truck keels over and then bounces back up again. We look at Lenin, and he's still okay in the back. It took three people to carry him down and put him in the boat. And just as we were pulling away from the pier, an official bus came hurtling down with a man in it who was obviously the local chief. He was ready to explode with anger, he was absolutely furious, but there was nothing he could do. It's an international treaty town so they had no boats, no arms, nothing. So we just pulled away from the pier with the bust of Lenin and took it home, where it's now sitting in my sun-room. That was a good one!'

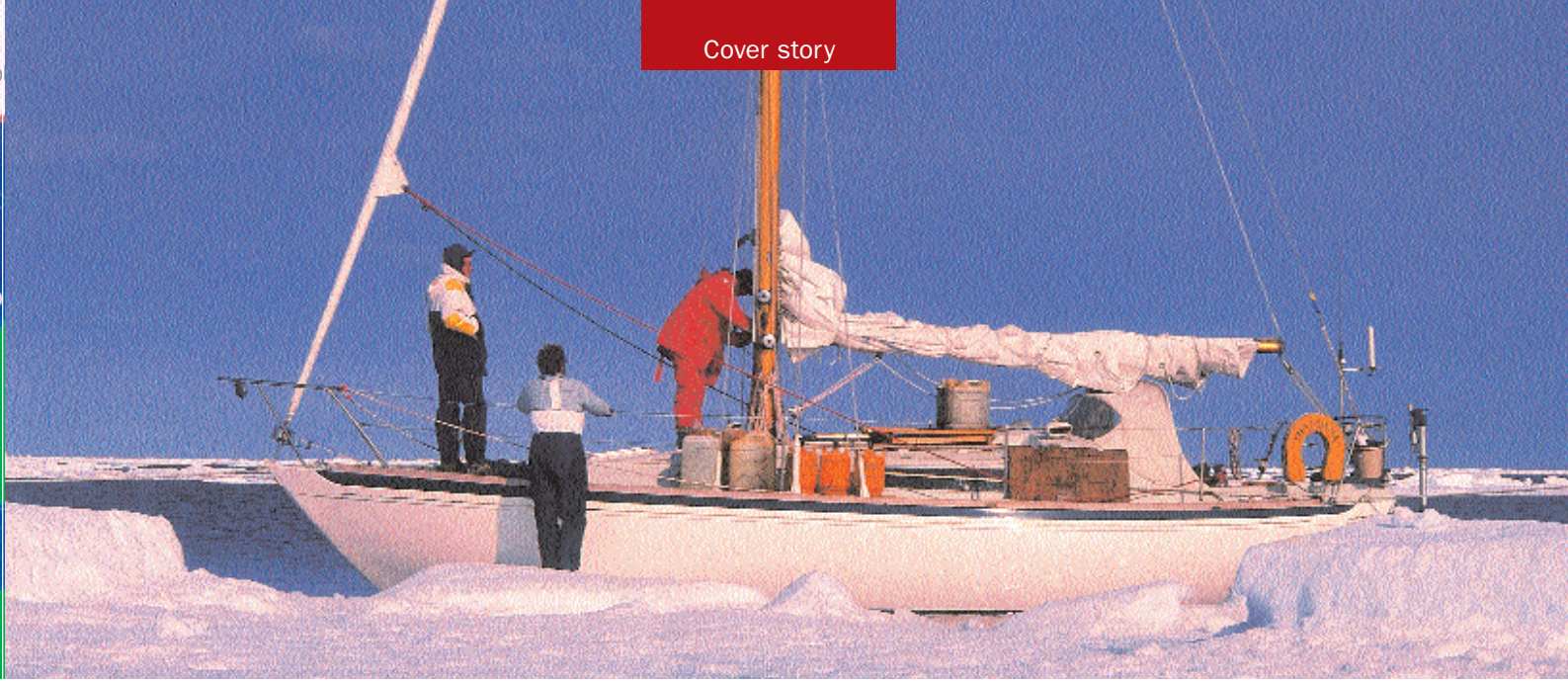
Bear necessities

During the last attempt to reach Franz Josef Land, Gore-Grimes and his crew made international headlines when his 44-foot Swedish-built boat, the *Arctic Fern*, became trapped in ice for five-and-a-half days. Characteristically, his biggest concern at the time was not the danger of being crushed between the huge fields of ice, which can range up to two miles across, but the possibility of missing the slim window of opportunity that would let them navigate through the arctic ice to reach their destination.

But the world's press weren't the only ones watching. On the basis that misery loves company, the ice-bound yacht was joined by curious and hungry polar bears.

'We had several visits from polar bears', Gore-Grimes says. 'Whenever it was foggy, you could expect them. They would come right up to the boat. I hadn't brought a gun that year because I felt I could never shoot a polar bear. That was a very foolish thing to have done. I'll always bring a gun in future, but it would still be a last resort to shoot one.

'There was one incident that shows you just how cute they are. We had taken ropes and tied them criss-cross across the deck. We could hardly walk on it ourselves so a polar bear wasn't going to climb up on the deck, but they would come right up to the



boat and put their paws on it. Whenever we were working outside to free the boat, somebody had to keep an eye out for bears. When the shout went up, you jumped back on the boat and went below. So we could see this chap stalking us. We were looking out the window at him creeping up and all we could see was the black nose. He saw us looking at him, so he stopped. And what did he do but pick up a piece of snow with his paw and put it over the black nose so he was completely white. It was extraordinary, it really was. To this day, I think they are amazing'.

In a remarkable coincidence, it was another polar bear that apparently led the boat to safety through the ice fields some days later. The crew saw the bear swimming and decided to risk following him on the basis that the water might be deep enough to navigate. 'He's about 400 yards away and he's just sitting there looking at us, not coming near the boat. So we think "there's an open lead" and we hack the ice by pushing, shoving, breaking, whatever. That took half a day – seven-and-a-half hours. The bear is there all the time. He moves around a little bit, but he's there. When we get to the place where he had been swimming, the bear jumps into the water and starts swimming along the channel. Then when he turns to the left, we follow him; when he turns to the right, we follow him. He would pull himself out if he was swimming too slowly – and they can swim pretty fast – and he would run ahead. Eventually we came to the ice edge and that bear – whether deliberately or just because he wanted to go to the edge at the time – took us out of our predicament'.

A bear that smart, he notes wryly, should be practising law.

You might think that John Gore-Grimes has had enough adventures in the snow to last him a lifetime, but he's already planning his next one later this year, revisiting Scorsby Sund in Northeast Greenland after 18 years, before trying to reach the highest latitude possible, 83 degrees, 'just to see what it's like'.

So how does the law firm Gore and Grimes feel about one of its partners taking his life in his hands on a regular basis? 'Well, they don't care about my life', he says, 'I am sure of that. It is the time off that worries them! I'm pretty lucky: this profession has been very kind to me and it's allowed me to do all these things'. Luckily for him, and for the firm, he still gets a kick out of work and arrives at the office around 6am every morning. 'I get my best work done before the phone starts ringing', he explains.

'I battered one of the crew because he was just being bloody awfully-minded. I couldn't stick it anymore so I belted him'

Mutiny on the *Bounty*

He admits that he doesn't know how many high latitude expeditions he has left in him, describing it as 'a young man's game'.

'It's physically demanding', he says, 'and it's mentally demanding, being a skipper. I have made some horrendous mistakes. I've a very short temper when provoked, and I've done some stupid things, like when I battered one of the crew because he was just being bloody awfully-minded. I couldn't stick it anymore so I belted him and of course that set off World War III. Everyone turned against me!

'I am definitely a Captain Bligh. I have this rule that if anyone leaves anything lying around the boat it goes over the side. It is a very small space and you have to keep it tidy. So any of that sort of stuff, I just pick it up and over it goes. Very little gets thrown over now!

'You have to be very disciplined and very tidy. You have to get up at all sorts of unsociable hours; you have to do without sleep for a long time; you have to eat bad food. It upsets some people, and then they become difficult and argumentative. I've seen it enough times, not just on my own boat, and it can ruin a good trip, so you have to be terribly careful who you pick. This year we have a very young crew, but it still takes its toll.

'I'm 61 and I think I'm coming close to the end of those sort of trips. But I do have a friend who is 82 and he is still doing them – so there's hope'.

Like his friends in Scorsby Sund, you tend to suspect that John Gore-Grimes will always give it another shot. G

Just as we get to grips with the concept of e-commerce, information technology dips into the alphabet soup yet again and serves up 'm-commerce'. Paul Lambert analyses some of the possible legal pitfalls that come with this brave new world

Upwardly

Mobile and wireless services have given rise to many new legal issues and spawned the term 'm-legal'. One of the most recent m-legal topics to hit the headlines was the banning of picture messaging mobile phones in certain locations such as schools and gyms, even as David Beckham and Michael Schumacher are promoting the virtues of this technology.

Phone operators hope that picture messaging will mirror the success of SMS text messaging. An estimated 360 billion SMS texts were sent last year. Soon, an average of one billion will be sent daily. These are significant revenue streams for mobile operators. It is predicted that m-commerce (defined as 'mobile buying and selling') will eventually overtake e-commerce. One recent analysis forecasts that global m-commerce revenues could reach $225 billion by 2005.

Mobile phones have reached mass-market popularity faster than comparative technologies such as radio, TV and the Internet. Soon many more people will own mobile phones than traditional landline telephones, and the EU Commission predicts that more EU citizens will be Internet-enabled via mobile devices than through their PCs.

Wireless services other than m-commerce are already used by companies, consumers, mobile workers, emergency workers and the military. Some hospitals now use SMS to remind patients of upcoming appointments, while doctors and nurses increasingly rely on mobile devices rather than paper charts. Hospital, emergency and outpatient wireless services will continue to be a large growth area.

Loudmouth legislation

The enormous popularity of mobile phones means that it is now common to make and receive calls almost anywhere in public. As a result, many people are displeased by the apparent lack of mobile phone etiquette. Some of the proposed solutions to this perceived problem raise legal issues such as privacy, trespass, how to draft appropriate legislation, and the legality of mobile-jamming devices (see **panels**).

The existing e-commerce legal regime did not fully envisage all the implications of m-commerce and wireless services, and this may serve to hinder the development of m-commerce. For example, various e-commerce measures require that users receive detailed prior information. There are also requirements in relation to the formation of electronic contracts, distance selling, financial services and electronic signatures. All of these are more difficult to satisfy for m-commerce.

Intellectual property

New m-commerce and wireless services involve completely new – often complex – activities and therefore necessitate new contract and legal business

DEFINITIONS

- **M-commerce services** or mobile services can be described as 'mobile buying and selling'.
- **Wireless services** are mobile or wireless services other than m-commerce. Examples include wireless e-mail, wireless access to corporate data (for example, through personal digital assisants or pocket PCs), location-based services to help you find your nearest bar or restaurant, SMS (short messaging service) and MMS (multi-media messaging), picture messaging, entertainment and other services.

mobile

MAIN POINTS

- Explosion in mobile technology
- Privacy and other issues
- *Wireless Telegraphy Act, 1926*

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BANNING MOBILE PHONES

Several different types of ban are emerging. The policy reason and the methodology of implementation behind each is different.

Using a mobile while driving

There are perceived safety concerns over the use of hand-held mobile phones by drivers. This has resulted in bans in the United States and many European countries, including Ireland. The UK is also considering such a ban. However, these bans and the relevant exceptions differ in each jurisdiction. Should public use in an emergency be exempt? Should police and emergency services be exempted?

An emerging issue relates to mobile hands-free functionality integrated into vehicle dashboards by vehicle manufacturers. Do these fall outside the scope of the exemptions to these bans? Some exemptions are felt to be limited to non-integrated hands-free kits which are only installed subsequently. If this view proves correct, many legal bans may have to be redrafted.

Use in public places

Some public places now have signs indicating that mobile phones should be turned off. Indeed, some authorities have imposed bans, or propose to introduce bans, on using mobile phones in specified public places. On-the-spot fines are likely to apply. There is as yet no clear consensus on these measures. Indeed, in California a ban on mobile phone use in public schools was later withdrawn.

Every picture tells a story

Saudi Arabia bans the use of picture phones outright, and there have apparently been a number of convictions under the ban already. In other countries, bans appear to be limited to clubs, gyms or restaurants. These bans occur in private premises. In this country, there have been recent calls to ban picture phones in schools everywhere.

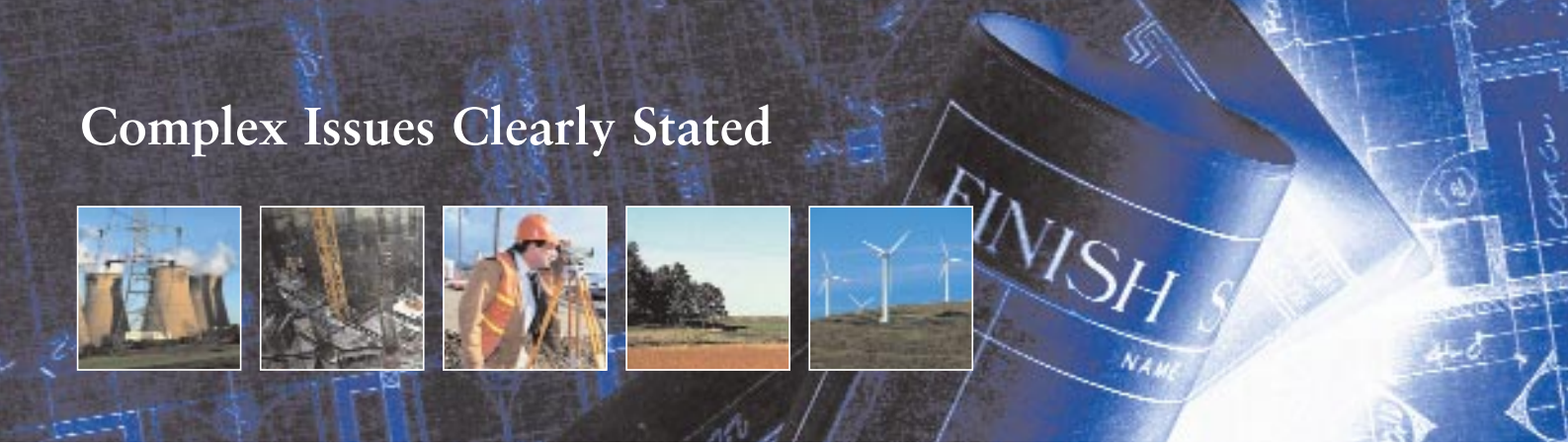
In the context of picture phones, data protection is potentially a more important issue than privacy. As picture messaging will often identify a living individual, it is possible that this activity is caught by the data protection regime. Issues arise, therefore, in relation to whether there is a fair capturing and use of the personal information. For example, are the individuals aware that their picture is being taken and have they consented? What happens if the picture is forwarded or used in a manner in which the subject of the photo did not anticipate or did not consent to?

models. Complex issues of intellectual property law could be involved. For example, the process of clearing third-party intellectual property rights (IPRs) is particularly important for mobile service providers as there are many new opportunities for infringement (and secondary infringement).

Already, there is threatened litigation involving ringtone copyrights. It is only a matter of time before litigation arises with mobile pictures, moving pictures, database rights and wireless peer-to-peer file sharing (remember the *Napster* case?). It will probably become necessary for lawyers to identify, minimise and allocate these and other risks wherever possible.

Data protection and privacy concerns are also topical issues for technophile lawyers. The EU has been described as leaning towards a prior consent 'opt in' model for customer consent. This would mean that service providers have to obtain the customer's consent prior to contacting them or sending them marketing material.

It is important to note that existing customer consents may not always be sufficient for new mobile activities and services. Data protection is an area that operators and other service providers will have to watch closely as there are many on-going national, EU and international developments. One



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John Gore-Grimes (BA, LLB, FCI Arb)

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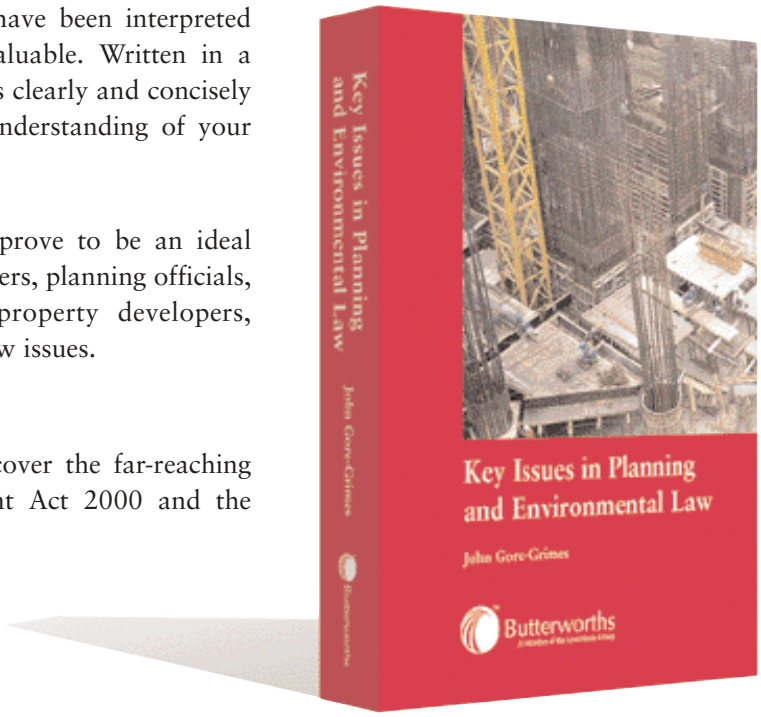

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'The UK government is concerned that children will be able to access adult content on their mobile phones'

MOBILE JAMMING DEVICES

The great thing about mobile phones is that you can make and take calls anywhere. But their huge popularity means that it is common to be subjected to the grating details of other people's private business in bars, restaurants, buses and many other inappropriate public venues. Because of a lack of mobile etiquette, some people want to ban or 'jam' mobile phones in public places.

It is technically possible to digitally block the use of mobile phones, and a recent European study found that a high percentage of consumers surveyed favoured such devices. These systems are known as mobile-jamming devices, and they block the radio signals of mobile phones. So mobiles could be prevented from ringing in concert halls, aeroplanes, schools, restaurants, churches and, indeed, courtrooms.

However, these devices are not without controversy. Some have argued that they could amount to an invasion of personal privacy. In addition, there is the potential 'collateral damage' of interference with mobile and radio devices used by law enforcement and emergency agencies. Jamming devices may also block signals to other wireless devices (such as PDAs and pocket PCs) that use non-audible signals such as texts, e-mail or even vibration alerts.

And what happens if an on-call doctor or IT consultant is unaware that his mobile phone is 'jammed'? Do users have the right not to be 'jammed'? Potential liability issues may also arise if an organisation operates a jamming device but the signal drifts so as to block mobile phone signals in adjoining areas or adjoining organisations.

The legality and legal regulation of mobile-jamming devices is far from clear. Certain jurisdictions view these devices as unregulated. Others have specifically banned them (Canada being the most recent). However, some jurisdictions such as Japan permit them. In Ireland, the Commission for Communications Regulation (previously the ODTR) seems to hold the opinion that the use of such devices is not permissible. This view may be justified by an examination of the *Wireless Telegraphy Act, 1926*. While the act pre-dates the widespread use of modern mobile phones and jamming devices, section 12 of the act restricts the use of certain equipment for wireless telegraphy.

The operative section states that it is not lawful 'for any person so to work or use any apparatus for wireless telegraphy that electro-magnetic radiation therefrom interferes with the working of or otherwise injuriously affects any apparatus for wireless telegraphy in respect of which a licence has been granted under this act and is in force'.

However, whether such an old statute can be interpreted to apply to a new and previously unenvisaged situation may well be open to legal argument.

would hope that mobile phone operators are developing privacy and location data management policies to address these issues.

Other potential legal issues

Many people are concerned with the possible health effects of mobile phones and base stations. A number of court cases have been taken already, although the body of scientific study so far indicates that there are no significant adverse health effects.

Other legal issues could include: new aspects of competition law; the security of wireless networks; lawful interception; record retention requirements for wireless communications; the applicability of broadcasting regulations to mobile services; and watershed hours. In the latter case, for example, the UK government is concerned that children will be able to access adult content on their mobile phones, which they would not have been able to view on TV (perhaps because of watershed hours), or content that they may not be allowed to access on the Internet at home. As a result, the UK is reportedly considering a ban on mobile pornography.

Mobile operators may oppose such government interference since data services will be a large revenue stream. In addition, they could face increased liability and cost issues if they have to implement such a system.

The fact that such a debate is going on at all highlights both the novelty of mobile technology and the often-complex legal issues that surround m-commerce and wireless services. As this revolution continues over the coming years, many more legal controversies and m-legal issues will demand attention from lawyers. G

Paul Lambert is a partner at the Dublin law firm Matheson Ormsby Prentice and specialises in IT legal issues.

Counting

In business, time really is money, and if management attention is diverted to fixing someone else's mistakes, then the company may have a legitimate claim in the courts. Paul Jacobs discusses the principles underlying claims for wasted management time and examines some recent judgments

MAIN POINTS

- Recent judgments of English High Court
- Quantifying the loss
- Importance of keeping records

Management time has real value to an enterprise. Two interesting and recent judgments of the High Court in England concern claims for losses that arose when management time was wasted in remedying failures of the defendant. The principles from these judgments are relevant to the assessment of loss for wasted management time in this country.

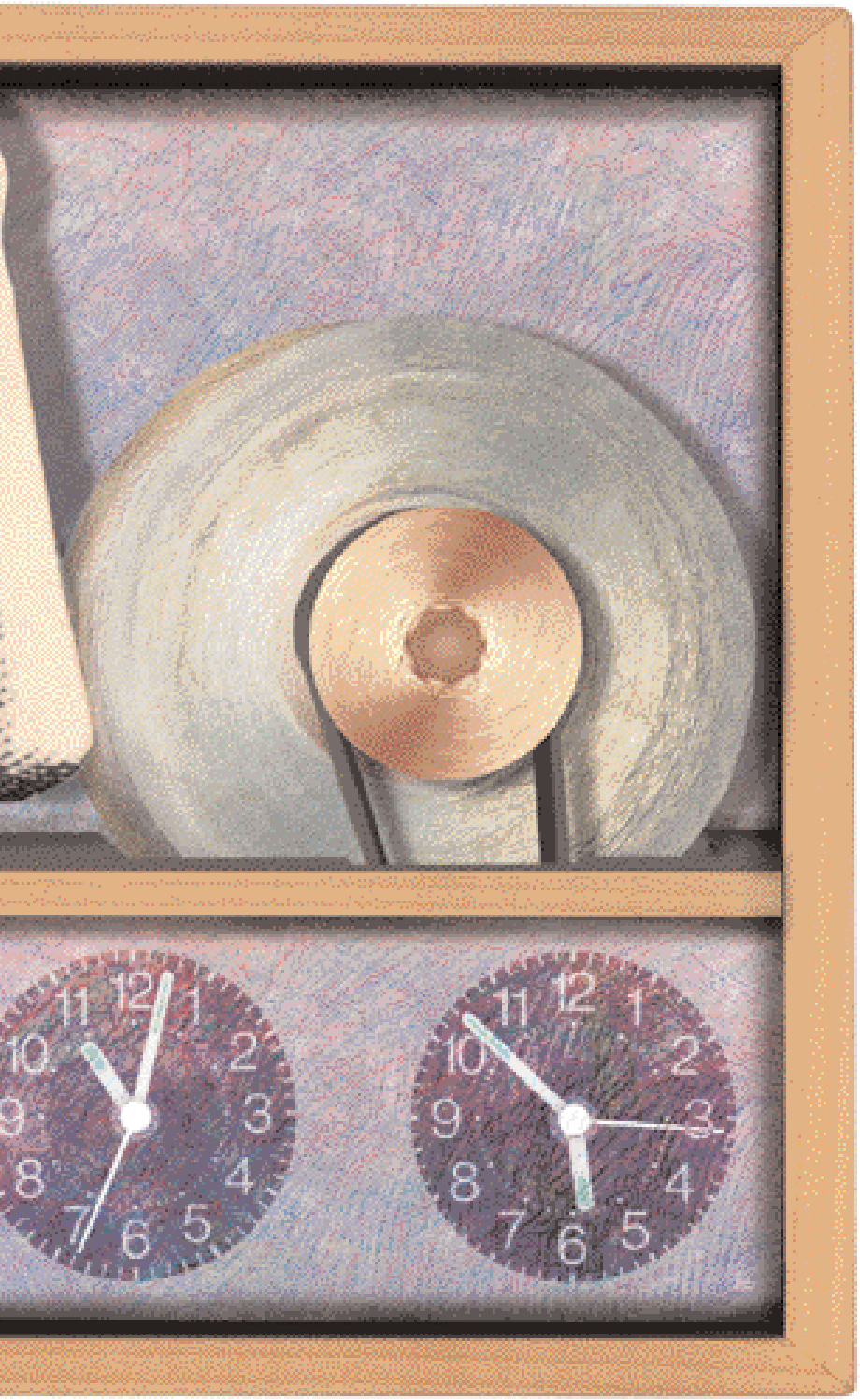
Diversion of management time from ordinary business can dent profitability and be of critical importance, especially for small to medium-sized enterprises. The substance of a claim for wasted management time is that, in order to keep damage within reasonable bounds, the plaintiff's management incurred time performing remedial work to correct the defendant's failures. The plaintiff lost the benefit of this management time, which would have been spent on other activities, but for the acts of the defendant. Furthermore, the plaintiff may have suffered additional financial costs as a result of the management time wasted.

The English cases are *Horace Holman Group Limited v Sherwood International Group Limited* (2001) and *Pegler Limited v Wang (UK) Limited* ([2000] EWHC Technology 137). Both claims arose from the defendants' failure to supply computer systems. In both instances, the plaintiffs spent time re-organising their computer systems and selecting and installing a replacement system.

Quantifying the loss

The quantum of loss for wasted management time can often be significant and can comprise a high proportion of the total claim. Claims for wasted management time typically involve a detailed analysis by the experts and the court of the time incurred by

the days



directors, managers and others – and the costs of that time. This article explores particular issues raised in the *Horace Holman* and *Pegler* judgments, and highlights areas that prospective plaintiffs and defendants should consider.

In-depth expert accounting evidence on the real value of the wasted time was presented in the *Horace Holman* and *Pegler* trials. In both cases, the plaintiffs recovered a higher proportion of the claim for wasted management time than they recovered for the average of all other heads of loss claimed (**see table overleaf**). Therefore, the principles for calculating losses for wasted management time could be seen to favour plaintiffs.

The recent claims for losses arising from wasted management time have their roots in *Tate & Lyle v GLC* ([1982] 1 WLR 149). In that case, construction work by the defendants had caused deposits of silt to form in a river, preventing access to the barge moorings for the plaintiffs' riverside trading premises. It was held that, in addition to claiming for the cost of the remedial dredging undertaken by the plaintiffs, they could also in principle recover for expenditure on managerial time in initiating and supervising the remedial work. They were only prevented from doing so because of a lack of proof of such loss on their part.

Typically, there are two main issues in assessing losses for wasted management time incurred:

- Quantifying the relevant hours involved, and
- Applying a value to those hours.

This article mainly explores the former. The valuation is generally accepted as meaning the cost of that labour to the entity plus additional taxes incurred, such as employers' PRSI.

Principle 1: reconstruction of actual time spent

It is evident from *Horace Holman* and *Pegler* that a lack of contemporaneous records of the time spent by management on remedial work will not necessarily preclude an award of damages.

In *Pegler*, the plaintiff recorded the time spent implementing the replacement computer system, but did not keep records of time spent for other remedial work required in earlier periods. Relying on *Tate & Lyle v GLC*, Wang submitted *'no records, no*

PRINCIPLES IN *HOLMAN* AND *PEGLER* JUDGMENTS

- Lack of contemporaneous records of time spent by management on remedial work does not necessarily preclude an award for damages. Reconstructions from memory of time spent were accepted in both cases
- There is no 'magic' in the label of 'management'. The time wasted does not have to relate specifically to managers
- Damages can still be awarded even if the plaintiff does not show that any day-to-day work was neglected or that specific identified tasks were not performed. Depending on the facts, unpaid overtime may be claimable on the basis that management thinking time has been lost
- There is no distinction between short and long periods of wasted time.

recovery'. Justice Bowsher held that the case differed from *Tate & Lyle* because in that case Forbes J had no evidence as to the amount of time spent. However, Justice Bowsher had evidence in the form of reconstruction from memory of events from the past, which he accepted. Justice Bowsher also accepted reconstructions based on memory of actual time spent in the later case of *Horace Holman*.

Although a reconstruction based on memory of actual time spent may be accepted by the court, a plaintiff relying on such reconstructions should be mindful that:

- If the plaintiff had the opportunity to record the time incurred but didn't, this may be important in the judge's approach to consideration of the evidence (see *Pegler*)
- The opposing expert will probably, as a matter of course and perhaps with some success, challenge the basis of the reconstruction and undermine the credibility of the plaintiff's witness evidence.

Therefore, as soon as a party is aware that it might make a claim for wasted management time, for each individual involved it ought to:[1]

- Record on a regular basis the actual time spent on remedial work and document how it was incurred
- Record estimates for time already incurred and document the basis of those estimates.

Principle 2: no 'magic' in 'management'

The term 'management' does not define the boundary of the category of employee for which the plaintiff is entitled to claim. In *Pegler*, it was accepted that remedial time incurred by white-collar office workers, computer systems experts and computer programmers should not be treated any differently from that time incurred by management.

Similarly, in *Horace Holman* it was held that there was no distinction between senior employees and those in less senior posts.

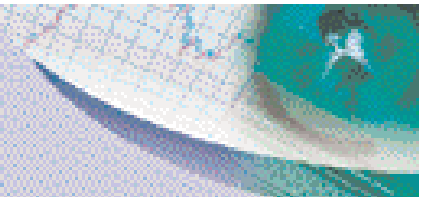
Principle 3: evidence of loss caused

A key issue in any case for wasted management time will be: what loss was caused as a result of management and others spending time on remedial work? If there is no evidence that the plaintiff incurred additional costs or missed out on business opportunities, then a defendant's expert is likely to argue that no loss has been caused by the defendant's acts.

Similar issues arose in *Pegler* and *Horace Holman*. In *Pegler*, Justice Bowsher found that Pegler had not shown that any day-to-day work had been neglected as a result of Wang's acts. Nevertheless, he stated: 'However, one can readily infer that when the time of a director or manager is taken up with remedial measures, that person is diverted from his proper job of managing the company. Time spent quietly and without distraction thinking is valuable to the company'.

In *Pegler*, it was evident that some employees had not been paid for overtime but that the claim had been formulated to include unpaid overtime. Justice Bowsher stated: 'I have the impression that much of what was lost was made up in unpaid overtime. The very large quantity of unpaid overtime suggests that during normal working hours also there was a willingness to work beyond the call of duty, but there will still have been some appreciable loss to the employer.

'Time spent quietly and without distraction thinking is valuable to the company'



Recovery of amounts claimed

	WASTED MANAGEMENT TIME			ALL HEADS OF CLAIM		
	Total claim	Damages awarded		Total claim	Damages awarded	
	stg£000	stg£000	% of claim recovered	stg£000	stg£000	% of claim recovered
Pegler	1,068	534	**50%**	22,852	9,047	**40%**
Horace Holman	143	136	**95%**	3,384	2,622	**77%**

If these damages are to be approached as a matter of calculation, I certainly think that the unpaid overtime hours should be removed from the calculation, but I do not have the information which would enable me to do that'.

Unpaid overtime

In my opinion, taking unpaid overtime into account in formulating or critiquing a claim for wasted management time requires professional judgment on the part of the expert. On one hand, it might be appropriate to deduct the unpaid overtime hours for those staff working full time on remedial work. On the other hand, in respect of management who have responsibilities other than remedying a project failure, a full deduction of overtime incurred may be unreasonable on the basis that, 'but for' the acts of the defendant, some of this overtime would have been used for other productive and strategic purposes. In light of the evidential difficulties, Justice Bowsher took a broad brush approach and awarded damages at 50% of Pegler's claim of stg£1,067,274.

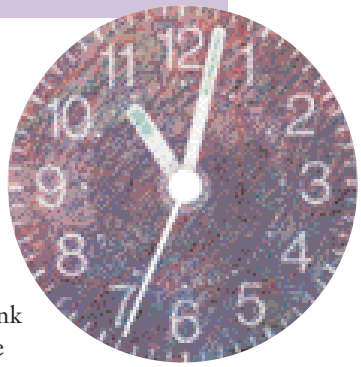
In *Horace Holman*, the defendant's accounting expert argued that the salaries of back office employees were part of the fixed costs of the plaintiffs and they had to be paid whether the staff member was usefully employed or not. It was therefore argued that no compensation should be paid for their wasted time.

The accounting expert for the plaintiff argued that staff time wasted, whether it is the time of the chairman or of the office boy, is a waste of the company's resources.

Justice Bowsher had the benefit of evidence indicating that a detrimental impact on the business had been caused by back office staff not producing information and not providing other back-up to profit-making staff.

On this basis, he held that: 'So far as this group is concerned, it is unrealistic to try and distinguish between profit-makers and non-profit-makers, as the defendants have sought to do'.

The phrase 'so far as this group is concerned' appears to leave open the possibility that damages may not be awarded in other cases if the plaintiff fails to demonstrate that time spent on remedial work by employees that represent a fixed overhead to the company caused disruption to the company. One may accept that time diverted from the ordinary job of a manager or staff member to remedial work is likely to cause some loss, but in my view any claim for wasted management time will be vulnerable to challenge without evidence of a causal link showing adverse impact on the plaintiff.



Principle 4: no distinction on duration

In *Horace Holman*, Justice Bowsher held that there was no distinction between short and long periods of wasted management time. So it does not matter if the amount of wasted time was five hours a week or 15 hours a week.

These two cases highlight the importance of keeping detailed records of the time spent on IT projects, and records of any losses suffered as a result of a systems failure. Failure to pay due attention to these matters could have a detrimental impact on the ability to prove the plaintiff's losses, and could impact on the credibility of other heads of loss claimed.

Apart from the preferable approach of maintaining contemporaneous records of time spent, plaintiffs should also record the impact of diversion of management and staff time to remedial projects. This would include details of any duties that have been neglected, projects or investments that have not been undertaken, and the consequential effects on the business.

Footnote

1 See *Forensic accounting*, Brennan and Hennessy, paras 17-91, which states that plaintiffs may need to record details of such management time as the court will not speculate on quantum by awarding some percentage of expenditure (relying on *Tate & Lyle Flood* ([1981] 3 All ER 716). G

Paul Jacobs is director of Ernst and Young's litigation and forensic accountancy service. The views expressed in this article are his own.

Irish Competition Law: The Competition Act 2002

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A happy medium

If mediation in a dispute can save you time in court, it's surely worth a shot. Joe Kelly describes the benefits of a recent mediation course run by the Centre for Dispute Resolution

MAIN POINTS

- **Benefits of alternative dispute resolution**
- **Recent mediation course**
- **Just go for it!**

For the past 20 years or so, alternative dispute resolution (ADR) has been talked about as being the 'next best thing'. The fact that ADR has not realised the ambitions of its proponents has much to do with a lack of focus. More recently, that focus has sharpened on mediation as a defined dispute-resolution process.

In the UK, mediation has been accepted as a dispute-resolution process that delivers results. Because of the Woolf reforms there, it has become almost mandatory for disputants to go to mediation before they can bring their differences before a court.

Those interested in getting disputes resolved more quickly and more cost effectively have come together with a view to promoting mediation in Ireland as a readily identifiable and viable method of dispute resolution. To that end, a recent training course hosted at A&L Goodbody's offices attracted a cross-section of lawyers, business people and accountants. The training course was run by the

Pictured are those who took part in the Centre for Dispute Resolution mediator training course in January 2003, hosted by A&L Goodbody. Front row (*left to right*) Heather Allen, CEDR; Emer Gilvarry, Mason Hayes & Curran; Tony Allen, CEDR; Laurence Shields, LK Shields; Caroline Preston, A&L Goodbody; Niall Pelly, Niall Pelly and Associates; Ronald Bradbeer, CEDR; Michael Tyrrell, Matheson Ormsby Prentice; Brian Kiely, Poe Kiely Hogan; Andy Grossmann, CEDR; Tracey Commock, CEDR. Middle Row (*left to right*) Beverly Rogers, CEDR; Connor McDonnell, Arthur Cox; William Aylmer, Eugene F Collins; Andrew Lenny, Arthur Cox; Joe Kelly, A&L Goodbody; Sean Bagnall, Bagnall Molloy & Co; Alexis Fitzgerald. Back row (*left to right*) Klaus Reichert; John Doyle, Dillon Eustace; Michael Twomey, consultant in partnership law; Dermot McEvoy, O'Donnell Sweeney; Michael Quinn, William Fry; Steve Clarke, CEDR; Eugene Murphy, Eugene F Collins

'There are disputes that probably cannot be resolved by mediation, but it is impossible to know which disputes these are until you have tried it'

London-based Centre for Effective Dispute Resolution (CEDR).

It will not surprise those who are aware of the growing interest in mediation that the course was over-subscribed. It says much about the course content that the participants took five days (including a Saturday) out of their busy schedules to do the course, and that they felt sufficiently challenged by it to stick with it until its completion. Those who completed the course, and others who have undergone similar training with CEDR in the UK, are now available to mediate disputes here in Ireland.

It is also worth noting the presence of the International Centre for Dispute Resolution (ICDR), the European arm of the American Arbitration Association, which is based here in Dublin. Its director, Mark Appel (tel: 01 418 2286), is ready, willing and able to help anyone who needs information about the mediation process or, indeed, anyone who wants to get in contact with a mediator.

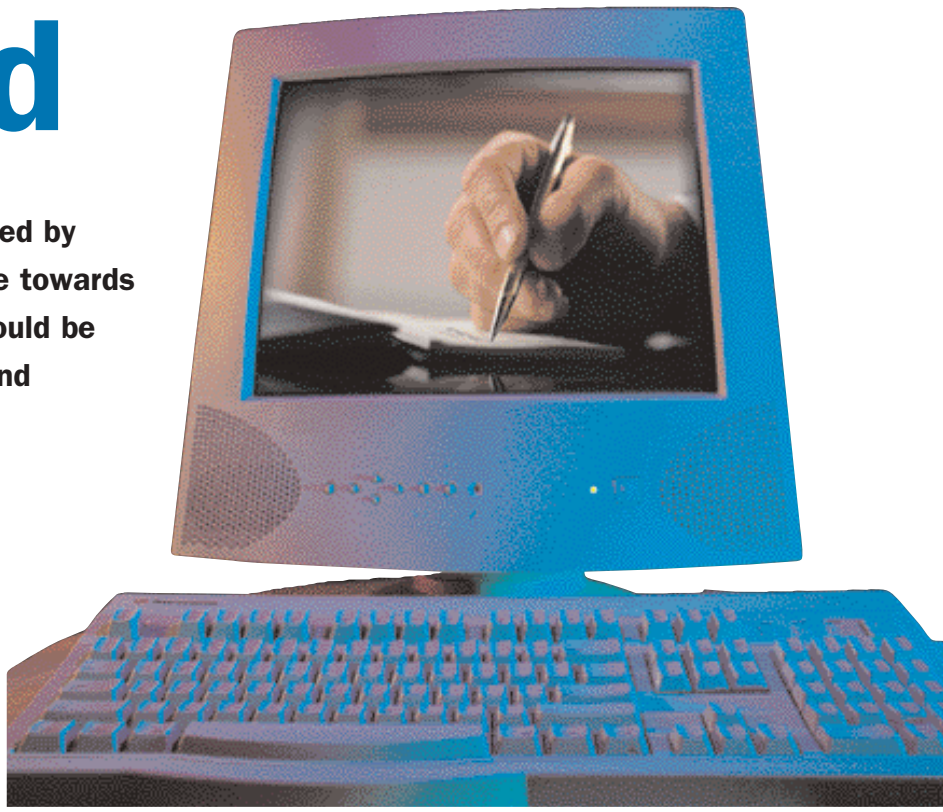
Mediation has already been tried in a number of cases, and I have had personal experience of a mediator successfully resolving what appeared to be an intractable shareholder dispute that had reached the defence stage in High Court litigation. Seeing the process deliver results in such situations gives confidence about what can be achieved. The value of getting people around a table for a day, in a 'without prejudice' meeting, should not be discounted, provided it is done in the presence of a trained mediator and with the willingness of the protagonists to the dispute.

Of course, there are disputes that cannot be resolved by way of mediation. Certainly, we have all had an involvement in disputes where it was difficult to see that an assisted negotiation or mediation could produce a result. From the training I have received and my involvement with mediation to date, I would agree that there are disputes that are probably incapable of resolution by way of mediation. However, it is difficult – if not impossible – to know which disputes those are until you have tried mediation.

Now that there is a face on mediation (or, indeed, many faces, as can be seen from the photograph on page 25), perhaps we can all feel that bit more confident about asking someone we know about mediation, and about its usefulness in terms of achieving results for our clients. G

Joe Kelly is a partner at the Dublin law firm A&L Goodbody.

Signed, sealed, delivered



Would you accept a contract you received by e-mail? Maybe not now, but as the move towards digital signatures continues apace, it could be common practice, as Eamonn Keenan and Tony Brady explain

In the expanding world of e-commerce, the ability to rely on digital signatures will be of increasing importance. Business can be done and contracts entered into electronically without the formality of secure digital signatures. It is all just a matter of proof. But proof is made more difficult when faced with the challenges posed by increasingly sophisticated possibilities for fraud.

You can scan your signature and insert the scanned image into a document. That is a digital signature. Even the issue of your printed name at the end of an electronic document can amount to your digital signing of the document. But more secure means are needed to satisfy others that *your* signature is indeed what it appears to be, and that *your* document is in fact the unaltered version of the document that has been digitally signed by you.

So to find reliable digital signatures, we have to have a system of reliable checks and balances. The security measures are introduced with the aid of bodies called certification authorities and by means of the issue and verification by those authorities of two keys. One key is known as your public key (used to encrypt a message, and available to anyone who ought to have it), the other is a private key (to encrypt, unencrypt or to digitally sign a message; this private key is kept to yourself).

How the system works

John wants to send an encrypted and digitally-signed message to Eamonn:

- John types his message and encrypts it with the aid of Eamonn's public key. He digitally signs it with his own private key
- The software scrambles and combines both the message and the signature as one before it passes the scrambled package by e-mail to Eamonn
- The message arrives in Eamonn's machine.

Eamonn needs his own private key to unscramble the message. Since he has access to John's public key, his software will check the scrambled package to prove that John's signature was, in fact, affixed by John using John's own private key, and that the message is unchanged since John signed it.

The certification authorities

The role of the certification authorities is to issue the private and public keys, and the software and passwords needed to use them. When a digitally-signed document is being e-mailed, the process is passed for verification to the certification authorities to check that the issued signature has not been withdrawn. In the case of solicitors using their signatures 'as solicitors', the check would include a verification that the solicitor's practising certificate had not been withdrawn.

Still mystified by the above? Take heart. Even the use of sealing wax was an acquired skill in days gone by. When the certification authority for solicitors has been agreed and we launch gingerly onto this new and interesting sea of e-commerce, the Law Society's Technology Committee will be here to throw more light on the intricacies of digital signatures in tomorrow's world. Hopefully, it will be a more secure place than the area inhabited at present by insecure and informally-signed messages. Watch this space! G

Eamonn Keenan and Tony Brady are members of the Law Society's Technology Committee.

MAIN POINTS

- **What are digital signatures?**
- **How do you use them?**
- **How are they certified?**

Tech trends

Have you seen the light?

OK, so everything's shrinking and that can be a real pain, because small is not necessarily beautiful – otherwise we'd have dwarves prancing down the catwalks of Paris. But occasionally it does bring real benefits. Toshiba's new lightweight portable projector, the cleverly-named TDP-P5, is a good example. Weighing in at a mere 1.1kg and with a surface area smaller than an A5 sheet of paper, this little machine is ideal if you have to make presentations to clients. The projector produces a brightness of 1100 ANSI lumens, which in plain English means that you don't even have to close the blinds. It's also remarkably easy to use: just plug in your laptop, PC, DVD or whatever, and the projector works out what you're using and configures itself to your machine. All you have to do is adjust the focus. Naturally, it comes with a remote control so you are not tied to your laptop. But beauty comes at a price, and the TDP-P5 will cost you a pretty penny. Or €4,071, to be precise.

For more information, contact Toshiba on 01 248 1248.

Wild, wild Westlaw

Sometimes when you hit the books, the books hit you back. So if you really want to do legal research the easy way, law publisher Round Hall has just introduced an on-line service that has already put a smile on the faces of lawyers on both sides of the Atlantic. *Westlaw* has been an established legal resource in the United States for many years and more recently in England.

Among other things, *Westlaw.ie* offers law reports (ILRM, ELR, and unreported judgments), annotated legislation, a current awareness service (including articles of interest from national newspapers), and the full text of Round Hall journals. There are a number of clever innovations that should make your life an awful lot easier. For example, when you call up a reported case, you can click on a button marked *TOA* (which stands for 'table of authorities), which will give you direct links to all the precedent cases mentioned in the judgment.

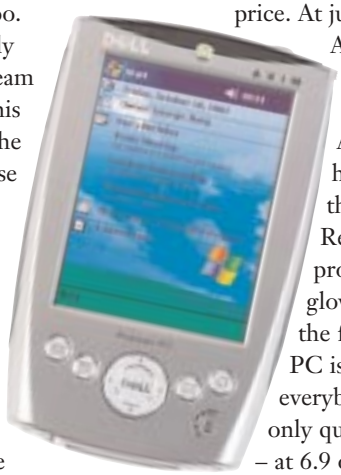
You can also link to relevant cases that have been tried since the case in question. *Westlaw.ie* boasts a host of other features that should mark it out as an indispensable service for practitioners.

A single user subscription to the complete Westlaw.ie service is €1,670 for 12 months. But pricing varies according to user numbers, Roundhall says.

Available from Round Hall on 01 662 5301.

Legion of the rearguard

The Duke of Wellington's flagrantly gay younger brother, Edmund, threw away a promising military career as a result of his antics at the battle of Waterloo. Having personally trained a crack team of troubadours, his plan was to lull the French into a false sense of security with their incessant balladeering and then to take Napoleon's army in the rear. He might have succeeded had he laid his hands on the new Dell Axim X5 handheld PC, because he could have organised himself more efficiently and downloaded a better class of tunes from the Internet. While the Axim has all the usual features you would expect to find in a PDA (personal digital assistant) – a pocket PC operating system, Intel 300 MHz *XScale* processor, 32Mb SDRAM memory and so on – where it really scores is on price. At just €310 for the Axim 5 basic (€431 for the memory-expanded X5 Advanced), Dell has put it up to all the other PDAs. Reviews of this product have been glowing, because for the first time a pocket PC is now within everybody's reach. The only quibble is its weight – at 6.9 oz it's a bit heavier than most of its competitors – but at that price, who's complaining? And with its ten-hour battery, the unfortunate Edmund could have cried himself to sleep as he listening to his downloaded lullabies.



Available from Dell Computers (www.dell.ie).

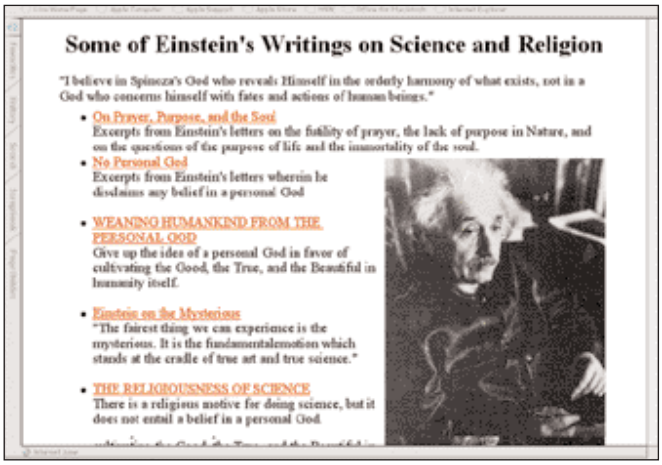
Sight and sound

Somebody always has to go one better. Just when you thought digital cameras had found some kind of inner peace, along comes Olympus with its new W10 digital camera and digital recorder combination. The idea is that you use the voice recorder as normal but take pictures while recording. When you have downloaded the files onto your PC, you can play back the recording and the pictures will appear in the appropriate places. Why you might want to do this is anybody's guess, but the quality of the images is unlikely to be particularly good, given that the resolution is a mere 640 by 480 pixels, compared to the more standard 1.5Mb of entry-level digital cameras. High quality voice recording will last you 45 minutes, while standard quality recording will stretch to 67 minutes. So if you're looking for an entry level sight-and-sound product at a price you can afford, the Olympus W10 digital camera at a retail price of €250 might just be the thing for you.

For more information, call Business Electronic Equipment on 01 450 9044.

Sites to see

Trust and estate *(www.step.ie)*. STEP Ireland is the Irish branch of the Society of Trust and Estate Practitioners. Solicitors with an interest in probate and estate should swing by this website. It contains all you need to know on the subject, including discussion forums, resources for difficulties, lobbying changes in law and much more.



Einstein on religion *(http://stcloudstate.edu/~lesikar/einstein)*. This site is only for the more esoteric – or ye who think ye know it all. Einstein was not only into quantum physics; he had room upstairs for other things: the science of religion – less physics, more spook! This site hosts, among other things, articles published by him, in his day, in the *New York Times*. Maybe worth a look.

Things that have been sold in vending machines *(www.chaparraltree.com/vending)*. Vending machines are great crack, a bit of a gamble. You're never sure if your money is good enough, and if you're lucky you might even get more chocolate than you can fit in your pockets. This website lists some of the weird things that are, or have been, sold in those machines, including stuffed animals and hot tea in aluminium cans. Worth a look if you're bored.

Piggy lickin' good *(http://ocean.ucc.ie/02/peb1/why.html)*.
If a pig lose its voice, is it disgruntled?
When a cheese gets its picture taken, what does it say?
For more perplexing questions go here!

War, what is it good for?

Well, actually, it seems it could be good for the equities market worldwide, as Robbie Kelleher explains

It has been a tough start to the year for most equity markets. As this magazine goes to press, the main European benchmarks were registering losses year to date (ytd) of almost 10%. In local currency terms, the US market has fared somewhat better, but the bulk of its better performance has been offset by the fall in the dollar against the euro. The UK has been under particular pressure, with the euro value of the FTSE 100 down by more than 10% ytd at the time of writing.

The impact on consumer and business confidence of the threat of war in Iraq has undoubtedly been a factor. Oddly enough, however, it now appears that the best hope of a near-term rally for equities is for the war to get underway. Over the past week or so it has been interesting to observe price action in the markets as sentiment ebbed and flowed with the perceived likelihood of an imminent outbreak of hostilities. Those who remember the last Gulf War will also remember that the markets took off just about the same day as the warplanes began to fly. Many expect that pattern to be repeated this time around.

More to it than war

In consequence, markets treat anything that delays the start of the war – such as the reservations expressed by the French, Chinese and Russians – as bad rather than good news. We reckon that if the war does get underway soon, there will be a very substantial rally in equity markets, at least in the short term.

But it would be wrong to believe that Iraq is the only issue for markets. There remain very fundamental problems in relation to imbalances in the global economy. For example, the 'Euroland' economy as a whole is barely inching forward and, within that, the German economy has fallen back into outright recession.

The inability of policy-makers to gain traction in the current environment is an additional source of concern. Nowhere was this more evident than in the response of markets to the surprise 25 basis points cut in interest rates announced by the Bank of England on 6 February (from 4% to 3.75%). On the day of the announcement, the FTSE 100 fell by 2.2%. Markets were concerned that if the BoE was willing to cut rates at a time when residential house prices are still rising rapidly, then the rest of the economy must be heading into very stiff headwinds. It is a classic 'pushing on a string' dilemma for monetary policy-makers. Concern about policy traction was probably the reason that the European Central Bank chose not to reduce rates that same week.

Growth forecasts slide

However, we remain convinced that we will see significant cuts in European rates over the coming months. Given the shape of the economies involved, it is hard to justify why interest rates in Europe are 0.5% higher than those in the United States.

Corporate earnings have mirrored the economic picture. Earnings downgrades have been coming thick and fast in recent weeks. Forecast growth in earnings for 2003 has slipped into single digits

Since the middle of last year, the consensus 2003 estimate for earnings per share on the FTSE Eurotop 300 has been pulled back by 20%, although it is still expected to show a 25% recovery from 2002.

Ireland does well

In this context, earnings estimates in the Irish market have been impressively resilient. It has been the major factor in so many Irish shares outperforming their peer groups in Europe and the US. Take the Irish banks, for example. Our current estimate for 2002 earnings is almost 10% above what it was this time last year. In contrast, earnings estimates for the European sector have been slashed by about 20%. Not surprisingly then, the Irish sector has outperformed by over 30% in that period.

The same pattern is emerging in 2003. In marked contrast to the US and Europe, there have been no significant earnings changes in the Irish market this year so far. Inevitably, there will be both upgrades and downgrades as the reporting season gets underway over the next month or so. But we believe the Irish market will again prove to be much more resilient than elsewhere and that should help it to outperform again in 2003. G

Robbie Kelleher is head of equity research at Davy Stockbrokers.

Robbie Kelleher: 'Those who remember the last Gulf War will also remember that the markets took off just about the same day as the warplanes began to fly. Many expect that pattern to be repeated this time around'

Report of Law Society Council meeting held on 17 January

Personal Injuries Assessment Board and Motor Insurance Advisory Board

Ward McEllin circulated copies of three requests under the *Freedom of Information Act* to the Department of Enterprise, Trade and Employment in relation to the PIAB Implementation Group, the interim board of the PIAB and the implementation group for the MIAB. It was hoped that the requests would provide some insight into the basis for various public assertions about the level of savings that the PIAB was expected to yield.

Submission on the *in camera* rule

The Council considered a submission from the society to the minister for justice, equality and law reform. The submission proposed a statutory solution to the difficulties arising from the decision of Murphy J in *RM v DM* that there was an absolute embargo on the production of information which derived from, or was introduced in, proceedings protected by a mandatory *in camera* requirement. Patrick Dorgan noted that the issue had originated from the judgment in *Tesco v McGrath*, which held that conveyancing solicitors would be in contempt of court if they exhibited documents arising from *in camera* proceedings. He felt that the difficulties presented for conveyancers were of particular concern and it was agreed that these might be highlighted in a supplementary submission.

Moya Quinlan said that the matter was also one of grave concern for family law practitioners. The president noted that the society's Law Reform Committee was also conducting a thorough review of the *in camera* rule for the purposes of a more general report and that the sub-committee dealing with that study included both conveyancing and family law practitioners.

Appointment of new lay member to the Registrar's Committee

The Council approved the appointment of Frank Brennan of IBEC, replacing Frank Bracken, as a lay member of the Registrar's Committee.

The *Legal diary*

The Council noted a request from the Courts Service for an indication of the likely level of interest within the profession for subscriptions to a hard-copy version of the *Legal diary*. The level of interest would determine whether hard copies would be produced for the future, as the minimum print-run required to cover production costs would be in the order of 1,000 copies a day. It was agreed that a notice should be published in the *Gazette* in order to gauge the level of interest. If sufficient numbers were not prepared to subscribe to a hard-copy version, the diary would be available electronically on the Courts Service website or by e-mail.

ECHR bill

The Council noted that James MacGuill, Brian Gallagher and Alma Clissmann had attended before the Joint Oireachtas Committee on Justice, Equality and Women's Rights on the previous day to present the society's views on the bill giving effect to the *European convention on human rights*.

VAT increase on new housing

The media coverage of the submission by the Conveyancing Committee to the minister for finance in relation to the VAT increase on new housing was discussed by the Council. It was noted that the society had been congratulated by media commentators for its stance on the matter and that this represented a rare occasion where the profession had been presented in a positive light. G

PRACTICE NOTE

PROPER PRE-CONTRACT ENQUIRIES

It has been brought to the attention of the Conveyancing Committee that, in an increasing number of cases, pre-contract enquiries such as or similar to the following are being raised as a matter of course by solicitors acting for purchasers: 'Has the vendor disclosed all letters, notices, orders or documents or other matters relating to the property which might prejudice the purchaser?'

It is the view of the committee that the above is an improper pre-contract enquiry as it effectively purports to negative the principle of *caveat emptor* as it applies to the Law Society's standard contract for sale.

Conveyancing Committee

LEGISLATION UPDATE: ACTS PASSED IN 2002

This list was updated by the Law Society Library on 20 February 2003

Appropriation Act, 2002
Number: 28/2002
Date enacted: 13/12/2002
Commencement date: 13/12/2002

Arramara Teoranta (Acquisition of Shares) Act, 2002
Number: 11/2002
Dated enacted: 10/4/2002
Commencement date: 10/4/2002; appointed day order to be made (per s3 of the act)

British-Irish Agreement (Amendment) Act, 2002
Number: 26/2002
Date enacted: 29/11/2002
Commencement date: 3/12/2002 (per SI 552/2002)

Civil Defence Act, 2002
Number: 16/2002
Date enacted: 10/4/2002
Commencement date: Commencement order/s to be made (per s1(3) of the act); establishment day order to be made (per s6 of the act)

Communications Regulation Act, 2002
Number: 20/2002
Date enacted: 27/4/2002
Commencement date: 27/4/2002. 1/12/2002 appointed as the establishment day for the purposes of the act (per SI 510/2002)

Competition Act, 2002
Number: 14/2002
Date enacted: 10/4/2002
Commencement date: Commencement order/s to be made (per s2 of the act): 1/7/2002 for part 1, part 2 (other than ss4(8), 5(3), 6(4)(c) and 10), part 4, part 5 (other than s48(b)), schedule 1, schedule 2 (other than para 4) and schedule 3; 1/1/2003 for ss4(8), 5(3), part 3, s48(b) and schedule 2, para 4 (per SI 199/2002)

Courts and Court Officers Act, 2002
Number: 15/2002
Date enacted: 10/4/2002
Commencement date: Commencement order/s to be made for ss13 to 21, 22, 29 and 46 of the act. Section 31 is deemed to have come into operation on 1/1/2002. Sections 39 to 43 are deemed to have come into operation on 9/11/1999 (per s1 of the act). 10/4/2002 for all other sections. 29/4/2002 for s29 (per SI 176/2002); 1/10/2002 for ss19, 20 and 21 (per SI 407/2002); 1/10/2002 for s22 (per SI 451/2002)

Domestic Violence (Amendment) Act, 2002
Number: 30/2002
Date enacted: 19/12/2002
Commencement date: 19/12/2002

Electoral (Amendment) Act, 2002
Number: 4/2002
Date enacted: 25/3/2002
Commencement date: 25/3/2002

Electoral (Amendment) (No 2) Act, 2002
Number: 23/2002
Date enacted: 3/7/2002
Commencement date: 3/7/2002

European Communities (Amendment) Act, 2002
Number: 27/2002
Dated enacted: 5/12/2002
Commencement date: 1/2/2003 (per SI 30/2003)

European Union (Scrutiny) Act, 2002
Number: 25/2002
Date enacted: 23/102002
Commencement date: 23/10/2002

Finance Act, 2002
Number: 5/2002
Date enacted: 25/3/2002
Commencement date: Various – see act, and: 1/5/2002 for s93 (per SI 177/2002); 15/5/2002 for s34 (per SI 211/2002); 1/7/2002 for s94(1)(a)(ii) (per SI 318/2002)

Gas (Interim) (Regulation) Act, 2002
Number: 10/2002
Date enacted: 10/4/2002
Commencement date: 10/4/2002; 30/4/2002 for the appointed day (per SI 146/2002)

Hepatitis C Compensation Tribunal (Amendment) Act, 2002
Number: 21/2002
Date enacted: 29/4/2002
Commencement date: 9/10/2002 (per SI 473/2002)

Housing (Miscellaneous Provisions) Act, 2002
Number: 9/2002
Date enacted: 10/4/2002
Commencement date: Commencement order/s to be made for all sections, except s12 (per s1(3) of the act). Section 12 is deemed to have come into operation on 1/1/2001 (per s12(4) of the act). 25/4/2002 for s17(c) (per SI 163/2002); 27/6/2002 for ss1 to 3, 5 to 10, 13 to 16, 17(d), 18 to 24 (s24 is the section dealing with trespass on land), and schedule 3; and for s4 and schedule 1 to the extent set out in SI 329/2002 (per SI 329/2002)

Medical Practitioners (Amendment) Act, 2002
Number: 17/2002
Date enacted: 10/4/2002
Commencement date: 1/5/2002 (per SI 159/2002)

Minister for the Environment and Local Government (Performance of Certain Functions) Act, 2002
Number: 24/2002
Date enacted: 3/7/2002
Commencement date: 3/7/2002

National Development Finance Agency Act, 2002
Number: 29/2002
Date enacted: 19/12/2002
Commencement date: 19/12/2002; 1/1/2003 appointed as the establishment day for the purposes of the act (per SI 617/2002)

Ombudsman for Children Act, 2002
Number: 22/2002
Date enacted: 1/5/2002
Commencement date: Commencement order/s to be made to appoint a day or days not later than two years after the passing of the act (that is, not later than 1/5/2004) for the coming into operation of the act (per s2(2) of the act)

Pensions (Amendment) Act, 2002
Number: 18/2002
Date enacted: 13/4/2002
Commencement date: Commencement order/s to be made (per ss1(3) and 1(4) of the act); 1/6/2002 for part 1 and ss6, 9 to 12, 15 to 28, 30 to 36, 40, 44, 50 to 55 and 59 (per SI 276/2002); 1/1/2003 for s41, and 1/1/2003 for s42 insofar as it inserts s59(1) in to the *Pensions Act, 1990* (per SI 609/2002)

Planning and Development (Amendment) Act, 2002
Number: 32/2002
Date enacted: 24/12/2002
Commencement date: 24/12/2002

Public Health (Tobacco) Act, 2002
Number: 6/2002
Date enacted: 27/3/2002
Commencement date: Commencement order/s to be made (per s1(2) of the act): 31/5/2002 for part 2 of the act (ss9 to 32) (establishment of the Office of Tobacco Control and the establishment by the Office of the Tobacco Free Council) (per SI 251/2002)

Radiological Protection (Amendment) Act, 2002
Number: 3/2002
Date enacted: 20/3/2002

Commencement date: 8/4/2002 (per SI 133/2002)

Residential Institutions Redress Act, 2002
Number: 13/2002
Date enacted: 10/4/2002
Commencement date: 10/4/2002; 16/12/2002 appointed as the establishment day for the purposes of the act (per ministerial order of 16/12/2002)

Road Traffic Act, 2002
Number: 12/2002
Date enacted: 10/4/2002
Commencement date: Commencement order/s to be made (per s26(2) of the act): 31/10/2002 for ss1, 11, 21, 23, 24 and 26 and for the matter at reference no 7 (offence of exceeding speed limit under s47 of the *Road Traffic Act, 1961*) in columns (1) to (5) of part 1 of schedule 1 to the act (penalty points); 31/10/2002 for ss2 to 7 and s 22 insofar as these sections apply to an offence under s47 of the *Road Traffic Act, 1961*; 31/10/2002 for s25(2) as respects offences committed after 31/10/2002, insofar as it applies to s104 of the *Road Traffic Act, 1961* (per SI 491/2002); 1/1/2003 for ss12(2) and 18; 1/2/2003 for s15 (per SI 598/2002)

Social Welfare Act, 2002
Number: 31/2002
Date enacted: 19/12/2002
Commencement date: Various – see act

Social Welfare (Miscellaneous Provisions) Act, 2002
Number: 8/2002
Date enacted: 27/3/2002
Commencement date: Various commencement dates for ss1 to 9, 13 and 17 – see act. Commencement order/s to be made for the remaining sections, ss10, 11, 12, 14, 15 and 16. 11/4/2002 for ss14, 15 and for s16 insofar as it relates to the *Charities Act, 1961* (per SI 132/2002); 9/8/2002 for s16 insofar as it relates to the *Combat Poverty Agency Act, 1986* and the *Family Law (Maintenance of Spouses and Children) Act, 1976* (per SI 412/2002); 17/10/2002 for s16 insofar as it relates to the amendment of s1 of the *Registration of Births Act, 1996* (per SI 481/2002)

Solicitors (Amendment) Act, 2002
Number: 19/2002
Date enacted: 13/4/2002
Commencement date: Commencement order/s to be made for all sections of the act except s20 (implementation of the establishment directive) which came into operation on 13/4/2002 (per s23(2) of the act); 1/11/2002 for ss1 to 7 inclusive, 10, 12 to 18 inclusive, 21 and 22; 1/12/2002 for s8; 1/1/2003 for ss9, 11 and 19 (per SI 494/2002)

State Authorities (Public Private Partnership Arrangements) Act, 2002
Number: 1/2002
Date enacted: 21/2/2002
Commencement date: 21/3/2002 (per s9(2) of the act)

Sustainable Energy Act, 2002
Number: 2/2002
Date enacted: 27/2/2002
Commencement date: 27/2/2002. Establishment day order to be made (per s3 of the act)

Tribunals of Inquiry (Evidence) (Amendment) Act, 2002
Number: 7/2002
Date enacted: 27/3/2002
Commencement date: 27/3/2002

Twenty-sixth Amendment of the Constitution Act, 2002
Date enacted: 7/11/2002
Commencement date: 7/11/2002 G

Prepared by the Law Society Library

Personal injury judgments

Tort – personal injury – hotel – licensed premises – 'bouncers' on security – claim that finger bitten by 'bouncers' – whether force used was excessive – conflict of evidence – value of corroborative evidence

CASE

***Thomas Callery v Sinnan Inns Ltd, trading as Clifton Court Hotel*, Circuit Court, judgment of Judge Hogan delivered on 16 July 2002; High Court, judgment of Mr Justice Michael Peart delivered on 28 November 2002.**

THE FACTS

On 18 July 1999, Thomas Callery met a number of people in a licensed premises in Dublin. All had a few drinks and played some pool. Later, Thomas Callery and his companions went to the Clifton Court Hotel at O'Connell Bridge, Dublin. Thomas Callery alleged that he went inside the premises without difficulty and at the time was in the company of his uncle Paddy, his brother Mark and his aunt Margaret. Having entered the premises, he and his uncle Paddy went to the bar to order drinks.

Mr Callery alleged that at that point a 'girl' picked up his mobile phone from the table he was sitting at and left the premises with it. He said he went out after her to retrieve his mobile phone. About two doors up from the premises, he caught up with her and got his phone back. He then stated he went back to the premises in order to get in to his friends but was refused admission by two 'bouncers' at the door. He alleged that he asked to be let back in to get his coat from the bar, but one of the bouncers said to him: 'If you are man enough to get your jacket, go ahead'. Mr Callery's case was that he proceeded to go back into the Clifton Court Hotel but was immediately attacked by the 'bouncers', put in a headlock by one of the bouncers and was thrown violently to the ground whereupon the bouncer, aided by the other bouncer, proceeded to kick him violently. He said that he was 'danced on' by one of the bouncers and in the scuffle on the ground his little finger on his left hand was bitten so severely that the tip was almost completely severed. He could see the bone in his finger and there was a lot of blood. He stated that apart from the injury to his finger, he also received cuts and bruises to his head and his shoulder was painful.

An ambulance was called and he waited for the ambulance to arrive, sitting either on or against a car that was parked outside the premises.

Thomas Callery sued Sinnan Inns Ltd, trading as Clifton Court Hotel, and Security Extra Services Ltd, the security firm that provided security services to the Clifton Court Hotel at the time of the proceedings. Proceedings were issued against both parties on a joint and several basis. Security Extra Services Ltd was in effect an independent contractor providing employees directly to perform the security duties at the hotel.

JUDGMENT OF THE CIRCUIT COURT

The matter came before Judge Hogan. On 16 July 2002, Judge Hogan gave judgment in favour of Thomas Callery in the sum of €25,394.76 together with costs and reserved costs against Sinnan Inns Ltd and Security Extra Services Ltd on a joint and several basis. The owners of the Clifton Court Hotel appealed to the High Court.

JUDGMENT OF THE HIGH COURT

The case came before Mr Justice Peart of the High Court, who heard the evidence and delivered judgment on 28 November 2002. Having set out the facts of the case, Peart J referred to the evidence of Thomas Callery and his brother. None of the witnesses on behalf of Thomas Callery had witnessed the incident.

Peart J referred to the cross-examination of the plaintiff. It was put to him that he knew the girl in question and that her name was Sabrina. He denied knowing any girl named Sabrina. It was put to him that, in fact, in a statement he had made to the gardaí he had stated that in the premises 'at about a quarter to nine, Sabrina's mobile phone rang and she went to the door of the premises to talk because it was too noisy inside' and he followed her out and waited for her, but Mr Callery denied this. It was also put to him that the security guards would say that when he went out of the premises and up the street after the girl, there was a row going on between him and the girl and there was a lot of shouting and screaming going on and that the reason why he was not let back into the Clifton Court Hotel was because the bouncers were fearful of further trouble inside. Mr Callery denied all this and said the bouncers had just 'pounced' on him for no reason and that he had simply wanted to go back in to get his jacket.

The judge referred to the evidence of Joe McKevitt, who stated that he was the manager at the premises for about five years and remembered Mr Callery rushing past him and onto the street on the day of the scuffle. A girl followed. Mr McKevitt stated that a row started between Thomas Callery and the girl, with scuffling and shouting. The girl seemed upset. Mr McKevitt stated that when he went back inside the premises, he said to

the two doormen that if Mr Callery and the girl should try and get back into the premises they should be refused. The manager went back to his office but a short time later he was told there was some trouble outside and he went back down. Mr Callery was outside shouting and pointing to his finger and saying 'this is thousands'.

Evidence was also given by the security men, who denied biting Mr Callery's finger. The doormen said that the girl had come back in a distressed state and had put her head on the shoulder of one of the doormen. Mr Callery then attacked the doormen and a 'scuffle' broke out. Mr Callery was restrained, put on the ground, eventually he was let up but was complaining about his finger. The doormen did not know how Mr Callery's finger got injured, but said there was no question of any of them biting the finger. The opinion was expressed that the finger must have been cut either on the hub of a car wheel perhaps or some glass on the pavement.

Peart J stated that, having heard the evidence from all the witnesses, he was satisfied that he could not rely on the evidence given by Mr Callery and his witnesses as to the sequence of events leading up to the 'fracas' in which Mr Callery's finger was injured. He noted that there were inconsistencies in the evidence regarding the mobile phone, the girl in question and the row outside. There were inconsistencies between what Mr Callery told gardaí in his statement and what he must have told his solicitors and also what he said in evidence.

On the balance of probabilities, the judge accepted the account of the relevant events given by Mr McKevitt, the manager, and by the two doormen as the correct version of events.

Having accepted the version of events given by the witnesses for the Clifton Court Hotel, the issue then arose whether force used by the doormen was excessive in the circumstances. Peart J stated that he did not believe it was. He also stated that it did not appear that Mr Callery mentioned the biting to the doctors he attended, as there was no mention of the biting in the medical reports. A medical report referred to 'a laceration', another to a 'crushing injury' and another to 'a significant injury to the tip of his left fifth finger'. Without some corroboration of the allegation of biting, the judge was not prepared to find that the finger was bitten by one of the bouncers. Peart J said he accepted that Mr Callery returned to the premises in a very agitated and aggressive state and, upon seeing the girl in question placing her head on the bouncer's shoulder, proceeded to attack the bouncer, pinning him against the wall by the throat. It was inevitable that some force had to be used to restrain Mr Callery and to put him to the ground. Given the struggle involved, the force used was not unreasonable. The evidence was that having been restrained from kicking and struggling while on the ground, Mr Callery calmed down somewhat and awaited the arrival of the ambulance while sitting or leaning against a parked car.

The judge noted that it was very unfortunate that any injury was caused to Mr Callery, but the fact that there was could not be blamed on the Clifton Court Hotel. Accordingly, Peart J considered that it was not necessary for him to address the issue as to whether the Clifton Court Hotel was responsible in negligence for the acts of the employees of the security firm and he refrained from doing so.

He set aside the order of the Circuit Court insofar as it gave judgment against the Clifton Court Hotel. He noted that since the other defendant in the case, Security Extra Services Ltd, had not appealed to the High Court, there was an anomaly remaining in that there would still be judgment in favour of Mr Callery against Security Extra Services Ltd. The judge considered that he could not interfere with that in any way since they were not an appellant before him.

Costs in relation to personal injury case – fall in bus while proceeding to upper deck with a child – contributory negligence – video evidence of an investigator – issue of exaggeration by plaintiff of medical condition and symptoms – High Court hearing – appeal to the Supreme Court – consideration of effect of exaggerated claim

CASE

***Siwsan Shelley-Morris v Bus Átha Cliath (Dublin Bus)*, Supreme Court (Denham, McGuinness and Hardiman JJ), judgment of Denham J for the court of 22 January 2003.**

THE FACTS

In the last issue of this magazine (page 48), I considered the substantive judgment of the Supreme Court in this case relating to liability and quantum of damages in relation to a personal injury case.

It had been alleged by Mrs Shelley-Morris that on a journey from the church in Monkstown to a wedding reception in Killiney a privately-hired bus owned by Dublin Bus had been 'jerky'. She was in the lower deck with her two-year-old daughter sitting beside her. The child got bored, the bus having stopped at a red light, and Mrs Shelley-Morris proceeded to bring the child upstairs to the top deck. She held the child on her right hip and started to go up the stairs. She was approximately one step from the top when the bus allegedly jerked forward and then carried on accelerating. She was thrown backward and injured.

On 26 October 2001, the High Court held Dublin Bus had been negligent; there had been contributory negligence by Mrs Shelley-Morris; the apportionment of fault was 75% on the part of Dublin Bus and 25% on the part of Mrs Shelley-Morris. The total award by the High Court was £172,500. Accordingly, it was ordered in the High Court that Mrs Shelley-Morris recover against Dublin Bus the sum of £129,335, being 75% of the total award and the costs of the action when taxed and ascertained.

Dublin Bus appealed to the Supreme Court. The matter came before Denham, McGuinness and Hardiman JJ, with Denham and Hardiman JJ delivering judgment on 11 December 2002 (McGuinness J concurred with both judgments).

The Supreme Court judgments dealt with, among other

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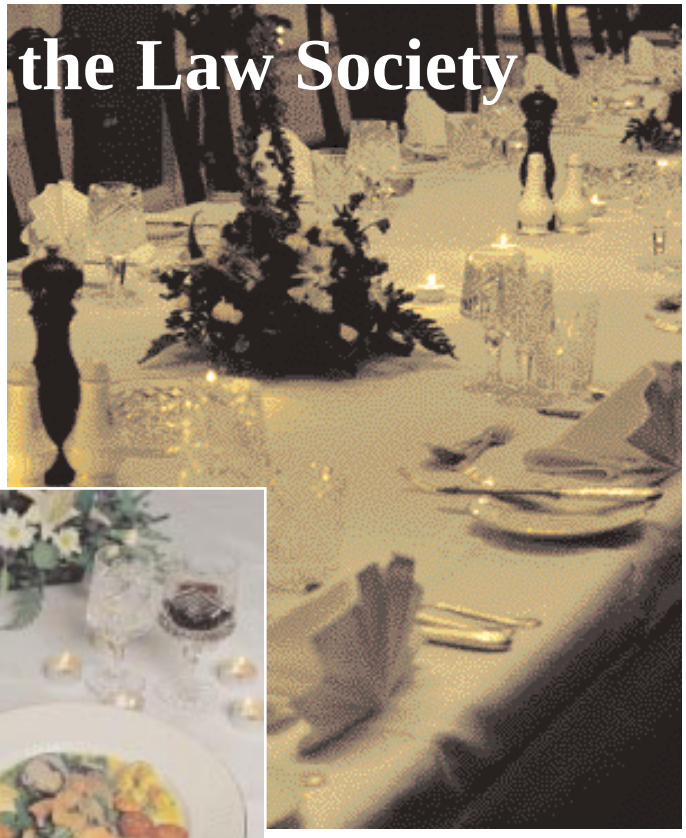

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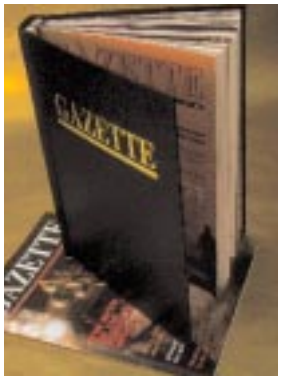

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things, the issue of the exaggeration by Mrs Shelley-Morris of her medical condition and symptoms. Hardiman J stated that Mrs Shelley-Morris told 'a number of deliberate falsehoods' in relation to her symptoms and capacities. He said that the manifest falsehoods and the overall impression of her performance in a videotape, which had been secretly taken, gave rise to considerable difficulty. The Supreme Court considered that Mrs Shelley-Morris was, indeed, capable of working. In claiming to be unable for any significant work, she was guilty of 'serious falsehood'.

Denham J emphasised in her judgment that Mrs Shelley-Morris was in danger of losing her entire claim because of the deliberate exaggeration. The Supreme Court determined contributory negligence on the part of Mrs Shelley-Morris at 50%. The damages awarded by the High Court were reduced from a total of £172,500 by the High Court to a sum of £90,000 in the Supreme Court. Having determined the contributory negligence at 50%, the sum awarded to Mrs Shelley-Morris was £45,000.

The case then came before the Supreme Court on the issue of costs. Counsel for Dublin Bus submitted that Dublin Bus had won on both the quantum and the issue of contributory negligence and that costs should follow the event and that Dublin Bus was entitled to the costs of the appeal to the Supreme Court. Further, it was submitted in relation to the High Court award that as the damages had been reduced by the Supreme Court, the High Court order as to costs should be disallowed or reduced. Counsel also referred to the *Rules of the Superior Courts*, order 99, rule 4, and sought a set-off of the costs of the High Court as against the damages, or that the court direct that one set-off of costs be set off against another.

Counsel for Dublin Bus submitted that even though there had been a stay on the High Court order, there had been 'a glitch' in that – despite that order – the matter of the costs of Mrs Shelley-Morris had proceeded to taxation and the sum had been certified. He stated that Dublin Bus had paid €44,000 to the solicitor for Mrs Shelley-Morris. Counsel argued that this should not have occurred. In these circumstances, he sought an order for a set-off under the *Rules of Superior Courts*, order 99, rule 4.

Counsel for Mrs Shelley-Morris submitted that the appeal to the Supreme Court was carefully drafted: it related to liability and damages and there was no mention of the matter of costs. He argued that Dublin Bus had not appealed or stayed the order for costs in the High Court. It was submitted that Dublin Bus was estopped from seeking an order interfering with the order for costs in the High Court. It was argued that in the Supreme Court every issue had been opened and that Mrs Shelley-Morris won in that Dublin Bus was found to be 50% liable, and while the Supreme Court ordered an increase in the percentage of liability for Mrs Shelley-Morris, the liability of Dublin Bus had been affirmed.

JUDGMENT OF THE SUPREME COURT

The judgment of the Supreme Court was delivered by Denham J on 22 January 2003. McGuinness and Hardiman JJ agreed with the judgment of Denham J.

Denham J referred to the facts and stated that order 99, rule 1(4) of the *Rules of the Superior Courts* provided that the costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event. Denham J referred to various cases which elaborated upon the issue of the discretion of the court in ordering costs. She also referred to O'Floinn and Gannon, *Practice and procedure in the superior courts*, who stated that the court must exercise discretion on the facts of each case and not apply a general rule. O'Floinn and Gannon had stated that ordinarily costs were awarded to the successful party. However, where each party succeeds in part, the application of the general rule as to costs yields more complicated results. The authors noted that each party may be directed to bear their own costs or, alternatively, the court may fix the costs payable in respect of each party or reduce the costs *pro-rata* by that amount by which the damages claimed by each party had been reduced.

Denham J stated that on this appeal, the liability of Dublin Bus was held to be grounded on the determinations of fact by the trial judge, made in the light of his assessment of the credibility of an independent witness. The Supreme Court did not interfere with that determination of fact of the trial judge in view of the jurisdiction of the court as an appellate court. The court referred to *Hay v O'Grady* ([1992] 1 IR210). However, the contributory negligence of Dublin Bus had been varied from 75% to 50%. Thus, on this aspect, according to Denham J, Dublin Bus succeeded. As to damages, Mrs Shelley-Morris's claim for special damages failed in the Supreme Court. As to general damages, the sum of £70,000 for pain and suffering to the date of the trial had been upheld, but the sum of £40,000 for pain and suffering in the future had been reduced to £20,000. Consequently, while Mrs Shelley-Morris succeeded in retaining part of the award, Dublin Bus was successful in having the special damages set aside, in reducing general damages for the future and in reducing the determination of the contributory negligence of Dublin Bus.

Denham J stated that the facts presented a mixed situation. In this mixed arena is the additional important fact that both judgments of the High Court and Supreme Court found a lack of credibility on the part of Mrs Shelley-Morris. The position of deliberate exaggeration by Mrs Shelley-Morris was considered by the court. The possibility of applications for abuse of process in other such cases was raised. All in all, Denham J stated that she was satisfied that the conduct of Mrs Shelley-Morris, her deliberate exaggeration of her symptoms for her claim, was an important factor in exercising the discretion of the court.

She was satisfied that Mrs Shelley-Morris, although obtaining an award of £45,000, was not entitled to her costs on the appeal in the Supreme Court as against Dublin Bus given the findings on appeal.

The issue of an abuse of process by Mrs Shelley-Morris (in view of the exaggeration of her claim) was not specifically argued in the High Court, according to Denham J. There was no such finding as to such a situation. If there had been, it would have more weight as an issue relevant to the determination of costs in a trial court and on appeal. In the light of the fact that it was not argued in the trial court and in the whole circumstances of the case, Denham J stated that she was not inclined to award to Dublin Bus the costs of the case against Mrs Shelley-Morris. However, it was emphasised that this was a decision particular to this case and the issue of costs in other cases where claims were seriously exaggerated should be considered in the light of the facts of each case. In all the circumstances of the case and not as a general rule, Denham J made no order as to costs in the Supreme Court. G

These judgments were summarised by solicitor Dr Eamonn Hall.

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COSTS

Planning and development

Judicial review – planning and environmental law – costs – whether normal rule that costs follow event should apply – exercise of discretion by court in departing from rule – factors to be considered – whether applicants acting in public interest – findings of fact made by court – conduct of respondent during proceedings – whether facts put in issue – Rules of the Superior Courts 1986, *order 99, rule 1(4)*

In a judgment delivered on 2 September 2002, the High Court declined to accede to the applicants' application to quash the decision of the respondent to make and adopt the development plan for Meath in 2001. However, in reaching its decision, the court was required to make a number of findings of fact, such facts having been disputed and put in issue by the respondent. The majority of these findings of fact were in favour of the applicants. During a subsequent hearing, the High Court heard the parties' submissions as to the costs of the proceedings.

In ordering that the respondent pay 100% of the costs of the transcript of the proceedings and 50% of the applicants' costs of the proceedings, Quirke J held that when considering its jurisdiction to make a pre-emptive costs order there is a distinction to be made by the court between private law litigation and public interest challenges, where proceedings raise public law issues which are of general importance and where the applicants have no private interest in the outcome of the proceedings. The court was influenced by the fact that the applicants were acting in the public interest and had no private interest in the outcome of the proceedings and that the respondent had put a number of facts in issue which facts could have been agreed between the parties prior to the hearing.

***McEvoy and Smith v Meath County Council*, High Court, Mr Justice Quirke, 24/1/2003** [FL6729]

Libel, practice and procedure

Conduct of trial in High Court – jury discharged in first trial – retrial ordered by Supreme Court – plaintiff recovering damages within Circuit Court jurisdiction – costs of original trial and retrial awarded on Circuit Court scale by trial judge to plaintiff – costs of seven-day hearing awarded to plaintiff – whether exercise of discretion by trial judge correct – Courts Act, 1981, *section 17*

The plaintiff was awarded €25,000 damages for libel in the High Court on a retrial following a Supreme Court appeal by the defendant. The High Court awarded the costs of the entire action to the plaintiff on the Circuit Court scale plus the costs of the aborted trial. The defendant appealed the High Court decision in relation to costs on the grounds that: the costs should have been limited to the costs of a three-day hearing on the basis that a Circuit Court trial would have been completed within that period; it would be unjust for the defendant to bear the costs of the abortive trial; and the trial judge should have exercised her discretion under section 17(5) of the *Courts Act, 1981* to award the defendant a portion of their costs as against the plaintiff.

McCracken J dismissed the appeal, holding that the plaintiff was entitled to the costs of a seven-day hearing in the High Court as the trial judge correctly refused to speculate on the length of a Circuit Court hearing and as time was taken up by reason of the unjustifiable defences raised by the defendant. As the Supreme Court, in an earlier ruling, ordered that the costs of the abortive first trial would abide the outcome of the retrial, the order of the trial judge was in accordance with the intentions of the Supreme Court and was not an improper exercise of discretion. As the plaintiff had not been unreasonable in bringing the proceedings in the High Court, the trial judge had properly refused to make an order under section 17(5) of the act of 1981.

***Mangan v Independent Newspapers (Ireland) Ltd*, Supreme Court, 31/1/2003** [FL6774]

CRIMINAL

Constitutional law, right to fair trial

Judicial review – prohibition – delay – fair procedures – whether necessary to show actual prejudice – whether order of prohibition restraining trial should issue – whether real risk of unfair trial

The applicant sought an order of prohibition to restrain his trial on the grounds of delay. The applicant had been charged with an offence which had been allegedly committed a number of years prior to being charged. The applicant claimed that the delay involved was culpable and amounted to a failure to vindicate the applicant's constitutional right to an expeditious trial. In addition, it was submitted that he had lost contact with potential witnesses who could have given evidence on his behalf. On behalf of the director of public prosecutions (DPP), it was contended that it was necessary that a related trial be concluded before the applicant could be tried and this had given rise to some of the delay.

Ó Caoimh J refused the relief sought. The court would not interfere with the decision of the DPP not to prosecute the applicant until such time as certain evidence became available. Although there had been delays in the prosecution of the case, the applicant had failed to establish actual prejudice. The applicant had failed to discharge the necessary onus and the application would be refused.

***Blood v DPP*, High Court, Mr Justice Ó Caoimh, 28/6/2001** [FL6721]

Evidence, practice and procedure

Murder conviction – inculpatory statements – newly-discovered fact – evidence – practice and procedure – whether newly-discovered fact had arisen – whether statements attributed to applicant could be relied upon – whether conviction of applicant unsafe – Criminal Procedure Act, 1993

The applicant had been convicted of the capital murder of a member of An Garda Síochána and sentenced to death (later commuted to 40 years' imprisonment). The applicant was convicted before the Special Criminal Court and had appealed to the Court of Criminal Appeal, which had dismissed his appeal. The applicant now sought an order pursuant to sections 2 and 3 of the *Criminal Procedure Act, 1993* quashing his conviction. The order was sought on the basis that a newly-

discovered fact had arisen, namely, analysis of statements allegedly made by the applicant to members of An Garda Síochána after the shooting. In addition, it was submitted that there was a newly-discovered fact relating to the common design possessed by the applicant and his co-accused regarding the plan to disable any pursuer in their attempt to escape after the robbery. The applicant sought to make the case that he had been under coercion regarding the extent of the common design between himself and his accused.

The Court of Criminal Appeal (McCracken J delivering judgment, O'Higgins J and Murphy JJ agreeing) refused the application. There was no doubt that the disputed statements were relied upon by the Special Criminal Court as evidence of common design and as evidence of the applicant's participation in both the robbery and subsequent shooting. However, the disputed statements were irrelevant in the light of the applicant's submission regarding the acknowledged common design. There was no reasonable explanation by the applicant of his failure to put forward a defence at his trial which he now sought to make regarding the extent of the common design.

***DPP v Callan*, Court of Criminal Appeal, 9/12/2002** [FL6800]

DISCOVERY

Family law, nullity petition

Practice and procedure – discovery – appointment of medical examiner – role of medical examiner – whether examiner should have access to medical/psychiatric records of respondent for purpose of preparing report in nullity petition – whether examiner would be exposed to hearsay in such records

The applicant was granted an order by the Circuit Court that all medical/psychiatric records relating to the respondent prior to the marriage be furnished to the medical examiner appointed for the purposes of the applicant's nullity petition. The Circuit Court restricted the order to discovery to the medical examiner only and not to the applicant himself. The respondent appealed that order on the grounds that the medical examiner would be exposed to hearsay in the form of medical/psychiatric records prepared by other medical practitioners.

O'Neill J affirmed the order of the Circuit Court that the applicant was entitled to discovery of the material encompassed in the order but without the restriction imposed, so that he could himself use the material either to advance his own case or damage the case of the respondent. However, in light of the fact that the applicant was satisfied with the restriction imposed by the Circuit Court, that restriction would not be interfered with.

***P(F) v P(S)*, High Court, Judge O'Neill, 17/12/2002** [FL6676]

Legal profession, privilege

Practice and procedure – discovery – litigation – legal professional privilege – public interest privilege – cabinet confidentiality – whether documents should be discovered – whether documents prepared in contemplation of proceedings

The plaintiffs had sued the defendants for damages for libel, negligence and alleged interference with their constitutional right to their good name. The action arose out of a statement issued by the minister for enterprise and employment concerning the survival of the Irish Press newspaper titles. An order of discovery had been made by the master of the High Court regarding documents in the possession of the minister. The minister resisted discovery of certain documents on the basis of legal professional privilege. It was claimed that the documents in question had come into existence in contemplation of legal proceedings and should not be discovered. In addition, public interest privilege was claimed over other documents.

Carroll J held that some of the documents in question had not been prepared in contemplation of litigation and should be produced for inspection. Certain documents were protected by cabinet confidentiality, while others were not, and should be produced for inspection. The defendants were, however, obliged to list all documents individually, including post-publication documents.

***Irish Press v Minister for Enterprise and Employment*, High Court, Ms Justice Carroll, 15/10/2002** [FL6750]

Personal injuries, tort

Litigation – documents – purpose of discovery – whether categories of documents sought necessary – whether facts sought to be proved material

The plaintiff brought proceedings against his employer for injuries suffered when his hand became trapped in a machine. He sought discovery of four categories of documents, the first two of which were sought as evidence of the defendants' state of knowledge of the condition of the machine.

Master Honohan refused discovery of all categories of documents except those concerning the reporting of the accident, holding that the nature of litigation is not a general process of inquiry into the circumstances of the accident but an adjudication of the truth or falsity of facts alleged in the statement of claim. As the reasons furnished for discovery of categories one, two and four concerned allegations of non-material (or surplus) facts, discovery would not be ordered in relation to them.

***Kelly v Van Den Bergh Foods Ltd and Unilever (Ireland) Ltd*, High Court, Master Honohan, 16/1/2003** [FL6773]

EMPLOYMENT

Duty of care, personal injuries

Employer's duty of care – employee injured challenging intruder – personal injuries – whether employer failed to establish a safe system and a safe place of work – novus actus interveniens – *claim against MIBI* – MIBI compensation of universal road victims agreement 1998, *clause 6* – Civil Liability Act, 1961, *section 11(1)*

The plaintiff was employed as a full-time bar woman. She came across a youth at the rear door apparently stealing beer. The youth made an escape in the plaintiff's car. The plaintiff attempted to prevent the escape by clinging on to the bonnet but fell off and was injured. She sued her employer and the Motor Insurers' Bureau of Ireland (MIBI).

Judge McMahon awarded the plaintiff general damages of €15,000 and special damages of €3,562.64, holding that that the employer had failed to establish a safe place of work by failing to maintain a proper rear door which would have minimised the risk of intruders. The plaintiff's action was not a *novus actus interveniens* and did not amount to contributory negligence. The question of the liability of the MIBI only arose if there was no other defendant liable to the plaintiff.

***Millington v Taylor*, Dublin Circuit Court, Judge McMahon, 17/7/2002** [FL6786]

ENVIRONMENTAL

Planning and development

Planning injunction – time – application for injunction refused by High Court – costs awarded against applicant – whether normal rule that costs follow event applies – factors to consider when departing from normal rule – delay by respondents in filing reply – whether respondents culpable – whether significance should be placed on public watchdog nature by which section 27 enabled member of public to take action in deciding issue of costs – Local Government (Planning and Development) Act, 1963, *section 40* – Local Government (Planning and Development) Act, 1976, *section 27*

The High Court refused to grant the applicant an injunction under section 27 of the *Local Government (Planning and Development) Act, 1976* preventing the respondents from holding a concert at Punchestown racecourse and ordered that he pay the respondents their costs of the proceedings. The applicant appealed the order as to costs on the grounds that significance should be placed on the public watchdog nature by which section 27 enabled a member of the public to take action and on the fact that the respondents had filed a replying affidavit a day before the hearing of the motion. In dismissing the appeal, Denham J held that the applicant had not discharged the burden of showing that the order for costs should not follow the general rule that costs follow the event as there was no basis for the applicant to succeed on any alleged delay by the respondents in filing an affidavit as the time frame had been one created by the applicant himself. The ground that section 27 of the act of 1976 created a watchdog role for a member of the public such as the applicant had not been argued before the High Court and, accordingly, could not be raised on an appeal.

***Grimes v Punchestown Developments Co Ltd and MCD Promotions Ltd*, Supreme Court, 20/12/2002** [FL6684]

INTERNATIONAL

Litigation, practice and procedure

Litigation – Hague convention – *service of documents outside jurisdiction – whether party seeking to set aside judgment acted promptly – whether judgment obtained under convention should be set aside* – Rules of the Superior Courts 1986

The defendant brought an action seeking to set aside a judgment obtained by the plaintiff under the *Hague convention*. The defendant's motion was dismissed in the High Court by Mr Justice Kearns and the defendant appealed to the Supreme Court. The defendant contended that the proceedings had not been properly served.

The Supreme Court (Keane CJ, Denham J and Geoghegan J) dismissed the appeal. The defendant was aware of the original documents being served upon him which gave rise to the judgment. In order to set aside a judgment obtained under the convention, the defendant was obliged to act with reasonable expedition. It was quite clear that he had not done so and the order of the High Court would be affirmed.

***Collier v Hartford*, Supreme Court, 29/11/2002** [FL6719]

MEDICAL NEGLIGENCE

Doctors, tort

Mother seeking damages for post-traumatic stress as a result of son's death – failure to diagnose – whether doctor or hospital negligent

The plaintiff's son died as a result of a pulmonary embolism. A claim for negligence was taken by the plaintiff against the Mater Hospital and the treating doctor. The plaintiff claimed that she suffered from post-traumatic stress as a result of the accident. The negligence alleged was that the treating doctor failed to diagnose that the plaintiff's son was seriously ill when he presented at the hospital and failed to admit him to the hospital. The fact that records relating to the plaintiff's son had not been available to the treating doctor was also criticised.

In finding that there was no evidence of negligence on the part of the doctor or the hospital, Carroll J found that the doctor had acted with the ordinary care which a medical practitioner of equal status and skill should have shown. It was reasonable in 1994 that the records would not be immediately traceable at midnight on the day after the plaintiff's son was discharged.

***Cleary v Cowley*, High Court, Ms Justice Carroll, 20/12/2002** [FL6787]

PLANNING AND DEVELOPMENT

Environmental law, injunction

Declaration – whether works were development which was not permitted by restrictive covenant – whether works required planning permission – whether development an exempt development – Local Government (Planning and Development) Acts, 1963 to 2001 – Local Government (Planning and Development) Regulations 1984 and 1994

The case involved a dispute between neighbours concerning works undertaken by the defendant. The plaintiffs complained that the defendant was in breach of a restrictive covenant and sought a declaration to that effect and an injunction to prevent the works being carried out. In addition, they sought a declaration that the development was in breach of the *Planning Act, 2000.*

Kelly J granted an injunction restraining the defendant from carrying out the development in question save insofar as works could be carried out in accordance with the views of the plaintiff. He held that the development which was sought to be undertaken by the defendant was in excess of what was permitted under the covenant. The development was not exempted and planning permission was at all times required.

***O'Mara v Morrison*, High Court, Mr Justice Kelly, 10/12/2002** [FL6660]

PRACTICE AND PROCEDURE

Order of garnishee

Garnishee – inquiry in aid of execution of judgment debt – witness protection scheme – purpose of scheme – protection of witnesses identity – whether purpose of scheme would be defeated by granting relief sought – whether public policy would be served by granting relief sought – Criminal Justice Act, 1999, *section 40* – Rules of the Superior Courts 1986, *order 42, rule 36*

The plaintiff was granted judgment in the sum of £120,000 for personal injuries inflicted by the defendant. The defendant, being a participant in the witness protection scheme, was furnished with a new identity and material benefits by the state, including maintenance payments. The plaintiff sought an examination into the affairs of the defendant to ascertain what debts were owed to him, more particularly by the state under the witness protection scheme, so that an order of garnishee might be sought. The notice party resisted the application on the grounds that section 40 of the *Criminal Justice Act, 1999* precluded the information sought being furnished as to do so would undermine the operation of the witness protection scheme and, accordingly, be contrary to public policy.

O'Neill J refused the relief sought, holding that the information sought by the plaintiff was not so extensive as to lead to a breach of section 40 of the 1999 act. Nevertheless, even that level of confined disclosure would be sufficient to give rise to a real apprehension on the part of a would-be participant in the scheme that their new identity would not be protected from disclosure and, because of that, there was a real risk that potential participants in the scheme would be deterred from making their evidence available. Public policy therefore dictated that the relief sought should be refused. Moreover, the fact that the plaintiff was not permitted to pursue execution against those material benefits accruing to the defendant out of the scheme did not prejudice him; it merely left him with the same opportunities of execution as he would have had if the defendant was not in the programme. The difficulty in serving documents could be overcome by the transmission of documents to the commissioner of an Garda Síochána.

***Foley v Bowden and Commissioner of an Garda Síochána (notice party)*, High Court, Mr Justice O'Neill, 4/12/2002** [FL6665]

Summary judgment

Motion for judgment – summary judgment – set-off – counterclaim by defendant – whether payment due under terms of agreement – whether final judgment should be entered – whether equitable set-off available – whether stay on judgment should issue

The plaintiff entered into a distribution and loan agreement with the defendant, whereby monies were advanced to the defendant, which was terminated on or about 7 September 1998. The agreement provided that on termination all sums owing on foot of the loan agreement would thereupon become payable. The plaintiff claimed that under the terms of the agreement a sum of €51,546.05 was due to them and issued a notice of motion seeking liberty to enter final judgment. The defendant averred that he had a valid counterclaim against the plaintiff for damages and that the court should not give judgment as the defendant should be entitled to set off against any sum due.

In granting the plaintiff judgment for €51,546.05 sought, Peart J held that the agreement had been validly terminated so as to trigger the repayment clause in the agreement. In exercising its discretion to order a stay on entry of the judgment for a month, the court took into account the apparent strength of the counterclaim and the answer suggested to it, the conduct of the parties and the promptness with which they have asserted their claims and also the financial position of the parties.

***Stanley Works Limited v Timothy O'Connell*, High Court, Mr Justice Peart, 4/12/2002** [FL6650]

PROBATE

Interpretation

Construction of will – interpretation of expression 'my children' in discretionary trust – whether expression included the defendant – admissibility of extrinsic evidence – intention of testator

John Tracy, deceased, was married to Patricia Tracy. Tara Lawless, the defendant, was a child of the union of Patricia Tracy and one Janusz Szuch. The deceased treated the defendant in every way as his daughter. The case concerned the construction of the deceased's will. The will created a discretionary trust. The issue for the court was whether the defendant was one of the objects of the discretionary trust, having regard to the phrase 'my children' in the trust.

Smyth J held that the defendant was included in the expression 'my children'. The testator, when alive, had habitually referred to the defendant as his daughter. While the word 'children' *prima facie* means legitimate children, enough appeared on the face of the will to demonstrate that the testator intended to include the defendant.

***Crawford v Lawless*, High Court, Mr Justice Smyth, 6/11/2002** [FL6664]83] G

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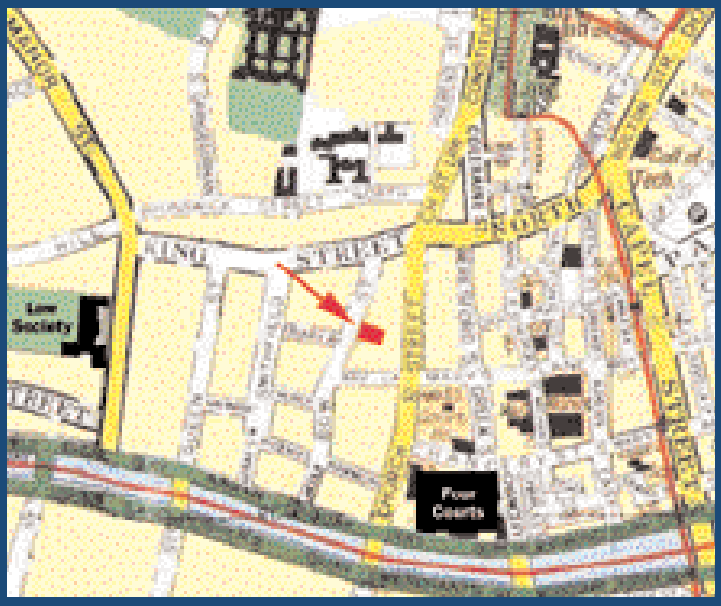

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Damages in holiday law cases

In an opinion delivered on 20 September 2001 in response to a reference from the Regional Court of Austria (Landesgericht of Linz) for a preliminary ruling in case C-168/00 *Simone Lietner v TUI Deutchland GmbH & Co KG*, advocate general Tizzano reviewed the position in the EU in relation to article 5(2) of directive 90/314/EEC on package travel, package holidays and package tours.

Article 5(2) states: 'With regard to damage resulting for the consumer from the failure to perform or the improper performance of the contract, member states shall take the necessary steps to ensure that the organiser and/or the retailer is liable unless such failure is attributable neither to any fault of theirs nor to that of another supplier of services because:

- The failures which occur in the performance of the contract are attributable to the consumer
- Such failures are attributable to a third party unconnected to with the services contracted for, and are unforeseeable or unavoidable
- Such failures are due to a case of *force majeure* such as that defined in article 4(6), second paragraph (ii), or to an event which the organiser and/or retailer or the supplier of services, even with all due care, could not foresee or forestall.

In the cases referred to in the second and third indents, the organiser and/or the retailer party to the contract shall be required to give prompt assistance to a consumer in difficulty.

In the matter of damages arising from the non-performance or improper performance of the services in the package, member states may allow compensation to be limited in accordance with the international conventions governing such services.

In the matter of damage other than personal injury resulting from the non-performance or improper performance of the services involved in the package, member states may allow compensation to be limited under the contract. Such limitation shall not be unreasonable'.

In Ireland, directive 90/314 was transposed into the legislative framework as the *Package Holiday and Travel Trade Act, 1995*, and article 5(2) is reflected in section 20 of the act.

The facts of the *Leitner* case were that the family of the plaintiff, Simone Leitner, booked a package all-inclusive club holiday in the holiday village of Robinson Club Pamfiilya in Side in Turkey with the defendant TUI Deutchland GmbH & Co KG, in July 1997. The family took all their meals at the club, and eight days into the holiday the plaintiff showed symptoms of salmonella poisoning. The illness lasted beyond the holiday period and also affected many other guests in the club. The plaintiff's condition was such as to require her parents' care for the remainder of the holiday. A couple of weeks after the end of the holiday, the plaintiff sent a letter to the defendant seeking compensation. She received no reply and instituted proceedings against the defendant a year later, including non-material damages in respect of loss of enjoyment of her holiday in the amount claimed over and above material damages.

The court of first instance held that the plaintiff was entitled to compensation for pain and suffering, but her claim for non-material damage was dismissed because according to case law of the Austrian Supreme Court (Oberster Gerichtshof) non-material damage may be compensated only when expressly provided for by the law. No such provision existed.

The plaintiff appealed to the Austrian Regional Court, which held that the court of first instance had correctly interpreted the national case law. The regional court asked, however, whether article 5(2) of directive 90/314 might not produce a different result as, given the limitations under the contract of compensation for damage other than personal injury, it would be permissible to conclude on the basis of the directive that, in principle, organisers and/or retailers are liable also for non-material damage.

Interestingly, though, even if the directive did entail compensation for non-material damage, it could not be invoked against travel agents as the direct horizontal effect of directives is not permissible. At the same time, however, a national court must interpret the provisions of its own law as far as possible in light of the wording and purpose of the directive so as to achieve the result it has in view. Indeed, section 2(7) of the act emphasises this, stating: 'In construing a provision of this act, a court shall give to it a construction that will give effect to the directive including its preamble'. The preamble concerns itself with harmonisation of legislation on package travel, holidays and tours; however, its main thrust is protection of the consumer.

Advocate general Tizzano reviewed the law in the various member states. Observations were submitted to him in the matter by a number of member states and the EU Commission. The commission and the Belgian government maintained that article 5 must be interpreted as meaning that the damage referred to must include non-material damage caused by loss of enjoyment of a holiday, whereas the Austrian, Finnish and French governments maintained that it did not. They considered that not only could liability for such compensation not be inferred but, because there was no explicit reference to non-material damage, the community legislator did not intend to regulate it through the application of common rules.

The advocate general, in looking at the concept of damage in directive 90/314, considered, in agreement with the commission and the Belgian government, that 'the scope of the directive was intended to cover all types of damages which could have any causal link with the non-performance or improper performance of the contract'[1] and, given the reference in article 5(2) to 'damage other than personal injury', it had to be concluded that 'the concept of damages, as referred to by the directive, includes both material and non-material damage'.[2] This, he felt, was underscored by the fact that

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directive 90/314, in employing the concept of damage in a general and undifferentiated manner, did so intentionally to allow the inclusion within the concept of all possible types of damages connected with non-performance of contractual obligations, including, he concluded, non-material damage arising from the loss of enjoyment of the holiday.

He noted the trend within the EU whereby an increasing number of judgments allowed for compensation for damages arising out of a ruined holiday, remarking that the position in Ireland was not dissimilar to that pertaining in the UK, whose case law was known to be the most open on the subject of compensation for non-material damage. The leading judgment in the UK is *Jarvis v Swan Tours* ([1973] 1 All ER 71) in which it was held that 'in a proper case damages for mental distress could be recovered in an action for breach of contract; the plaintiff was not necessarily restricted to the recovery of damages for physical inconvenience suffered by the breach'.[3]

A proper case was held to be one for breach of contract to provide a holiday for entertainment and enjoyment.[4] The judgment held that on breach there might be mental inconvenience, for example, frustration, annoyance and disappointment, and that damages could be awarded for such inconvenience. The judgment goes on to say: 'The correct measure of damages to which the plaintiff was entitled was not restricted by the sum which he had paid for the holiday but was the sum required to compensate him for the loss of entertainment and enjoyment which he had been promised and did not get, his vexation and disappointment in the holiday being relevant considerations in arriving at that sum'.[5]

Finally, and most tellingly, advocate general Tizzano concluded that in his opinion the trend towards widening the concept of liability for non-material damage and, more specifically, for damage arising out of a ruined holiday arises also due to the 'rapid development of tourism and to the fact that holidays, travel and leisure are no longer the privilege of a limited sector of society, but are a consumer product for a growing number of people, to which they devote part of their savings and their holiday from work and school. The very fact that holidays have assumed a specific socio-economic role and have become so important for an individual's quality of life means that their full and effective enjoyment represents in itself an asset worth protecting'.[6]

Limitations on the scope of damages

As mentioned above, the fourth paragraph of article 5(2) permits member states to limit compensation under the holiday contract for damage other than personal injury resulting from the non-performance or improper performance of the services involved in the package, but also adds the proviso that such limitation shall not be unreasonable. Section 20(4) of the act provides that: 'Where compensation limits are a term of the contract under subsection 3, the organiser may not limit liability to less than:

- In the case of an adult, an amount equal to the inclusive price of the package of the adult concerned
- In the case of a minor, an amount equal to the inclusive price of the package to the minor concerned.

This has been translated into the booking conditions of the majority of package holiday organisers as: 'The amount of compensation which will be paid to the consumer will be limited to, in the case of an adult, an amount equal to double the inclusive price of the package to the adult concerned and, in the case of a minor, an amount equal to the inclusive price of the package to the minor concerned'. Some organisers have taken a different approach when incorporating the limitation of liability into their booking conditions or contracts, stating in one case that this limit will be the maximum paid and in another that the amount of compensation 'shall be limited to an amount not greater than' the statutory minimum.

The wording of the act itself and of such clauses gives rise to certain anomalies. The act lays down a statutory minimum payable for damages other than personal injury damages. This would appear to mean that even if an arbitrator or judge (more usually the former since, owing to the arbitration clause also incorporated into the booking conditions or contract, the consumer is bound in most instances to pursue their claim through arbitration rather than court proceedings) should consider that a lesser amount is appropriate, the arbitrator or judge is bound by the act to award the statutory minimum.

With respect to the clauses limiting liability incorporated into the booking conditions/contract, where the majority limitation of an amount equal to the statutory minimum operates, this would appear to have the consequence that where the plaintiff or plaintiffs can show actual damage of a non-personal injury nature which amounts to a sum greater that the contractual limitation the arbitrator/judge cannot award an amount in excess of the contractual limitation to compensate the consumer for their actual loss. A judge might feel that he had the discretion or jurisdiction to do so, but an arbitrator is bound by the terms of the contract. Thus, there is a potential for an injustice to be perpetrated on a party to an arbitration and it would appear that this could not be remedied by the arbitrator.

It could perhaps be argued, in an appropriate case, that this limitation clause is an unfair term pursuant to *the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995* from the point of view of both the anomalies mentioned above.

A third, even larger, question looms over the booking conditions/contracts of the minority of organisers which state that the amount of compensation payable shall be an amount not greater that the statutory minimum. This particular clause would appear to be at total variance to the thrust of both the act and directive 90/314. It could be argued that an organiser or retailer could rely on such a clause (to which the consumers' attention is particularly drawn when they sign their holiday agreement, along with the arbitration clause) to offer an unsuspecting consumer a compensatory amount less than the statutory minimum in any set of circumstances, but particularly where the losses sustained might equal or exceed the statutory minimum. The dictum 'ignorance of the law is no excuse' could not be argued against the consumer here since the act concerned is not aimed at the consumer but at the travel trade itself.

There would appear to be a case for subjecting such a clause to the scrutiny of a willing court in relation to its validity or legality *vis-à-vis* the act. In light of section 2(7) of the act, it would seem likely that it might well be struck down, given the thrust of both the act and the directive and the unequal bargaining positions of the parties to the contract.

There would equally appear to be a case for subjecting section 20(4) to statutory interpretation by the courts to clarify this provision, given the anomalies outlined above.

Footnotes

1 Paragraph 29
2 Paragraph 30
3 p71
4 Ibid
5 p72
6 Paragraph 43. G

Ann Hartnett O'Connor is a Dublin-based barrister.

Recent developments in European law

FREE MOVEMENT OF PERSONS

Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department*, 11 July 2002. Ms Carpenter is a Philippine national who was given leave to enter the United Kingdom for six months. She overstayed her leave and in 1996 married Peter Carpenter, a national of the UK. Mr Carpenter runs a publishing-related business in the UK. Many of his customers are established in other member states and he travels to those states for his business.

In 1996, Ms Carpenter applied to the UK government for leave to remain in the UK as the spouse of a UK national. The secretary of state refused her application and decided to make a deportation order against her as she had outstayed her original leave to enter. Ms Carpenter appealed the decision to the Immigration Appeal Tribunal, which made a reference to the ECJ.

It asked whether EU law confers a right of residence in a member state for the non-EU spouse of a national of that state. As Mr Carpenter travelled in the EU to provide services to his customers, he was exercising his treaty right to do so. However, secondary legislation in this area is restricted to the right of a national and his spouse to enter and reside in another member state but has no application to rights of residence in his home state.

The ECJ indicated that legislation on free movement recognised the importance of protecting the family life of EU nationals. The deportation of Ms Carpenter would clearly separate the two spouses and would be detrimental to their family life. It would affect Mr Carpenter's exercise of the fundamental right of free movement. Furthermore, it would interfere with his right to respect for his family life in accordance with the *European convention on human rights and fundamental freedoms*, which is among the fundamental rights protected by EU law.

The decision to deport Ms Carpenter did not strike a fair balance between the competing interests of, on the one hand, the right of Mr Carpenter to respect for his family life and, on the other hand, the maintenance of public order and public safety. Ms Carpenter had infringed UK immigration laws by overstaying her visa. However, her conduct had never been the subject of any complaint that could give rise to a view that she was a threat to public order or safety. It was also clear that the marriage was genuine and that they had a true family life in the UK, evidenced in particular by Ms Carpenter looking after her spouse's children from a previous marriage. In these circumstances, deporting her would be an infringement of a right that is not proportionate to the objective pursued.

Case C-299/01 *Commission of the European Communities v Grand Duchy of Luxembourg*, 20 June 2002. Luxembourg legislation provides for a guaranteed minimum income. However, the minimum income is only paid to individuals who resided in Luxembourg for at least five of the last 20 years before application. The commission argued that this provision was discriminatory and not in accordance with treaty rules on free movement of persons. The ECJ held that this rule was indirectly discriminatory against nationals of other EU member states and was in breach of article 7(2) of regulation 1612/68 and article 43 of the treaty.

INTELLECTUAL PROPERTY

Case C-299/99 *Koninklijke Philips Electronics NV and Remington Consumer Products Ltd*, 18 June 2002. In 1966, Philips developed a new type of electric shaver with three rotating heads in the shape of an equilateral triangle. In 1985, it registered a trademark in England, consisting of the shape and configuration of the head of the shaver. In 1995, a competitor, Remington, started to manufacture and market a shaver in a similar shape to the Philips one in the UK. Philips brought proceedings against Remington for infringement of its trademark.

Remington argued that the sign on which the trademark was based had no distinctive character. The English Court of Appeal referred a number of questions to the ECJ on the interpretation of the *Trademarks directive*. It asked whether there was a category of trademarks where registration could be refused, as they were not capable of distinguishing their products from those of others, even if they acquired distinctive character through the use made of them.

The ECJ pointed out that there are two preconditions in the directive for a sign to constitute a trademark. The sign must be capable of graphic representation and of distinguishing the products of one undertaking from another. The directive allows refusal of registration for trademarks that are devoid of representative character. However, a sign through use may acquire a distinctive character which it initially lacked. The directive also prohibits the registration of signs that cannot constitute a trademark. Thus, only marks having a distinctive character by their nature or by the use made of them are capable of distinguishing their goods from the goods of other undertakings and are thereby capable of registration.

The Court of Appeal then asked whether the fact that a class of persons associates the shape of a product with a specific manufacturer, believing that all products with that shape come from that manufacturer, is sufficient to give that sign a distinctive character which would enable it to be registered as a trademark. The ECJ held that if at least a significant proportion of consumers identify goods as originating from a particular undertaking because of the trademark, it must hold that the requirement for registering the mark is satisfied. Such circumstances cannot be shown to exist solely by reference to general, abstract data, but must be assessed in the light of the presumed expectations of an average consumer of the category of goods in question. Their identification of the product as originating from a given undertaking must be as a result of the use of the mark as a trademark.

The Court of Appeal had also asked whether it was possible to refuse to register a sign if it is established that the functional feature of the shape of a product are attributable only to a technical result. The ECJ indicated that the directive gives an exhaustive list of the grounds for refusal of signs consisting of the shape of a product. The purpose of these grounds for refusal is to prevent the trademark right from granting its proprietor a monopoly on technical solutions likely to be used by competitors. The directive is intended to preclude the registration of shapes whose essential characteristics perform a technical function, and thus not to prevent competitors supplying a product incorporating such a function or at least choosing a technical solution incorporating such a function. This is pursuing an aim that is in the public interest, as it requires that all may freely use such a shape.

LITIGATION

Brussels convention

Case C-80/00 *Italian Leather SpA v WECO Polstermöbel GmbH & Co*, 6 June 2002. The applicant is an Italian company and the respondent is a German partnership. Italian Leather sells leather-uphol-

stered furniture under the name *Longlife*. WECO sells similar furniture.

In 1996, Italian Leather granted WECO the right to distribute its goods within a specified area. A clause in the agreement provided that the label *Longlife* could only be used to describe suites covered in Longlife leather and could only be used by dealers in advertising with written authorisation from the supplier. Italian courts were given jurisdiction to deal with any disputes.

In 1998, WECO complained of defective performance of the contract by Italian Leather. It indicated that it would sell easy-care leather using its own label. Italian Leather brought proceedings against WECO in Germany to restrain it from marketing easy-care leather under the brand name *Naturia Longlife by Maurizio Danieli*. The German court dismissed the application. A few days before the judgment, Italian Leather applied to the Italian courts for interim measures. The *Tribunale di Bari* gave an order prohibiting WECO from using the word 'longlife' for the distribution of its leather furniture in certain member states, including Germany. Italian Leather sought an enforcement order in Germany on foot of this judgment. The German court refused to grant such an order on the basis that the Italian judgment was irreconcilable with an earlier German judgment, under article 27(3) of the convention. On appeal, the matter was referred to the ECJ. It held that in order to ascertain whether the two judgments were irreconcilable, it was necessary to examine whether the judgment had legal consequences that were mutually exclusive. It was immaterial that the judgments were delivered in proceedings for interim measures rather than on the substance of the dispute. The decisions made by the national courts in this case were irreconcilable.

References to the ECJ

Case C-516/99 *Walter Schmid*, 30 May 2002. Mr Schmid is an Austrian national who appealed his income tax assessment. The Fifth Appeal Chamber of the regional tax authority heard his appeal. It referred the matter to the ECJ for a ruling on the application of free movement of capital rules to foreign dividends. The ECJ initially considered whether the appeal chamber was a court of tribunal within the meaning of article 234. It set out the relevant criteria: whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.

In this case, the criterion of independence was not fulfilled. The expression 'court or tribunal' in article 234 means an authority which acts as a third party in relation to the authority which adopted the contested decision. In this case, the appeals chamber had an organisational link with the tax assessing body and therefore could not be regarded as a third party to it. Two of the five members of the appeals chamber were also members of the tax authority. The president of the tax authority may also act as president of the appeals chamber. He is given the power to nominate members of the appeals chambers. The president could modify the composition of an appeals panel while an appeal was being heard. Thus, members of the panel cannot be said to enjoy sufficient safeguards against undue intervention or pressure on the part of the executive. G

Members of the Council of the law Society of Ireland 2002/03

Pictured are: (*front row, from left*): Rosemarie Loftus, Laurence K Shields, Orla Coyne, Moya Quinlan, Ken Murphy (director general), senior vice-president Gerard Griffin, president Geraldine Clarke, junior vice-president John Fish, Patrick O'Connor, Marie Quirke, John Costello, Hugh O'Neill. (*Middle row*): Gerard Doherty, Philip Joyce, Helen Sheehy, Stuart Gilhooly, Angela Condon, Owen Binchy, Thomas Murran, Elma Lynch, Patrick Dorgan, John P Shaw, Anne Colley, James MacGuill, Helene Coffey, Donald Binchy, Anthony H Ensor. (*Back row*): John O'Connor, John P O'Malley, Michael Boylan, Kevin O'Higgins, Michael Irvine, John D Shaw, James McCourt, Andrew Cody, Simon Murphy. Absent from photo: Peter Allen, David Bergin, Andrew Dillon, Eamonn Fleming, Patricia Harney, Ward McEllin, Eamon O'Brien, James O'Sullivan, Michael Quinlan, Brian Sheridan, James Sweeney, and Fiona Twomey

Subscriptions to the *Legal diary*

Following the recent liquidation of Mount Salus Press, the company that used to publish the *Legal diary*, the Law Society has been asked by the Courts Service to ascertain from members whether they would be prepared to subscribe to a new *Legal diary* in print format. (The Courts Service has been publishing the diary in downloadable form on its website at *www.courts.ie* since the collapse of Mount Salus Press.) Members should bear in mind that the level of subscription charged for any new printed version of the diary will depend on the degree of take-up by the profession.

To help the society and the Courts Service to determine the level of demand, please return the form below (or a photocopy) to the *Law Society Gazette*, Blackhall Place, Dublin 7 (fax: 01 672 4877)

Please tick appropriate box:

☐ **I would be prepared to subscribe to the *Legal diary***

☐ **I would not be prepared to subscribe to the *Legal diary***

Lady Solicitors' Golf Society

The first outing of the Lady Solicitors' Golf Society in 2003 is at Elm Park golf club, Donnybrook, Dublin 4 on Friday 9 May 2003. All are welcome.

Notices will be sent to members of the society around the end of March/early April. (Note, the number of places is limited to 45).

Any new members interested in joining the society should send the following to Mary Molloy, 2 Rose Inn Street, Kilkenny:

- Name, address and DX number
- Details of golf handicap
- Membership subscription of €13, made payable to the Lady Solicitors' Golf Society.

Note for diary: captain's prize will be held at Kilkenny Golf Club on 5 September 2003.

Reflections of the Leitrim bar

The Leitrim Solicitors' Bar Association met in January 2003 (*front row, from left*): Claire Moran, Michael P Keane, association president; Brendan Lynch, former state solicitor for Leitrim; Law Society president Geraldine Clarke; director general Ken Murphy; Gerard Gannon, county solicitor; and Paddy Duffy. (*Back row*): Gerry Kilrane; Niamh McGovern; Gabriel Toolan, secretary; Áine Gordon; Michael Keane; Berna Gibbons; Fergal Kelly; Kieran Ryan; Noel Quinn; Noel Farrell, state solicitor for County Leitrim; Conor Maguire; and Peter Collins

A day in the 'decies'

Pictured at a meeting of the Waterford Law Society in January were (*front row, from left*): Margaret Crowley; Ann Murran; Margaret Fortune, secretary; director general of the Law Society Ken Murphy; John Purcell, president; president of the Law Society Geraldine Clarke; Tom Murran, public relations officer; Derry O'Carroll; Brian McCarthy, treasurer. (*Middle row):* Paddy Gordon; Liz Dowling; Bernadette Cahill; Frank Heffernan; Helen O'Brien; Johanna Geary; Brona McNamara; Rosie O'Flynn; Emmet Halley; Eva Lalor. (*Back row*): Gillian Kiersey; Niamh White; Jim Hally; Pat Burke; Gerard O'Herlihy; Danny Morrissey; Myles O'Connor; and Bryan Douglas

Keep on running!

The Calcutta Run, the annual charity event organised by solicitors, will take place on Saturday 17 May. It is a 10K fun 'run' (though you can walk, hop or roll on your side if you like), followed by a barbecue at Blackhall Place. Participants raise money through sponsorship, and over the last four years they have raised more than €600,000. Pictured here are some of the 1,400 participants in last year's run, which exceeded targets and raised €225,000 for GOAL and Fr Peter McVerry's shelters for homeless youths in Dublin.

For more information about this year's run, go to *www.calcuttarun.com.* The full schedule, including the start-time, the route, and even training tips, should be on the site by mid-March. Have fun!

General insights

Advocate General Francis G Jacobs of the European Court of Justice delivered the third annual hibernian law lecture in association with the Irish Society of International Law. The lecture was *The rule of law and judicial remedies in the EU*. Pictured (*from left*) Mr Justice Nial Fennelly; Aisling Kelly, Hibernian Law Journal; Dr Antje Wiener, Queen's University Belfast; advocate general Jacobs; and Jonathan Tomkin, Irish Society of International Law

At a manor in the banner

Snapped at a recent meeting of the County Clare Law Association, are (*from left*) Chief Superintendent Liam Quinn, Judge Joseph Mangan, Law Society president Geraldine Clarke, president and vice president of the law association, Ronan Connolly and Niall McDonagh

SADSI
Solicitors Apprentices Debating Society of Ireland

Full steam ahead!

Starting in the post of SADSI auditor is remarkably similar to the first few weeks in a law firm as a trainee. The newcomer blazes in, full of new ideas and bursting with fresh insights, only to discover that they have just a vague idea of the practicalities – of how things work in the real world. To say the least, the last few weeks have been instructive, and I could easily fill this article with lavish praise for those who have been generous with their experience and advice. Suffice to say, the outgoing committee has been fantastic, and I would like to express my deepest thanks to Martin Hayes, last year's auditor, Donncha O'Connor and Noel Devins for the meetings, e-mails, texts and faxes that they have organised and directed over the last few weeks.

From discussions with both my committee and other trainees, it is apparent that, while several persistent issues require action, wages are of immediate concern. As the current PPC I class return to their firms and PPC II looms, there is growing confusion about payment for trainee solicitors. I was repeatedly urged to address this chaos on behalf of the trainee body, earlier this year, when faced with an election and canvassing for support. While a significant number of trainees are now paid, many are not. Crucially, many trainees returning for PPC II at the end of April will not be paid while attending Blackhall. I would encourage all trainees facing this situation to contact the Law Society or visit the SADSI website and get the information as to our precise entitlements. Space here will not permit a detailed analysis of the recommended wages structure, but we will dedicate an entire *Gazette* article and a mailshot to the matter very soon.

Wages for trainees are of immediate concern

The wages issue is an on-going and difficult situation, exacerbated by confusion as to whether the figures agreed two years ago were to be index-linked. This will be addressed by my committee as a matter of urgency. I acknowledge the feedback from trainees (and a few solicitors) from the agenda that we mailed in January, and I welcome your comments and suggestions.

Social and personal

On a lighter note, SADSI has always played a prominent role in the social aspect of traineeship and this year will be no exception. The new committee is in the very fortunate position of having, for the first time in a long while, audited accounts. The credit for this must go to Martin and Donncha, who were very conscientious with the books last year. Under the watchful eye of our treasurer Eamonn Kelly, we have set out an ambitious timetable for this session. At the time of writing, there are plans for three major events in the next two months.

Ball control

The first is the upcoming solicitor-trainee football match that is being held in Blackhall Place. Rest assured, we'll be bringing you the photos and the injury list (any would be purely accidental, of course!) just as soon as we have them. The second is the 'sending-off social' for the current PPC I trainees who are finishing their exams in March (best of luck to all!). We hope to hold this party on the evening of the last PPC I exam. Our public relations officer, Nessa Barry, and our PPC I eastern representative, Simon Hannigan, are working hard to secure a venue and sponsorship.

The third event will be the 'welcome back' party for the returning PPC II trainees in April. Lots of interest has been expressed to the committee over the past few weeks and we have been listening. We are endeavouring to find a function room that will accommodate most of PPC II, those of PPC I that can attend, and anyone else that comes along – more news when we have it. Our PPC II eastern rep Lorraine Rowland, and our honorary secretary Sinead Lynch will be sending out a pamphlet and advertising the event in the regular mailshot closer to the time.

Remember your reps

Our regional representatives have been very vocal for more funding for social events, and while this has been agreed in principle, exact figures have not been laid down. To those trainees who are based outside Dublin, I would say: your reps (Cormac O'Regan, south; Dawn Carney, west; and Sonya Heney, mid-west) are working hard in your interests. I urge you to give them your support. They are your first point of contact if a problem or issue should arise. Remember, they volunteered for this job: they *like* and *expect* to be buttonholed and put on the spot. I have complete faith in their willingness to assist their fellow trainees in any way they can. Go to the website for contact details (*www.sadsi.ie*).

As announced in the Law School newsletter, we are currently overhauling the SADSI website to make it as user-friendly and informative as possible. This is part of our drive to open the society to the entire trainee body. The main mission for the website is to allow you to know exactly who represents the trainees, in what capacity, and how to contact them. Additionally, the website may have the information you want, saving you time. We intend to put a lot of information up there. If you feel that the website should have a particular article, let us know. We'll do our best to incorporate it.

On behalf of my committee, I would like to thank the entire trainee body for their support of the society. We hope to see all of you at the upcoming events in March and April.

Finally, on a personal note, I would like to extend my deepest appreciation to the members of tutorial group (15 October 2001 PPC I) for all their support and votes of encouragement over recent months. G

Des Barry, auditor, SADSI

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 7 March 2003)

Regd owner: Maura Eithne Pendred, Gowna, Co Cavan; folio: 9254; lands: townland of Loch Gowna; **Co Cavan**

Regd owners: Margaret Danaher and Patrick J Danaher; folio: 29002; lands: townland of Doonnagore and barony of Corconroe; **Co Clare**

Regd owner: Michael Lynch; folio: 1002F; lands: Clonroad More and barony of Islands; **Co Clare**

Regd owner: Patrick Cullinane; folio: 30696; lands: a plot of ground being part of the townland of Caherbeg and barony of Carbery East (west division) in the County of Cork; **Co Cork**

Regd owner: John Hennessy; folio: 760; lands: a plot of ground being part of the lands of Gortnahomna Beg and barony of Imokilly in the county of Cork; **Co Cork**

Regd owner: Cork County Council; folio: 50710; lands: a plot of ground being part of the townland of Flats and barony of Muskerry West in the county of Cork; **Co Cork**

Regd owner: Richard Hurley; folio: 61820F; a plot of ground being part of the townland of Oldcourt and barony of Carbery West (east division) in the County of Cork; **Co Cork**

Regd owner: Cornelius Kelleher; folio: 56650; lands: a plot of ground being part of the townland of Augeris and barony of Muskerry West in the county of Cork; **Co Cork**

Regd owner: Michael O'Keeffe; folio: 3055; lands: a plot of ground being part of the lands of Lyradane and barony of Barretts in the county of Cork; **Co Cork**

Regd owner: Thomas O'Sullivan; folio: 52635F; lands: a plot of ground situate in the townland of Garraunawarrig Upper and in the barony of Dunhallow in the county of Cork; **Co Cork**

Regd owners: Philip Roche (deceased), Katherine Roche and John Luke Roche; folio: 13638F; lands: townland of Burgess Lower and barony of Imokilly; **Co Cork**

Regd owner: John Ryan; folio: 11746F lands: Gortatoghter; **Co Clare**

Regd owner: Hugh Brogan, Ballybofey, Co Donegal; folio: 4920; lands: Stranorlar; area: 2.7812 acres; **Co Donegal**

Regd owner: Kathleen Connolly, Higginstown, Ballyshannon, Co Donegal; folio: 20328; lands: Carrickboy; area: 6 acres, 3 perches; **Co Donegal**

Regd owner: Dorothy Kirk, Cloughroe, Kilmacrenan, Letterkenny, Co Donegal; folio: 79; lands: Legnahoory; area: 47.0375 acres; **Co Donegal**

Regd owner: Cornelius Horan; folio: DN17269F; lands: a plot of ground known as 9 Artane Cottages Lower in the parish and district of Killester; **Co Dublin**

Regd owner: Michael and Siobhan Murray; folio: DN79845L; lands: property being an apartment known as 102 Custom Hall in the parish of St Thomas and the district of North Central; **Co Dublin**

Regd owner: Paul White and Caitriona Bracken; folio: DN104150F; lands: property to the north of Navan Road in the city of Dublin; **Co Dublin**

Regd owner: Ebbtide Ltd; folio: DN3264; lands: property situate in the townland of Kinsaley in the barony of Coolock; **Co Dublin**

Regd owner: Fiona Hughes; folio: 140597F; lands: a plot of ground known as site no 21, Ash Park Heath, Lucan situate in the townland of Esker South and barony of Newcastle; **Co Dublin**

Regd owners: Fiona and Maurice Keenan; folio: DN87272L; lands: known as apartment no 16, second floor and carpark space no 13, Kings Court, Parnell Street in the parish of St. Mary's and district of North Central; **Co Dublin**

Regd owner: Elizabeth Field; folio: DN3823; lands: property in the townland of Balally in the barony of Rathdown; NB, notification due within 14 days; **Co Dublin**

Regd owner: Lorraine Lowry; folio: DN62981L; lands: property situate to the South East of Tandy's Lane in the town and parish of Lucan; **Co Dublin**

Regd owner: Odlum Group Ltd; folio: 26464F; lands: a plot of ground known as 60 Ayrefield Drive being part of the townland of Tonlegee and barony of Coolock; **Co Dublin**

Regd owner: Vincent O'Toole; folio: 22254; lands: Kylemore; Area: 20.5074 hectares; **Co Galway**

Regd owners: Donal and Maire O'Connor; folio: 36402F; lands: townland of Rahoonane and barony of Tralee; **Co Kerry**

Regd owner: Ellen T O'Connor; folio: 1002F; lands: townland of Tralee and barony of Trughanacmy; **Co Kerry**

Regd owners: Albert and Madelaine Nolan; folio: 16517; lands: townland of Newtown and barony of North Salt; **Co Kildare**

Regd owner: John Kenny; folio: 10765f; lands: Waddingstown and barony of Iverk; **Co Kilkenny**

Regd owner: Leaville Enterprises Ltd, Roden Place, Dundalk, Co Louth; folio: 7917; lands: Newtownbalregan; area: 23.0937 acres; **Co Louth**

Regd owner: Mary Curry; folio: 5964; lands: Derryool and barony of Costello; **Co Mayo**

Regd owner: Michael Murray and Denise Madden; folio: 35813F; lands: Kilmoremoy; **Co Mayo**

Regd owner: Damien and Katrina Smyth; folio: 9600F lands: townland of Tawnaghmore and barony of Tirawley; **Co Mayo**

Regd owner: John O'Donnell; folio: 19387; lands: townland of Aughoose, Pullathomas, Ballina; **Co Mayo**

Regd owner: Michael Gibbons; folio 6440F; Annies Bridge, Hollymount, Claremorris, lands: townland of Annies and barony of Kilmaine; **Co Mayo**

Regd owner: George A Hunter, Fermoyle, Calry, Co Sligo; folio: 181; lands: Clondoogan; area: 0.4062 acres; **Co Meath**

Regd owner: Patrick McHugh, Legganhall, Bellewstown, Drogheda, Co Louth; folio: 24811; lands: Legganhall; area: 54.238 acres; **Co Meath**

Regd owner: Teresa Boland; folio: SL237; lands: townland of Farranyharry and barony of Tireragh; area: 87943 hectares; **Co Sligo**

Regd owner: Thomas Coleman Wims; folio: 8325F; lands: Rathdoony More and barony of Corraw; **Co Sligo**

Regd owner: Gerard Conboy; folio: 10363; lands: townland of Tully Beg; **Co Sligo**

Regd owner: Michael Kielty; folio: 16880; lands: Cuilmore; **Co Sligo**

Regd owner: Arrabawn Co-op Society Ltd; folio: 10890; lands: townland of Clonalea and barony of Ormond Upper; **Co Tipperary**

Regd owner: Daniel McNamara; folio: 21957; lands: townland of Gortaknockeara and barony of Clanwilliam; **Co Tipperary**

Regd owner: Maura Milne; folio: 21457F; lands: townland of Ballincor and barony of Ormond Lower; **Co Tipperary**

Regd owner: Fergus Roche (deceased); folio: 3547; lands: a plot of ground being part of the lands of Knockalahara and barony of Decies-Without-Drum in the County of Waterford; **Co Waterford**

Regd owner: Michael O'Neill (deceased); folio: 12024; lands: a plot of ground being part of the townland of Coolbunnia and barony of Gaultiere in the County of Cork; **Co Waterford**

Regd owners: Maurice Murphy and Anne Murphy; folio: 11072F; lands: a plot of ground being part of the townland of Rathmoylan and barony of Gaultiere in the county of Waterford; **Co Waterford**

Regd owners: Padraig O'Caoimh, Mairtin O'Neill, Seán de Brún, Padraig O'Siothchain; folio: 16390; lands: Clonatin Lower; area: 15 acres, 2 roods, 12 perches; **Co Wexford**

WILLS

Curran, Mary (deceased) late of St. Jude's Turnapin Great, Cloghran, Co Dublin. (Also known as Turnapin Great, Cloghran in the county of Dublin). Would any person having knowledge of the whereabouts of the original will dated 17 December 2000 of the above named deceased who died on or about 12 May 2001, please contact Liam Moran & Company, Solicitors, 11 Malahide Road, Swords, Co Dublin, tel: 01 8404346, fax: 01 8406528, ref: PR2/01

Dowling, John (deceased) late of 4 Petrie Road, South Circular Road, Dublin 8. Would any person having any knowledge of the whereabouts of a will executed by the above mentioned deceased on 21 August 2002, who died on 27 December 2002, please contact Arthur O'Hagan, Solicitors, 9 Harcourt Street, Dublin 2, tel: 01 4758701, fax: 01 4781583

Faughey, Ellen (deceased) late of 431 Cherry Lane, Liverpool, L4 8SB, England. Would any person having knowledge of the whereabouts of an original will which was made on 29 August 1975, please contact Esther McGahon McGuinness & Co, Solicitors, Kilgar House, Jocelyn Street, Dundalk, Co Louth, tel: 042 9334102, fax: 042 9329728

Fenton, David (deceased) late of 54 Copeland Avenue, Clontarf, Dublin 3. Would any person having knowledge of a will made by the above named deceased who died 15 July 1986 at Sir Patrick Duns Hospital, Dublin 2, please contact Kilroys Solicitors, 69 Lower Leeson Street, Dublin 2, tel: 01 4395600, fax: 01 4395602; e-mail: info@kilroys.ie

Lennon, John (deceased) late of 3 Riverside Drive, Lucan Road, Palmerstown, Dublin 20. Would any person having knowledge of a will made by the above named deceased who died on 11 August 2002, please contact Lee & Sherlock, Solicitors, 123 Upper Churchtown Road, Dublin 14, tel: 01 2960931, fax: 01 2690932

Madigan, Winefride (deceased) (otherwise known as Frances Burke) late of Villa Maria, 63 Bird Avenue, Clonskeagh, Dublin 14 who died on 10 January 2003. Would any person having knowledge of a will made by the above named deceased, please contact Mannion Solicitors, Oranmore House, Taney Road, Dundrum, Dublin 14, tel: 01 2989344, fax: 01 2989846; e-mail: tmannion@oceanfree.net

Murray, Annie (Ann) (deceased) late of 9 Melvin Road, Terenure, Dublin 6W. Would any person having knowledge of a will made by the above named deceased who died on or about 29 March 1980, please contact Mr Damien Kelly, Kelly & Griffin, Solicitors, 77 Terenure Road North, Terenure, Dublin 6W, tel: 01 4901185, fax: 01 4903505

Noonan, Josephine (otherwise Nora Josephine Noonan) (deceased) late of Bridge House, Milford, Charleville, Co Cork and formerly of 68, The Rock, Middleton, Co Cork. Would any person having knowledge of a will

made by the above named deceased who died on 5 January 2003, please contact James Binchy & Son, Solicitors, Charleville, Co Cork, tel: 063 81214

O'Toole, Andrew (deceased) late of 96 Mangerton Road, Drimnagh, Dublin 12. Would any person having knowledge of a will made by the above named deceased who died on 3 July 2002, please contact Power Stephens & Co, Solicitors, Deanstown House Main Street, Blanchardstown, Dublin 15, tel: 01 8214340, fax: 01 8217767

Roche, John Martin (deceased) late of Emone, Belclare, Tuam, Co Galway. Would any person having knowledge of a will made by the above named deceased who died on 21 January 2003 or information in relation to a wife, *de facto* partner or children of the deceased, please contact Peter Keane, Solicitor, of Keanes Solicitors, Hardiman House, Eyre Square, Galway; tel: 091 566767 or fax: 091 565075; e-mail: info@pmkeane.ie

Roche, Mary (deceased) late of The Lighthouse, Knockaclare, Lyreacrompane, County Kerry. Would any person having knowledge of a will made by the above named deceased, please contact Stephen J Daly, Solicitors, The Square, Abbeyfeale, County Limerick, tel: 068 31300/31005, e-mail: stephanj.daly@eircom.net

Whelan, Thomas Anthony (deceased) late of Seafield, Ballymoney, Gorey, Co Wexford and formerly of 179 St. Peter's Road, Walkinstown, Dublin 12. Would any person having knowledge of a will made by the above named deceased who died on 29 October 2002, please contact Redmond & Company, Solicitors, Bridge Point, Abbey Square, Enniscorthy, Co Wexford, tel: 054 342585, fax: 054 34277

EMPLOYMENT

Locum solicitor available with wide experience of general practice, particularly conveyancing, probate, and litigation. Reply to **Box No 12**

Assistant solicitor required for busy expanding practice in Ennis, Co Clare. Experience in litigation, conveyancing and probate required. Salary commensurate with experience. Reply with CV to Kerin, Hickman & O'Donnell, Solicitors, 2 Bindon Street, Ennis, Co Clare, tel: 065 6828712/6828466

Assistant solicitor required for general practice in Roscommon town, Co Roscommon. PQE required in conveyancing, probate, litigation and family law. Applications with CV to Messrs Conleth Harlow & Co, The Square, Roscommon

Solicitor required, with two years post-qualification experience with emphasis on litigation, for the Mid-West region. **Box No 20**

Experienced locum solicitor – general practice experience, seeks position part-time or full time, Cork/Kerry areas preferred. **Box No 21**

Locum solicitor - experienced solicitor required for Roscommon town practice for 3-6 months late June. Send CV in confidence to Russell Brennan Keane, Castle Street, Roscommon, marked for the attention of Mary-Louise Dillon

Semi-retired country solicitor will undertake conveyancing and probate work from home, modern office facilities, might suit firm unable or unwilling to employ full-time assistant, would consider limited attendance at employer's office. **Box No 22**

Solicitor required (recently qualified might suit) for administrative, environmental, and planning litigation and general practice. Good long-term prospects, please contact Barry Doyle and Company, 17 Percy Place, Dublin 4

Locum Solicitor available in Dublin with experience in conveyancing, litigation, probate and commercial. Reply to **Box. 26**

Solicitors Practice for sale. Sole General Practice in South Dublin. Principal may be available to remain as consultant. Reply to **Box 27**

Solicitor with 4 years PQE required by established practice. Experience in conveyancing, probate and litigation needed. Attractive package and prospects for suitable candidate. Apply to PJF McDwyer & Co Solicitors, Belturbet, Co Cavan

Full-time book-keeper required for busy solicitors office in Nenagh, County Tipperary. Knowledge of computerised accounting systems essential together with experience in dealing with payroll and VAT returns. Apply in writing, enclosing CV, to Mr P J Slattery, Slattery Flynn & Co, Registered Auditors & Certified Public Accountants, Friary House, Friary Street, Nenagh, Co Tipperary

Locum solicitor available with strong civil litigation experience, some family, conveyancing and probate; March/April 2003 to September 2003; Dublin/Meath/Kildare. Reply to **Box No 23**

MISCELLANEOUS

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

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

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

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

England & Wales solicitors will provide comprehensive advice and undertake contentious matters. Offices in London, Birmingham, Cambridge and Cardiff. Contact Levenes Solicitors at Ashley House, 235-239 High Road, Wood Green, London 8H, tel: 0044 208817777, fax: 0044 2088896395.

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Translations: Legal translations by English mother tongue court interpreter, French/English, Spanish/English. tel: 07163550, e-mail: fejmcnab@eircom.net

Solicitor Client wishes to acquire a general practice/block of clients in the Dublin area. May suit sole practitoner planning a phased retirement. Apply in strictest confidence to: Michael J Joyce & Co, Chartered Accountants, Claregate Street, Kildare Town, Co Kildare

For Sale: seven day publican's licence. Offers to F.P. Gleeson & Co Solicitors, Thurles, tel: 0504 22577, fax: 0504 22213, ref: WFG or e-mail: info@tipperarylaw.com

For Sale: seven-day publican's licence. Interested parties are invited to apply to MJ O'Connor, Solicitors, 2 Georges Street, Wexford. Reference JOL.

For Sale: ordinary seven-day publican's licence. Please contact Anne Hickey, Solicitor, Wine Street, Sligo, tel: 071 46042, fax: 071 46275 e-mail: hickeyso@iol.ie

For Sale: seven day licence, Donegal. **Box No 25**

Wanted: ordinary seven-day publican's licence. Please contact Daniel G McGrath, Solicitors, Dublin Road, Tuam, Co Galway, tel: 093 25411, fax 093 24232, e-mail: mcgrathsolicitors@eircom.net

Wanted publican's ordinary 7 day licence. Replies to Carmel Sreenan, Sreenan & Company, Solicitors, Kenmare, Co Kerry, tel: 064 42656, fax: 064 42658

TITLE DEEDS

Thomas Mary Joan (otherwise Joan Thomas) (deceased) late of 11 Castilla Park, Clontarf, Dublin 3. Would any person having knowledge of the whereabouts of the title documents of property, held in the name of the above named deceased, known as 11 Castilla Park, Clontarf, Dublin 3 situated in the parish of Clontarf, barony of Coolock and city of Dublin please contact Bohan Solicitors, 3 Inns Court, Winetavern Street, Dublin 8, tel: 01 6779616.

SOLICITORS' HELPLINE

The Solicitors' Helpline is available to assist every member of the profession with any problem, whether personal or professional.

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If you require advice for any reason, phone: 01 284 8484

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