Law Society Gazette

Regulars

Cover Story

Editor: Conal O'Boyle MA. **Assistant editors:** Kathy Burke, Garrett O'Boyle. **Designer:** Nuala Redmond. **Editorial secretaries:** Catherine Kearney, Valerie Farrell. **Advertising:** Seán Ó hOisín, 10 Arran Road, Dublin 9, tel: 837 5018, fax: 884 4626, mobile: 086 8117116, e-mail: seanos@iol.ie. **Printing:** Turners Printing Company Ltd, Longford. **Editorial Board:** Pat Igoe (Chairman), Conal O'Boyle (Secretary), William Aylmer, Tom Courtney, Eamonn Hall, Mary Keane, Ken Murphy, Michael V O'Mahony, Alma Sheehan, Keith Walsh

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 98, number 6
Subscriptions: €57.15

rochford brady group

...information as you need it

- Company Registration Office
- Closing Searches
- Copy Folio/File Plans
- Folio Inspections
- Registry of Deeds
- Licensing
- Planning
- Probate
- Title Registration
- Birth, Marriage & Death Certificates
- Mapping Searches

rochford brady legal services
64 francis street
dublin 8
tel 1850 529 732
fax 1850 752 436
www.lawsearch.ie
email: rochford@lawsearch.ie

- Irish Company Information
- UK Company Information
- Land Registry
- CID Search
- Watch List
- Closing Searches
- Judgment Searches
- Global Company Information
- Legal Diary
- Legal search archive
- Bonded searches

LawLink Ltd.
7/8 mount street crescent
dublin 2
tel +353 1 480 1800
fax +353 1 480 1801
www.lawlink.ie
email: support@lawlink.ie

Public service and the profession

I was saddened to learn of the death of Donal Binchy last month after a long illness. Don was a predecessor of mine, serving as president of the Law Society in 1990/91. As I attended his funeral, in the company of a great many of his solicitor colleagues, from Clonmel and much further afield, I was struck once again by what a unique profession we are.

Don Binchy, to me and to many of his colleagues, typified the spirit that sets our profession apart from others. His was a life of public service, to his local community, to his profession and to his professional body. Such was his stature and his reputation for integrity that, uniquely for a past president, he was asked to chair the Finance Committee in 1993 at a time when the profession was under severe financial pressure following the spectacular collapse of a number of solicitors' practices. The profession knew that it could rely on Don to make the hard decisions but, more importantly, to make the right decisions.

Similarly, when the annual general meeting of members demanded a root-and-branch review of the Law Society and its functions in 1994, it was Don Binchy who was asked to chair the review group.

Don was the kind of solicitor we all aspire to become. He was the kind of man whose approval we desired. He gave of his time, energy and wisdom to his colleagues and to his society, and sought nothing in return because, to him, that is what it meant to be a member of a profession.

And listening to his colleagues reminisce about the man, I understood just how important it is to preserve and nurture that unique spirit in today's solicitors' profession. We have never had a stronger or bigger profession, yet conversely there has never been a greater need for the kind of collegiality and voluntary service that has always made this profession so special. It is part of our wonderful legal heritage.

I would urge colleagues to involve themselves in their local bar associations and, at national level, in the work of the Law Society. Stand for election, volunteer to serve on committees, give your time and expertise to colleagues as tutors or lecturers. Above all, play your part.

The Law Society alone has, at last count, some 27 committees, nine task forces or working groups, and representation on a wide range of other bodies. We need your help to be able to carry on this work. We need your involvement. You are the lifeblood of the profession, and without your active support and involvement, it will wither away.

At Don's funeral, his colleague Paul Morris, on behalf of the profession in Clonmel, gave an oration at his graveside. This is part of what he said:

'The hallmark of Don Binchy's dealings with his clients, his colleagues and the public at large was courtesy. He recognised each person's innate dignity as a fellow human being, as a valid moral entity, which is the very foundation of our respect for human life itself and our sense of justice.

Don's other eternal passion was his love of the law itself. He wore his knowledge of the law lightly and shared that knowledge with his colleagues generously and with humility without any sense of condescension.

Fred and Donald may be justifiably proud of their father, who not only knew his law with rare depth, insight and understanding, but most importantly of all could make it understandable to his clients and thereby give good counsel'.

That is what it means to be a solicitor. And it is still something we should all aspire to.

Gerard F Griffin,
President

'We have never had a stronger or bigger profession, yet there has never been a greater need for collegiality'

NATIONWIDE
News from around the country

CLARE

New courthouse

Good news from the Banner County, with the announcement that the old courthouse has been fully refurbished and is again open for business. 'We had been having the District Court in the local GAA Éire Óg social room with the bar in the background for the past three years, which is hardly worthy of the dignity of the court', noted Ann Walshe, honorary secretary of the Clare Bar Association.

The official opening is scheduled for 12 July.

And new county registrar

Solicitors in Clare are also happy that nearby Limerick practitioner, Pat Wallace, has been appointed county registrar. The position had been vacant since the death of Enda Brogan in 2002.

'This is an important position and should not have been left vacant for so long, but the staff and neighbouring county registrars all helped us to get by', Walshe said.

DUBLIN

Chief justice retiring

On the eve of the forthcoming retirement of Chief Justice Ronan Keane, leading members of the Dublin Solicitors' Bar Association met him in his chambers in the Four Courts. Addressing him on behalf of the 3,500 practising solicitors in Dublin, John O'Connor paid tribute to his extraordinary legal career both as a practitioner, a legal author and judicial colossus who has always been held in the highest regard by the Dublin legal profession. A framed parchment was presented to the chief justice, together with a piece of Dublin Crystal. The chief justice expressed his warm appreciation and high regard for the solicitors' profession.

President Mary McAleese and Dublin solicitors at the relaunch of the *Solicitors' helpline*

President McAleese launches helpline

Many Dublin solicitors were greatly honoured to be received by the President of Ireland, Mary McAleese, in Áras an Uachtaráin recently. The occasion was used to relaunch and publicise the *Solicitors' helpline*. The president spoke of the 'giddy' times through which the legal profession was living and the perception that perhaps lawyers had never had it so good. She remarked that while we are living in times of plenty, she felt that there also existed among our profession victims of this success.

The helpline was, she felt, a worthwhile and necessary support which was managed and maintained by solicitor colleagues. She was more than happy to endorse it. In fact, she drew from her own personal experience of a solicitor friend of hers who had recently committed suicide, which had utterly shocked his family and friends as there were no apparent reasons as to why he should have done so.

KERRY

Continuing professional development

The CPD requirement on solicitors is proving a most useful way of ensuring that we are all up-to-date on legal issues, according to Pat Sheehan, honorary secretary of the Kerry Law Society. They are still taking suggestions from members on the issues to be covered and their courses will begin in September. 'It is an excellent stimulus and ensures that we continue our necessary legal education', he said.

LAOIS

Personal Injuries Assessment Board

The Laois Solicitors' Association continues to hold meetings about PIAB and is continuing to liaise with its counterparts in Limerick on joint moves. Christina Dobbyn, honorary secretary of the association, has been meeting leading members of the Limerick Bar Association. She will shortly be reporting back to her association on proposals on the way forward.

Judge Alan Mahon

Laois solicitors recently welcomed back Judge Alan Mahon to the Circuit Court in Portlaoise during a break from his eponymous tribunal in Dublin. At the function, they also honoured colleague Paul Ryan of PP Ryan & Company, who has been in private practice for 60 years.

TIPPERARY

Solicitors' support

Solicitors should support each other in a threatened profession, Eugene Tormey, president of the Tipperary Solicitors' Bar Association, said at their recent annual dinner. Solicitors should realise the importance of mutual support and also support themselves by supporting their local bar associations. It was a case of the old cliché of 'hang together or hang separately'. The dinner was attended by two guests, chief superintendents Pat Murray and Kevin Ludlow.

Delegation to the Dáil

A delegation from the association recently met three members of the Dáil Justice Committee to make submissions on the *Civil Liability Bill and Courts, 2004*. 'Among the issues we raised is the proposed reduction of the statutory limitation time from three years to one, which could lead to a denial of justice', according to the delegation's leader Eugene Tormey. The other delegates were Philip Joyce and Maura Derivan. They met Séan Ardagh TD, Peter Power TD and local TD Maura Hoctor.

Annual dinner

In a move that may be followed by other non-Dublin bar associations, the Tipperary Solicitors' Bar Association is heading off to Budapest in September for its annual conference. The theme will be *European Union expansion and its legal implications*. A line-up of speakers is being arranged. G

Nationwide is compiled by Pat Igoe, principal of the Dublin law firm Patrick Igoe & Co.

Braiden promises early survey on support services for the profession

Olive Braiden, chairperson of president Gerry Griffin's Support Services Task Force, is planning a survey of all solicitors. She believes that this is an essential first step if the services of the Law Society are to be developed. The survey will identify the problems that solicitors have in their practice situations.

This is the first time that such a comprehensive survey has taken place. Every solicitor in the country is being given an opportunity to make a statement about their needs in their particular circumstances. This will help the Law Society plan new services to meet the needs of solicitors everywhere.

The survey will also review the effectiveness of the existing services provided by the Law Society and others. According to Braiden: 'While I am encouraged by the number of services already in place, it appears that these are under-utilised. They would benefit from being promoted more actively. I know from speaking to solicitors that they are not aware of all the services that are available'.

The survey will test the awareness of the services in the profession. Even doing the survey may help many solicitors to become aware of services that they did not know existed.

'My experience has been that as soon as a service is put in place, the difficulty is not in promoting the service but rather in trying to put in place resources to operate the service at an acceptable level to meet demand. I understand that over the years each Law Society service and other services for solicitors have been developed in response to a particular need. Those needs undoubtedly still exist. We need to ensure that the services are reaching the solicitors who need them', said Braiden.

'The Law Society needs to be sure that they are responding to the members' current needs. As times change, needs change. A solicitor in practice today has a very different experience to the experience of a solicitor practising 30 years ago. Solicitors are no different from any other group. The pressures of practice have grown enormously. The pace of life is much faster and the demands of clients are much greater. Clients can be quite aggressive in their dealings with solicitors.

'Most solicitors cope well with practice but would undoubtedly welcome more support. Every new service which can be put in place, or every existing service which can be further developed, ensures that solicitors will continue to cope. If support can be accessed as soon as a problem is identified by a solicitor, the problem can be dealt with and will not develop into a crisis. Early help is much more useful than help when the solicitor has reached a crisis'.

Braiden: solicitors' needs change with the times

Law Society president Gerry Griffin draws attention to the problems of solicitors who, for whatever reason, have already reached a point of crisis. 'Most solicitors in practice come across colleagues who are among a small group of solicitors whose personal problems are affecting their professional lives and the lives of their clients', he says. 'These people urgently need assistance. We must try to ensure that they can be directed to appropriate services, whether medical or otherwise, which would best help them to rehabilitation'.

And Olive Braiden adds: 'There are approximately 6,500 solicitors in practice, and we would like to hear from each of them. A survey such as this is unlikely to be repeated in the short term.

'We have made a decision to issue this survey by post so that we can be sure that it arrives on each individual solicitor's desk. However, we are emphasising that the survey can also be answered on-line. It will be available on the Law Society's website at *www.lawsociety.ie*. We are encouraging solicitors to respond on-line and we realise that for a large number of solicitors this will be the preferred option.

'We have tested the survey and are happy that it will only take between ten and 15 minutes to complete. This will be time well spent. Who knows? Ten minutes spent by a solicitor now may save that solicitor many hours in the future because when that solicitor needs a particular service, it will be in place, ready and waiting to be accessed!

'I look forward to a really good response'.

The survey will issue to the profession early in July.

New web area for training solicitors

The Law Society website now has a new section dedicated to training solicitors, *writes apprenticeship officer Fionna Fox.* This new section is available on the members' area and includes information on:

- Who is eligible to be a training solicitor
- How many trainees a solicitor can employ at any one time
- The training programme
- Trainee salaries
- Tax relief in respect of course fees, and
- Secondments.

The site also displays the CVs of those students who are eligible to attend the PPC1 course but who have not yet secured a training contract. If you are looking for a trainee, this is the ideal place to find one. And if you require temporary assistance, some of the candidates on the register might consider a temporary position. Time working with a firm before the PPC1 starts in the autumn can act to reduce the length of time of the training contract. This is called obtaining 'credit', and details of how the credit system works is available on the website.

OVER 1,000 ATTEND PIAB SEMINARS

The single biggest educational seminar ever organised by the Law Society, attended by some 360 solicitors, was held in the Silversprings Hotel in Cork on 31 May, *writes Ken Murphy*. By coincidence, it was the day preceding the coming into force, for employer liability cases, of the *Personal Injuries Assessment Board Act, 2003*.

In total, over 1,000 solicitors attended Law Society seminars, organised free-of-charge for members, on this topic in Dublin (twice), Cork, Sligo, Galway and, by video-link, Thurles. The seminar provided a very detailed practical analysis of the PIAB legislation and rules. Two speakers, Ken Murphy and Stuart Gilhooly, spoke at all the seminars, with Roddy Bourke and Patrick Groarke sharing the third speaker position. Chairmen at the various venues included Ward McEllin, Elma Lynch, Ernest Cantillon, Peter Allen and Maura Derivan.

'This was the biggest number ever to attend a Law Society organised series of CLE or CPD lectures. The level of interest was phenomenal and the evaluation forms filled out by those who attended indicated a very high level of satisfaction with both presentation and content', said the society's CPD executive Barbara Joyce, who organised the seminars. Her colleague Lindsay Bond, who organised the seminars held outside Dublin, said: 'It is clear there will be a demand for more seminars on PIAB next year when some experience of its operation has emerged'.

Overhaul urged for High Court injuries actions

Personal injuries procedures in the High Court need a comprehensive overhaul, according to a new report. The system currently in use is 'not appropriate to modern personal injuries litigation'. The report recommends that the necessary changes could be made most effectively by amending the rules of court.

The report, published by the Committee on Court Practice and Procedure in late June, says that there should be a reduction, to two years, in the time allowed to lodge a personal injuries claim, greater enforcement of deadlines for advancing cases, and penalties introduced in relation to costs for causing delays or introducing unnecessary expert witnesses. It also recommends that people who bring false or exaggerated claims should be penalised, and advises that both the plaintiff and defendant should verify on oath the contents of the pleadings.

Mrs Justice Susan Denham, who chaired the committee

Among 23 recommendations for changes in court practices, the report says that case management of personal injuries actions should be introduced 'in appropriate cases', that court rules should have a more realistic, but more strictly enforced, timetable for the different steps in pre-trial procedures, and that the parties should lose control of the pace of the action and the courts should be more proactive in moving the case on.

• *A more detailed analysis of the committee's recommendations can be found on p20 of this month's issue.*

Two years are better than one

In response to intense lobbying by the Law Society and a number of other organisations, the period in which personal injury cases may be brought in future will be two years, *writes Ken Murphy*. This replaces than the one year originally provided for in the *Civil Liability and Courts Bill, 2004*.

The bill had originally reflected the desires of the business and insurance lobbies that the *Statute of limitations* be altered to reduce the period for bringing a personal injuries claim from three years to one year. The society immediately opposed this as completely impractical, unfair and unjust to accident victims and contacted others who might share the same views.

A number of local bar associations (Tipperary in particular), together with accident victims' groups such as Patient Focus and Cheshire Ireland, as well as the State Claims Agency, lobbied justice minister Michael McDowell. Following a very constructive debate and urging from members on all sides of the Seanad, the minister was persuaded and accepted an amendment from Senator Sheila Terry to increase the limitation period in the bill from one year to two.

Director general Ken Murphy believes that the lobbying produced 'a satisfactory outcome in the circumstances'.

Four Courts or Fort Knox ?

'Airport style' security checks and a reduced number of points of access to the Four Courts are among the ideas being considered by the Courts Service as part of a major upgrade of security in the Four Courts. Representatives of the Court Service have met the Law Society to discuss these plans, but no final decisions have been taken yet.

The society is supportive of measures to increase security within the Four Courts provided they are practical and do not unduly inconvenience the thousands of people who use the Four Courts building every day.

'Any significant delays in entering the Four Courts or reduction in the number of points of access would be matters of serious concern', said director general Ken Murphy.

Reform of conveyancing and land law on the cards

The government has announced plans to modernise conveyancing and land law. The project was announced by justice minister Michael McDowell on 29 June and will be jointly carried out by his department and the Law Reform Commission.

According to the minister, the project aims to repeal over 100 pre-1922 statutes – the earliest of which date back to the 13th century – and to replace them, where necessary, 'with modern provisions that meet the needs of the 21st century'.

The project has three phases, the first of which began in early 2004 and has involved the screening of existing legislation with a view to identifying statutes that can simply be repealed without replacement and those that need to be replaced with modern provisions. This phase will culminate in the publication by the Law Reform Commission of a consultation paper in October 2004, which will present the results of the screening process and contain pointers for future reforms.

Conveyancing: over 100 pre-1922 statutes could be repealed

The second phase includes a conference on *Modernising Irish land and conveyancing law* to be held on Thursday 25 November 2004 at the O'Reilly Hall at UCD. The conference, which will be addressed by international guest speakers, will discuss the reform proposals identified in the consultation paper as well as modernisation of the Land Registry and preparations for e-conveyancing. It will be open to all those with an interest in the reform of conveyancing and land law. It is intended to include a conference brochure with further registration details in the August/September issue of the *Gazette*.

The final phase will involve the drafting of a bill (or bills) to give effect to the proposals for reform. The government hopes to have a draft of the new legislation by August 2005.

Society calls for an end to 'rip-off' in house stage-payments system

'A straightforward rip-off' is how Cork solicitor Patrick Dorgan recently described the system, which still prevails in many parts of Ireland, whereby builders extract payments from buyers of new houses as the houses go up, *writes Ken Murphy*. He was speaking on RTÉ's *Morning Ireland* programme. Dorgan, a Law Society Council member and chairman of the society's Conveyancing Committee, denounced the stage payments system as 'unfair and anti-consumer' and called for legislation to outlaw it.

He was unveiling to the media the results of a Law Society-commissioned survey, conducted by the accountant and financial analyst Des Peelo, which concluded that in an average €250,000 house, the cost of financing stage payments to the purchaser is about €7,000. 'How many carpets and how many curtains and how many cookers can they buy for that money?, Dorgan asked.

According to Peelo's report, widely reported in the print and broadcast media with comment welcoming the Law Society's highlighting of this issue, the total cost to the new house-buying sector, at current levels, could be of the order of €175 million a year.

Subsequent to Dorgan's media interviews on the subject, Senator Paul Coghlan of Fine Gael introduced a bill in the Seanad seeking to prohibit stage payments. Although support for the principle of the bill was expressed by senators from all parties, it was voted down by the government.

Minister of State Noel Ahern said he supported the objective of the bill but wished to see whether it could be achieved by consultation with the building industry before resorting to legislation. He said he intended to use the next six months to conduct this consultation.

RETIREMENT TRUST SCHEME
Unit prices: 1 June 2004
Managed fund: 433.135c
All-equity fund: 103.048c
Cash fund: 255.357c
Long-bond fund: 111.748c

A&L GOODBODY APPOINTS FIVE NEW PARTNERS
Dublin law firm A&L Goodbody has appointed five new partners. They are Michael Barr (corporate and technology law), Dominic Conlon (corporate and outsourcing law), James Somerville (corporate tax law), Eamonn Conlon (projects and construction law), and Dudley Solan (projects and construction law). This brings the total number of partners in the firm to 63.

CHIEF JUSTICE SET FOR PARCHMENT CEREMONY
In one of his last official functions before he retires on 19 July, Chief Justice Ronan Keane will be attending the forthcoming parchment ceremony on 15 July at Blackhall Place, where he is expected to address the graduands and their guests.

ECHR CONFERENCE
The Law Society is to host a conference in October on the effect of the *ECHR Act, 2003*, which came into force from January of this year. The one-day conference is entitled *ECHR incorporation review and human rights in gender law* and will be held at the society's Blackhall Place headquarters from 9.30am to 4.30pm on Saturday 16 October. The second part of the conference will look at the contributions and limitations of human rights law in the area of cohabitation, gender change and same-sex unions. Admission costs €25 (concession rate €12) and further information can be obtained from the society's parliamentary and law reform executive, Alma Clissmann, on tel: 01 672 4831 or e-mail: a.clissmann@lawsociety.ie.

The big question: to act or

Now that the Personal Injuries Assessment Board has finally arrived, the big question that solicitors must ask is: to act or not? The answer is easy, writes Stuart Gilhooly

So PIAB is upon us. As you know by now, if your client has an accident at work and is suing his employer, he must first refer the case to PIAB, unless proceedings have been issued in the case before 1 June. So, what do solicitors do if a client comes in with such an accident and asks us to take the case on?

Rule number 1: don't send him away. He won't thank you for it and he probably won't come back. Despite propaganda to the contrary, solicitors can act for claimants in the PIAB process. This is a claimant's fundamental right. There is a common misconception that solicitors are banned from – or will be ignored by – PIAB. This is simply not the case. The grounding act and subsequent regulations are, in fact, entirely silent on the issue of representation except insofar as

Gilhooly: 'help your client – that's why he came to you in the first place'

section 7 of the act specifically allows for a claimant to receive legal advice.

What will happen, as laid down by section 79 of the act, is that PIAB will correspond directly with a claimant even where a solicitor is instructed. However, it is crucial to note that, under the same section, the claimant can nominate an alternative address for service of documents, which can be his solicitor's office. In those circumstances, PIAB must – and has confirmed that it will – send copies of all correspondence to a claimant's solicitor.

Therefore, when your client comes in, it is business as usual – just with a different procedure. The first thing to do is to explain to the client that you will act, but that if he accepts the PIAB award, he will not receive costs, except in very limited circumstances, and most probably not all of his outlay. It is also important to note that, in many cases, the award will not be made due to refusal of the respondent to consent to assessment, or either party may reject the award, meaning that the client will have to issue proceedings anyway. Most clients will be happy to trust you to look after their interests and get the best deal for them.

Once you receive instructions to act, it is advisable to get authority from your client for you to act for them in this process and any subsequent proceedings. This should accompany your section 68 letter. Having done that, a letter-before-action is necessary, as is the acquisition of a medical report. The medical report should be in the form of the template laid down by PIAB at *www.piab.ie* – or at least you should ask the doctor to put it in that format.

Once you have got the medical report, it must accompany the application form (also available from the website) together with a cheque for €50. Attach copies of all *inter partes* correspondence, including the letter-before-action and all vouchers for special damages. And you should send a covering letter stating that you wish your

Getting it right: Danish pa

Agreeing the terms of an inter-state constitution was never going to be easy, and many of the issues that arose during Europe's recent efforts mirror what went on in America over 200 years ago, writes Hugh O'Donoghue

A flurry of inter-governmental activity under the banner of the Irish presidency has now completed the work of the convention on the future of Europe, which has set the framework for the future political, legal, economic and social shape of the European Community. The result is a new constitution for Europe, an outcome that might be considered long overdue.

At present, EC law appears inchoate, consisting of an accretion or amalgam of treaties, bolstered by a body of juridical doctrines, all of which has emerged incrementally (the so-called *Acquis communautaire*). Moreover, the legal patchwork has little in common with the ideal of constitutional government, at least in the republican tradition.

No doubt with those imperfections in mind, comparisons have been drawn lately, not least by Valéry Giscard d'Estaing, between the convention of which he is the chairman and the much celebrated Congress of Philadelphia, which paved the

Birth of a nation: signing the Declaration of Independence

not to act in the PIAB?

office to be the alternative address as allowed by section 79 of the *PIAB Act*.

It is vital to be aware that the *Statute of limitations* only stops running when the completed application form is deemed to be received by PIAB and **not when you post it**. Therefore, it is important to make your application as soon as possible to avoid possible statute difficulties.

Once the application is deemed to be received, you can sit back and wait for the respondent to decide, inside 90 days, whether to go to assessment. If they do not respond within this time limit, they are deemed to consent. A misconception is that consent to assessment is an admission of liability. In fact, the opposite is true. Liability is not admitted in this way. It remains open at all times. If the respondent refuses to consent to assessment, then the claimant will receive an authorisation, which is a

document that you use to issue proceedings. If the respondent does consent, the process continues through to an award, which must take place no later than 15 months after consent to assessment.

If no award is forthcoming by this time, then PIAB must release the case by way of authorisation. In most cases, however, PIAB will be anxious to make an award and will do so, allowing the respondent 21 days to accept the award and the claimant 28 days to do likewise. If the respondent does nothing, he is deemed to accept the award, while if the claimant does nothing, he is deemed to reject the award. If both sides accept or are deemed to accept the award, then the case is settled. If either side rejects or is deemed to reject the award, then an authorisation will issue and proceedings must ensue.

An important point to note is that the *Statute of limitations* is frozen from the date that the application is deemed to be received by PIAB until six months after the issue of the authorisation. Please also be aware that the liability can be fully in issue in subsequent proceedings, regardless of what happens in the PIAB process.

This is a whistle-stop tour of PIAB. Please do not rely solely on this article. There is much more that you need to know before advising your client properly. Believe it or not, a great place to start is the PIAB website. And read the act. It's great bedtime reading.

Most importantly, though, help your client. That's why he came to you in the first place. G

Stuart Gilhooly is a partner at the Dublin law firm HJ Ward & Co and a member of the Law Society's PIAB Taskforce.

stry meets American pie

way for the archetypal republican constitution of 1789. The delegates to the European convention have been likened to the American founding fathers. This comparison might be considered an example of hyperbole, but the parallels are striking. It is timely to look again at these momentous events, separated by over two centuries.

Philadelphia cheese

In 1785, general dissatisfaction with the articles of confederation stirred a number of states to revisit them, but it was Virginia, with the help of the 'brilliant and indefatigable' Alexander Hamilton (the New York representative), that got all the states to a convention in Philadelphia in May 1787. The delegates took as their point of departure a constitutional plan that included a bicameral legislature (two houses of government). According to the Virginian plan, the composition of these houses of parliament was to be apportioned among the states according to their 'free' population. At that time, there were only 400,000 or so free electors in that North American polity. The idea was that the people would directly elect the membership of the first house, and that house in turn would elect the second, both houses together making up a national legislature that itself would elect the executive and the judiciary.

Patriot games

Battle lines were drawn from the start, behind which stood the bigger states, opposed by the ranks of the less populated ones. Like their present-day European counterparts, the small American states did not want to be overwhelmed, and the burning question centred on representation. The impasse that followed was overcome by the 'great compromise' – a proposition sponsored by the 'American Socrates', Benjamin Franklin, that the lower house be elected on the basis of population and that membership in the upper house would be the same for all states. There were other less crucial issues. For instance, the southern states worried about interference with the slave trade – a not inconsiderable apprehension given the significance of this industry. The case of Thomas Jefferson is an example. He owned 55 slaves in Virginia, yet paradoxically he was also the greatest proponent of natural or human rights and the author of the *Declaration of independence*.

In secret sessions, and within three months, the convention in Philadelphia produced a draft constitution for 13 independent legislatures. It included a provision for a brand-new legislature with

power to tax the people, to raise and support armies, and to declare war, as well as provisions creating the office of president. Moreover, the document provided for a national judiciary spearheaded by a 'constitutional court' with appellate jurisdiction over all cases involving the constitution, even those that began in the courts of the individual states. Central to the new order was a system of checks and balances, including the Supreme Court jurisdiction to adjudicate on the exercise of state governance. That novelty, the revered power of judicial review, so-called by Hamilton writing in the *Federalist*, was treasured in later centuries as a shining jewel in the crown of democracy.

In light of our contemporary concerns, another feature of the Philadelphia debate is of interest. This is the 'democratic deficit' - the fear that laws will be enacted by decision-makers who are remote from, rather than elected directly by, the people. Like we Europeans, the fathers of the new American republic shared these worries. 'It is the people', said John Marshall, expressing the ideal, 'that give power, and can take it back'.

The American electors proved reluctant to approve the draft constitution, nonetheless. Virginia herself only ratified the document by ten votes. This was remarkable given that approval was by special convention in which the constitution makers could themselves be participants. A second trump was thought to lie in the fact that as soon as nine of the 13 states voted favourably, the constitution would be triggered. However, despite these structural supports, only the promise of a *Bill of rights* saved it from an early grave.

Federal reserve

Why was it so hard to get the constitution through? The

Letters

Harney's PIAB cheque likely to bounce

From: A Gerard Moylan, Loughrea, Co Galway

The much vaunted, highly controversial *Personal Injuries Assessment Board Act, 2003* became law on Tuesday 1 June 2004. Understandably, there is widespread outrage, anger and bewilderment out there because of this massively massaged, ill-thought-out, inadequately debated and irresponsible piece of legislation.

PIAB is an independent board of assessors who will deal with all personal injuries claims resulting from accidents happening in the workplace, motor and public liability accidents. Since 1 June, it deals with accidents happening in the work environment, and later this year it is intended to embrace all accident claims resulting in personal injuries. It is envisaged that there will be a strict time-limit of one year from the date of an accident within which to bring a claim. Claimants will not have the professional guidance of a solicitor or barrister, except at their own cost. Prior to this, they had automatic access to the courts through their solicitor, whose fees were paid by an insurance company. Claimants were guaranteed just and fair compensation either by way of a professionally-negotiated settlement or by court determination, at no cost to them. This will no longer be the case. They are now on their own, unless they engage a solicitor and pay fees out of whatever compensation may be awarded to them by PIAB.

Harney: yielded to the multinational insurance sector

The new legislation is the brainchild of tánaiste Mary Harney, who, in true Pavlovian style, has yielded to the all-powerful multinational insurance industry, whose annual profits in Ireland alone run into ever-increasing millions. It is bombastically claimed by PIAB that accident victims will now get a better deal and, as a carrot, they spuriously claim that claims will be settled more quickly (nine months has been mentioned). They also claim that there will be very significant reductions in motor insurance premiums.

Such claims are dubious, naïve or deliberately deceptive. As a solicitor with considerable experience in this area of law, I would consider it professionally unwise to settle any significant personal injuries case within the time-limit contemplated by PIAB. In some cases, it could be professionally disastrous and certainly inimical to the best interests of a client. I wonder if any adequate consideration has been given to accidents involving injuries to children or minors? In these cases, it usually takes a minimum of 18 months before a doctor or medical specialist can give a definitive and final prognosis.

I have in mind a case for a six-year-old child who suffered gross physical injuries to his lower limbs, and I am aware that I should not attempt to bring his case to a court hearing until the boy is skeletally fully formed at the age of 14 at the earliest. How could the parents of this unfortunate child be expected to prosecute a claim on his behalf without the professional guidance and expertise of his solicitor? It will be at least eight more years before this boy's claim can be brought to successful finality. Under the PIAB system, who would look after this lad's claim and who would pay the inevitable costs involved? His parents?

Since the new law came into existence, I have had to tell three different clients of mine that, since 1 June, their claims cannot be formulated through the court system because the new law requires them to deal directly with PIAB. They are required to download all procedural data and information from PIAB's website. They are not entitled to have their genuine claims prosecuted by me except at their own cost. Needless to say, they knew nothing about the new law. This did not surprise me in the least, because why should it impact on the average person until they have the misfortune to have an accident?

An tánaiste has claimed PIAB as her political *magnum opus* or *grande projet*. I can say without equivocation that she has opened a very deep can of worms. PIAB simply will not work, and the public at large will suffer while it remains on the statute books. Mary Harney's promissory note is certain to bounce. Between this and the election results last month, she is likely to look back on 2004 as the year when her *magnum opus* became her *annus horribilis*.

overriding problem was then, as now, one of sovereignty – the location of ultimate constitutional power. That led to a bitter debate. The enormous energy released in the ensuing storm of words seemed to centre on a seemingly innocuous term drawn from the vocabulary of political science. At that time, those who were in favour of independent state power, according to orthodox terminology, described themselves as 'federalists', while at the same time they stigmatised the reformers, correctly, as 'nationalist'. Yet those very nationalists assumed 'federalism' for themselves, thus stealing the label if not the clothes from their more orthodox brethren, and no doubt setting an early example of the elasticity and political potential of the term as a weapon of mass destruction!

Can we expect the European debate to go down the same road? Certainly, the focus will be on 'competences' – a word that is practically a synonym for sovereignty – and the extent of the powers of individual states in relation to the union. This includes the big question: who decides where these powers ultimately reside whenever there is ambiguity? In the past, the US Supreme Court, then exercising a new competence, fixed the boundaries between state and federal government and thus shifted the centre of gravity away from state to union. But it was the popular magic generated by the *Bill of rights* that ensured the long-term political success of the USA.

No doubt the present sponsors of the European convention will bear that component in mind. G

Hugh O'Donoghue is a partner at the Cork law firm HV O'Donoghue.

Letters

Taking the VHI fight to the ombudsman

From: Collins, Brooks & Associates, Clonakilty, Co Cork

I have written before on this matter. I brought a case to the insurance ombudsman, Caroline Gill. In essence, we had resisted the efforts of VHI to secure from us an undertaking on behalf of our client, notwithstanding what percentage of our client's losses were recovered from the offending third party, to recoup to VHI their full outlays.

The matter was determined in favour of our client, the insured. However, the main contentious issue of the form of undertaking to be completed in future cases is not influenced by the findings of the ombudsman.

The ombudsman decided that the undertaking contained in the injury section of the claim form signed by our client read, and we quote:

'I hereby irrevocably authorise the solicitor(s) representing me in making a claim to furnish to [the company] an undertaking in the following form – "in consideration of [the company] discharging the hospital and medical expenses of my/our client [name], I/we hereby undertake to include as apart of my/our client's claim the monies so paid by [the company] (details of which are now supplied to us by [the company]) and, subject to any order to the contrary, to repay to [the company] out of the proceeds that come into our hands the net amount recovered in respect of such payments made by [the company]".'

This was the 'old' form of undertaking. However, the undertaking (new form) subsequently sent to us refers to, and we quote: *'subject to any court order to the contrary to repay the VHI Healthcare – out of the proceeds that come into our hands – all such monies paid by the company'.*

The ombudsman pointed out that the undertakings were clearly different and her recommendation, therefore, was that the undertaking contained in the injury section of our client's claim form should apply in respect of this claim.

Regretfully, therefore, the main issue at this point in time has not been resolved. However, solicitors should now look at the undertaking contained in the claim form completed by their clients and ascertain if it is in the first form above referred. If so, in my view, VHI is bound to accept the undertaking which solicitors are quite happy to give, which fairly protects VHI's position.

No doubt the claim forms will be changed by VHI now and the battle will have to start over again and the matter will have to be referred back to the ombudsman for determination of the main issue.

Calling all Cork alumni

From: Mairead Enright, interim director, UCC Law Soc History and alumni project

The student Law Society at University College Cork is 75 years old in the new academic year. To celebrate this special anniversary, the society is putting together a small book on its history and alumni for launch at our planned 75th anniversary ball in spring 2005.

We would be delighted to hear from past members and officers of the society who would be interested in helping us with our research. In particular, we are keen to receive photographs, memorabilia and society records, and we would love to hear people's stories of their time with the Law Soc. Those who are interested in contributing to our project should write to Deirdre Duffy at the Law Society *History and alumni project*, 6 Carrigside, College Road, Cork, or e-mail us at history@ucclawsoc.com.

Solicitor athletes

From: Arran Dowling Hussey, Law Library

I read with interest the article in last month's *Gazette* on solicitor and 1906 Olympic gold medallist Peter O'Connor. It is, of course, the case that there are a number of present-day solicitor athletes of great distinction. John Menton, a Dublin lawyer, competed at the Sydney Olympics in the discus, while solicitor Cathal Lombard, a long-distance athlete and native of Cork, has qualified for the Athens Olympics.

Airbrushed from history

From: Ken J Byrne, Blackrock, Co Dublin

I note the airbrush was at work in eliminating the right nipple of Naomi Campbell on the front of your June issue, while leaving it on display on page 15 within. This presumably was in keeping with the tenor of the article: outwardly respecting Ms Campbell's right to bodily privacy while inwardly, per *Dudgeon v UK* (as recited), recognising the entitlement to lift the veil due to the gravitas of the subject matter.

The introduction of the ban on smoking in the workplace has given rise to concern about how it will operate in practice. Maura Connolly looks at the formal steps that employers must take to ensure compliance with the legislation

MAIN POINTS

- ***Public Health (Tobacco) Acts, 2002 and 2004***
- **Where the smoking ban applies**
- **Steps that employers should take**

While Ireland has been to the forefront in Europe in introducing a ban on smoking in the workplace, it is clear that a similar ban is under consideration in other jurisdictions. The BBC recently reported the results of a poll carried out by market analysts Mintel, which found that there was more than 52% support for the introduction of a similar ban on smoking in public places in Britain.

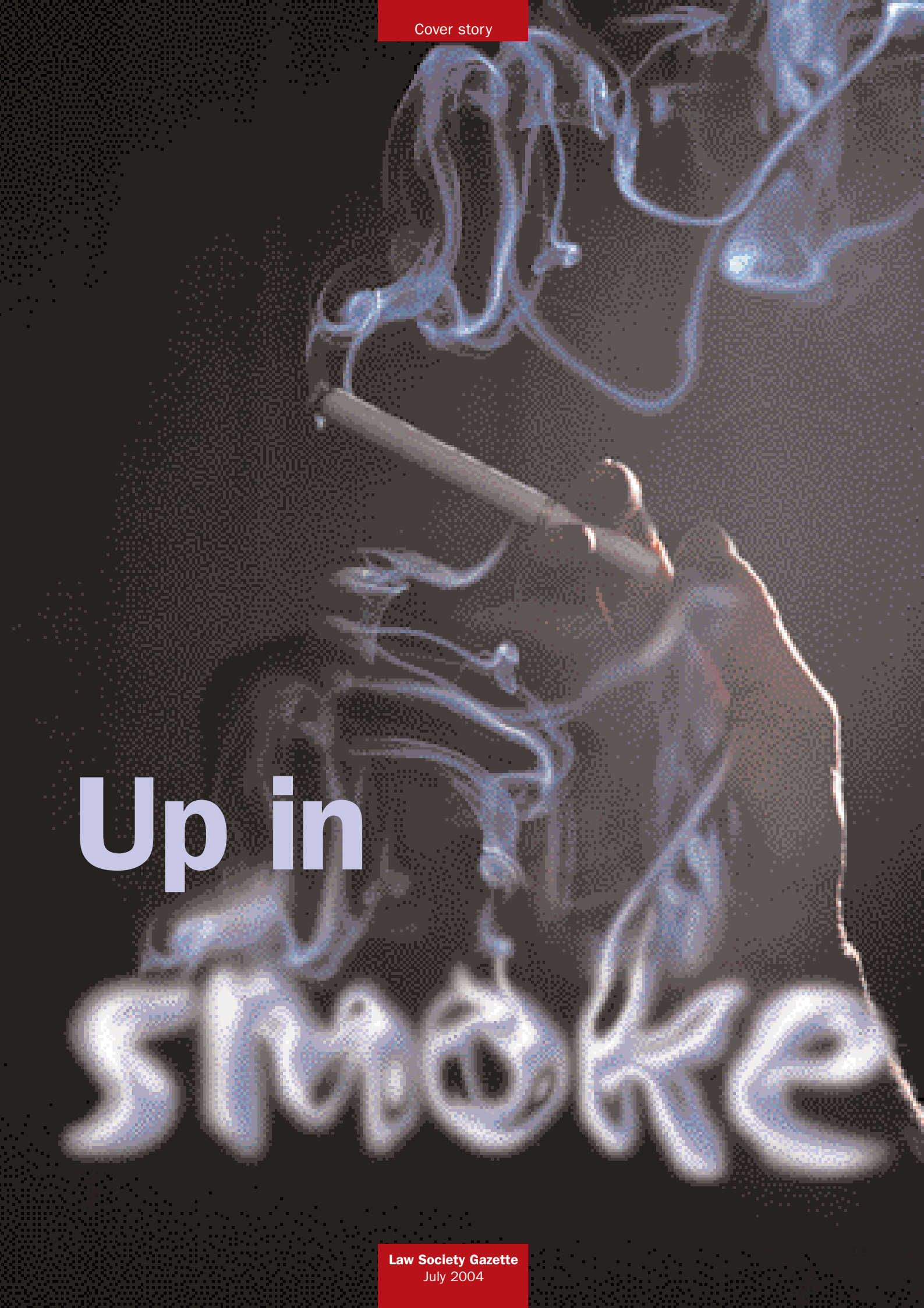
Although many employers have introduced a ban on smoking in the workplace, there has been a less obvious compliance with other aspects of the legislation requiring prominent signage to be maintained. Many licensed premises have been preparing for this legislation for some time; other workplaces appear to be less aware of their obligations to display signage that declares the workplace to be 'smoke-free'. In some cases, the signage is inadequate or does not specify a named manager to whom complaints can be made.

In the wake of the ban, there are reports of increased littering, with cigarette butts being strewn outside public places. Employers should perhaps be aware of the impact of the *Litter Pollution Act, 1997* and the regulations made under that legislation. The implementation of the ban will also require employers to develop anti-smoking policies and to train management in how to deal with breaches of the legislation.

Non-smoking workplace

The *Public Health (Tobacco) Act, 2002*, as amended by the *Public Health (Tobacco) Amendment Act, 2004*, which took effect on 29 March, prohibits smoking in any workplace, with certain limited exceptions (**see panel, page 14**). The acts deal generally with the sale of tobacco products and set out certain restrictions on the advertisement and sale of those products.

The ban on smoking in the workplace was introduced as a health and safety measure and must be considered in the context of the *Safety, Health and Welfare at Work Act, 1989* (and the regulations made under that act). For example, employers are obliged to provide staff with a safe place of work, safe



Up in smoke

WHERE DOES THE SMOKING BAN APPLY?

The prohibition on smoking applies to:

- A place of work
- An aircraft, train, ship or other vessel, public service vehicle or a vehicle used for the carriage of members of the public for reward, insofar as it is a place of work
- A health premises or a hospital that is not a health premises
- All or part of a school or college
- Any state-owned building to which the public has access
- A cinema, theatre, concert hall or other place normally used for indoor public entertainment
- A licensed premises insofar as it is a place of work
- A registered club insofar as it is a place of work.

The prohibition does not apply to:

- A dwelling
- A prison
- A place or premises, or a part of a place or premises, that is wholly uncovered by any roof whether fixed or movable
- An outdoor part of a place or premises covered by a fixed or movable roof, provided that not more than 50% of the perimeter of that part is surrounded by one or more walls or similar structures (inclusive of windows, doors or other means of access or egress)
- A bedroom in a hotel or bed and breakfast or any other premises where sleeping accommodation is offered to members of the public
- Charitable accommodation
- Accommodation rooms in educational establishments
- A nursing home
- A hospice
- A psychiatric hospital
- The Central Mental Hospital.

systems of work, and to control or eliminate hazards in the workplace.

Much publicity has been given to the offences introduced under the *Tobacco Acts*, where failure to comply is an offence which, on conviction, may lead to a fine of €3,000. Because of the need for authorised officers to attend at the premises in order to monitor compliance, there may be a perception that such convictions will be rare.

Employers should be aware that non-compliance with the *Tobacco Acts* and permitting employees to smoke at work in breach of the ban could be regarded as exposing other employees to an unsafe working environment within the meaning of the *Safety, Health and Welfare at Work Act, 1989*. If, for example, an employer allowed a lax attitude to smoking at work, a non-smoking employee could argue that the employer had failed to properly protect him from hazards or did not maintain a safe workplace.

A place of work is as defined in the *Safety, Health and Welfare at Work Act, 1989* and includes any place, land or other location in, upon or near which work is carried on, whether occasionally or otherwise. This definition particularly includes:

- A premises
- Any installation on land and any offshore installation
- A tent, temporary structure or moveable structure
- A vehicle, vessel or aircraft.

There has been a great deal of discussion about whether certain workplaces, particularly places of permanent residence, should be covered by the ban. This has led to the large number of exceptions listed in the acts. The fact that company vehicles are defined as a place of work may be regarded as imposing an onerous and impractical obligation on employers to monitor compliance. Employers discharge their obligations under the *Tobacco Acts* by making 'all reasonable efforts to ensure compliance'. It will be critical for them to show that they had adequate policies in place and that they took steps to ensure that employees were made aware of the requirement of these policies. For example, if a co-worker is required to share a company car with a driver who smokes during the journey, there should be a clear procedure through which the co-worker can lodge a complaint and for action taken to implement the ban.

It can be anticipated that where employers have put in place temporary structures to facilitate smoking outside the workplace, these may be subject to scrutiny to see whether they come within the criteria described above.

Sign of the times

Section 46(2) of the act provides that where smoking is prohibited, there must be displayed at all times a sign clearly indicating:

- That smoking is prohibited on the premises
- The name of the occupier or other person in charge of the premises
- The name of the person to whom a complaint may be made by a member of the public who observes a person smoking on the premises.

Anyone who smokes in a specified place will be guilty of an offence. Equally, where a smoking offence has been committed, the occupier or manager will each be guilty of an offence.

In proceedings brought for an offence under the act, it is a defence for a person to show that he made all reasonable efforts to ensure compliance with this section of the act. A person convicted of an offence is liable to a fine of €3,000 on summary conviction.

Executive action

As a priority, employers must draw up a 'smoke-free at work' policy. Within this policy (which should be widely circulated, perhaps as part of an employee handbook), the employer should identify the manager who will be in charge of a premises.

Employers must put up signage in accordance with the *Tobacco Acts*. This will have the effect of publicly demonstrating compliance and should also assist in compliance.

A procedure must be developed to be used in cases where there are breaches of the legislation. This should refer not only to employees but also to visitors, sub-contractors and clients.

In the case of employees, any breach of the policy (and the legislation) should be regarded as a disciplinary matter that may lead to dismissal. In the case of non-employees, the signage should indicate that breaches of the legislation will be acted upon by the occupier or the manager. If an employer takes disciplinary action against an employee on foot of a breach of the smoking ban, then the employee will be entitled to the protections of the *Unfair Dismissals Acts, 1977 to 2001* and to fair procedures. Where an employer does not have a specific disciplinary procedure in place, the Labour Relations Commission code of practice on grievance and disciplinary procedures gives guidance as to fair procedures.

Further steps that may be regarded as coming within the description of 'reasonable efforts' would be to put in place smokers' assistance programmes to help employees who wish to stop smoking.

After the initial publicity that followed the introduction of the smoking ban, the challenge for employers will be to ensure compliance with the legislation on an on-going basis and to have in place proper procedures that clearly set out the requirements of the legislation and the implications of any breaches. G

'In the wake of the ban, there are reports of butts being strewn everywhere. Employers should be aware of the impact of the Litter Pollution Act, 1997'

Maura Connolly is a solicitor with the Dublin law firm Eugene F Collins and a member of the Law Society's Employment and Equality Law Committee.

ASCENT OF

Last year, the first-ever report on women lawyers in Ireland was published by TCD's law school. Co-author Ivana Bacik summarises some of its findings

MAIN POINTS

- Women in the legal professions
- Gender discrimination
- Recommend-ations for professional bodies

In October 2003, President Mary McAleese launched *Gender InJustice*, a report on women in the legal professions that was based on an 18-month study funded by the Department of Justice, Equality and Law Reform, with support from the Law Society and the Bar Council.

There has been a dramatic increase in the number of women entering the law in recent years. Among the law class at Trinity College, male students are clearly outnumbered almost two-to-one every year. As academics and legal practitioners, we were keen to examine whether this 'feminisation' of legal education was mirrored in a more general feminising of the legal profession, particularly at the top levels. So we carried out an extensive postal survey of practising lawyers, including solicitors, judges and barristers, both women and men, to which we received 788 very detailed responses. We supplemented the valuable information gained from these by carrying out interviews and focus groups and by gathering comparative material about women lawyers from other countries.

International law

A number of similar themes emerged from our review of the comparative literature, in which we concentrated on common-law jurisdictions. First, we found that in every country there are gender disparities among lawyers – at entry to the professions and in the career prospects, specialisation, and income differentials of men and women.

Second, we found that the culture of the legal professions has not been accommodating for women, who routinely tend to experience exclusion from the sort of social networks that are necessary to further their legal careers.

Third, in every jurisdiction, the dual burden of work and family life has been found to be a significant factor impeding women's career advancement. Mothers invariably take on responsibility for childcare to a much greater degree than fathers, and this means that mothers are far more likely than fathers to take time out from their

A WOMAN

careers for family reasons.

Fourth, an assumption has emerged alongside the increase in women entering the professions in the last two decades everywhere: the assumption is that women's progression is inevitable with time (the 'trickle-up fallacy'). However, this view ignores the point that more women should surely have 'trickled up' the career ladder by now, if it were merely a matter of time.

Finally, the self-regulating character of the legal professions, and the resistance among lawyers to invoking their legal rights where discrimination has occurred, tend to make legal practice a 'lawless domain' for women lawyers in many countries.

Home rule

Having reviewed the comparative literature and identified these five key themes, we then sought to measure the extent of recent changes in the gender breakdown of lawyers in Ireland. We found that 66% of all full-time undergraduate enrolments in law at university nationally are now female. Not only that, but women have made up half of all law enrolments since the mid-1980s, and more than 30% since the mid-1970s.

When we reviewed the figures for practising lawyers, we found that women make up 39% of all lawyers in Ireland, taking solicitors and barristers together. The figure is higher for solicitors, 41% of whom are women, almost double the figure of 22% that applied 20 years ago. By contrast, only 34% of barristers in Ireland are women, but this is up from a mere 16% 20 years ago. Women also now constitute 21% of all judges in Ireland.

This is a relatively high figure when compared with the figure of 12% for women judges in the UK and United States. But it is still very low compared with the number of women now practising as lawyers in Ireland, and it masks the very low figures for women at certain levels. In the High Court, for example, there are only three women judges (11% of the total). It is also a low figure compared with Canada, where 26% of judges at federal level and one-third of judges at provincial levels are women.

The Irish figure also compares unfavourably with much higher figures in EU civil law countries. In Finland, for example, 46% of judges are women; in France, 54%.

When we looked at the senior levels of both professions in Ireland, we saw that women were

RECOMMENDATIONS FOR PROFESSIONAL BODIES

- Gender issues should be incorporated into the training curriculum in each subject taught on both professional training courses, and a structured career guidance programme should be introduced to assist students setting out on legal practice in order to reduce gender segregation in choice of specialisation
- The professional training bodies should adopt clear policies and procedures on harassment and bullying, modelled on existing codes used in the university system
- Networks should be developed between generations of women lawyers to provide role models, mentoring and support to students embarking upon a legal career
- The professional bodies should bear greater responsibility in promoting equality among practising lawyers, on behalf of their increasingly female membership. In particular, we recommend that each professional body should adopt an equality policy or code, to be incorporated into the rules of professional conduct governing relations among members as well as between members and third parties. These equality codes should include reference to the legislative framework, procedures for dealing with harassment and bullying, and monitoring and implementation practices. In particular, data should be kept on the membership, according to gender, on applications for membership, entrants to the professions, career progression and attrition rates. In light of the reluctance of lawyers to make formal complaints, structured confidential exit interviews aimed at establishing individuals' reasons for leaving legal practice should be introduced
- The Law Society and Bar Council should each establish an equality committee to ensure that equality policies are implemented. The functions of the Law Society equality committee should include the drafting of model equality policies for firms and solicitor-employers to adopt, particularly addressing issues of harassment and bullying, work/life balance and the 'long hours' culture, pay equity, and gender-sensitive evaluation methods and promotion criteria. The committee could also organise the provision of training for members on gender equality issues, including training in appropriate language-use and sensitivity, since it is clear that inappropriate or sexist comments continue to be experienced by many women lawyers
- Solicitors' firms should adopt statements or codes on equality, modelled on the code produced by the Law Society. Support staff and locum cover should be provided where necessary by firms to ease the pressures of the 'long hours' culture upon employees, and firms need to introduce greater transparency and objectivity in their partnership selection process
- Proactive steps need to be taken both by the professional bodies and by law firms to improve work/life balance. The Law Society should ensure that all firms pay maternity leave at full salary and that employees do not suffer disadvantage to their careers in taking statutory maternity leave or other forms of leave to facilitate their childcare arrangements. Many solicitors' firms do not pay full salary on maternity leave – and this is not confined to small one-person operations. One woman partner in a large commercial firm informed us that 'it is only in the last two to three years that maternity leave is paid beyond the statutory minimum'
- Parental leave and flexible working arrangements should be made available by firms to all solicitors, men as well as women. Men should be encouraged to take up leave and flexitime options, to end the current double standard where such arrangements are seen as being available only to women.

more significantly under-represented. As of 1 October 2003, we found that among the 12 largest law firms in Dublin (each with between ten and 60 partners), only one had a female managing partner. The average proportion of women partners across all 12 firms was only 24% (in one firm, only 8% of the partners were women). The highest percentage of female partners in any one firm was 32% per cent.

Surprising figures

The consistently low figures for women at the top of the professions are particularly surprising, given that the first woman graduated in law in Ireland as long ago as 1888, when Letitia Walkington received her degree from the Royal University of Ireland. She was the first woman to graduate with a law degree in Britain or Ireland. The first woman solicitor in Ireland, Mary Heron, qualified in 1923. The first two women barristers, Frances Kyle and Averil Deverell, were called to the bar in 1921 – again, before any women were called to the bar in England. Women have therefore been working as lawyers in Ireland for many years, but few have made it to the top until very recently. We wondered why this was so, and sought to discover what more could be done to encourage the career progress of women.

From our survey of practising lawyers, supplemented by focus groups and interviews, we found that the greatest obstacle to women's career progression in law in Ireland is the difficulty of achieving a work/life balance within the 'long hours' culture that exists within legal practice. Many women we surveyed believe that it is simply not possible for women lawyers to 'have it all' as working mothers. In addition to this structural problem, many women lawyers also believe that an 'old boys' club' exists within the profession. These findings reflect similar conclusions reached in other studies internationally.

In support of this belief, we found that far more women than men tend to feel excluded from social networks within the law. Almost one-third (31%) of all women we surveyed had experienced exclusion in this way, such as not being invited to golf outings or other events. More than one-third (36%) also reported having experienced sex discrimination in the form of inappropriate comments, such as being called 'good girl' or 'love' by male colleagues, or being asked about their husband at interview. One woman solicitor had been told early in her career by a male colleague: 'I don't know why we employ women; they go off and have babies'. Another even reported that a male judge had said to her in open court, in front of her client and other colleagues: 'you're far too pretty to be taking this action'. In addition, 19% of women had been asked to perform inappropriate tasks such

as making tea, fetching files or buying personal gifts on behalf of their employer.

Perhaps most worryingly, sexual harassment or bullying had been experienced by 14% of women. This ranged from serious physical assault to the making of sexist jokes, innuendoes or 'fairly constant jibes', as one woman solicitor described it. Another wrote: 'I was bullied by my boss during my apprenticeship and he made inappropriate comments all of the time. I was too young/scared and inexperienced to do anything about it at the time'. Worryingly, most women were very reluctant to make any complaint even where they had been harassed, due to fears that it would affect them adversely in their careers.

Paying the piper

There was also a difference between men and women in terms of the area of work in which they are likely to specialise. Unsurprisingly, far more women work in family law and men are more likely to work in criminal law and commercial law. Some 30% of women believe they are discriminated against in terms of level of earnings. When we examined the question of pay in more detail, we discovered that a significant gender pay gap does exist, even where lawyers of the same age are compared. Men over 50 years of age, we found, have a 60% chance of earning more than €100,000 a year, whereas for women of the same age the chance of earning this much is only 20%.

Our findings might be summarised by saying that, despite the many advances made by women lawyers over the past decades, barriers to women's career progression remain, particularly in the form of exclusionary practices, structures that impede work/life balance, and pay inequity. Clearly, many women believe that an 'old boys' club' still exists within the professions, and they feel excluded from sporting and social networks that are highly influential in furthering a legal career. Disproportionately, it is women who have experienced the use of inappropriate language in the workplace, while harassment and bullying occur at an unacceptable level.

However, it must be emphasised that the greatest obstacle to women's career progression remains the difficulty of achieving a work/life balance within the 'long hours' culture that respondents overwhelmingly agreed exists in the legal workplace. This culture particularly affects women where men are not taking on an equal caring role.

Preventive action

It is incumbent upon the professional bodies, in particular, to take preventive action to remedy the culture of discrimination experienced by many women lawyers. Responsibilities for furthering equality within legal practice also need to be borne by other bodies and institutions, including the state. Accordingly, based on our findings, we developed 50 recommendations aimed at the professional bodies, the state, the university law schools, and consumers of legal services (**see panel, page 18**).

'A male judge said to her in open court, in front of her client and other colleagues: You're far too pretty to be taking this action'

Those recommendations most relevant to solicitors are aimed at the Law Society. We focused first on the issue of professional training, and found that students had a uniformly positive experience of the solicitors' training course at Blackhall Place. As one student who participated in a focus group for our study commented: 'I thought Blackhall was great … they try to make it as near to working life as possible. The tutors explain their real-life experience, so you learn'. This was in marked contrast to the findings we made about the barrister training course at King's Inns, and we recommended that the structure of the Inns course should be revised, on a similar model to those reforms in legal education already carried out by the Law Society.

It is undoubtedly true that while childcare continues to be seen as a 'woman's responsibility', women in every profession, including law, will experience particular problems in balancing work and family commitments. In this respect, more fundamental societal change is ultimately required, notably a more equal shouldering of caring roles by men and women.

We recognise, however, that structural discrimination is difficult to address in any profession, since it is insidious and manifests itself through practices such as the use of inappropriate language and informal social exclusion. There are some ingrained cultural attitudes that will certainly take time to change. But the recommendations made in our report, if adopted and implemented by the Law Society and other bodies, could lead to a significant improvement in the position of women lawyers, and indeed an enhanced quality of life for all legal practitioners.

What should happen next? It is important that these issues are debated widely and that the professional bodies take responsibility for moving forward with the recommendations. The Law Society was extremely supportive at all stages of the research process, and we anticipate that changes will be brought about to ensure greater representation of women at every level of the solicitors' profession.

Great progress has already been made in other countries, such as Canada, through the adoption of positive interventions by the professional bodies and the state. It is important for us to learn from the experience of other countries in seeking to achieve gender equality. Women lawyers have come a long way in Ireland since Letitia Walkington graduated in 1888 – but more needs to be done to ensure that the 'old boy' culture becomes a thing of the past. G

Ivana Bacik is Reid Professor of Criminal Law at TCD. *Copies of* Gender InJustice, *by Ivana Bacik, Cathryn Costello and Eileen Drew, are available for €20 (to cover postage and packing), made payable to 'TCD no 1 account', from the Women in law project, Law School, Trinity College Dublin,* www.tcd.ie/Law/Womenin Law.html, *e-mail: womeninlaw@tcd.ie.*

REFORMING PRACTICE

The nature of personal injuries litigation is changing, and the report of the Committee on Court Practice and Procedure is part-and-parcel of this. Eamonn Hall outlines some of the committee's key recommendations

Justice is never anything in itself, but in the dealings of men with another in any place whatever and at any time. It is a kind of compact not to harm or to be harmed.
(Epicurus, *Principal doctrines*, xxxiii)

To none will we sell, to none deny or delay right or justice.
(*Magna Carta*)

Justice, sir, is the great interest of man on earth. It is the ligament which holds civilised beings and civilised nations together.
(Daniel Webster, funeral oration for Justice Story (US Supreme Court), 12 September 1845)

Some might start an article with one epigraph; I have written three. Perhaps this is an indication of the importance attached to the concept of justice and fairness in relation to fair and just compensation for injuries caused by the negligence of others.

This article focuses on the 29th report of the Committee on Court Practice and Procedure. The committee report was sent to justice minister Michael McDowell in late June 2004. The committee itself is of some vintage, being one of the longest-serving committees on legal practice and procedure in Ireland. It was established in 1962 but (in relation to this 2004 report) its specific terms of reference were determined by minister McDowell in 2002. The committee was charged with examining all aspects of practice and procedure relating to personal injuries litigation. In particular, the committee was to consider whether the present system of practice and pleadings was appropriate to modern personal injuries litigation. In short, the committee's answer was 'no'.

MAIN POINTS

- Personal injuries litigation
- Committee on Court Practice and Procedure
- Main recommend-ations

Perceived problems

The committee set out the current practice and procedure in relation to personal injury actions from the institution of proceedings to determination. It then addressed the submissions of those who made complaints about the shortcomings of the system. Submissions were received from many predictable quarters: the Motor Insurance Advisory Board, the Irish Insurance Federation, the Law Society, the Dublin Solicitors' Bar Association, the Bar Council, the Mediators Institute Ireland and others. Oral evidence was presented by then president of the Law Society Geraldine Clarke, director general Ken Murphy, and Roddy Bourke, chairman of the society's Litigation Committee. Others who presented oral evidence included Dorothea Dowling of the Personal Injuries Assessment Board, members of the Bar Council, including Conor Maguire SC and Hugh Mohan SC, and representatives of the Courts Service and the Irish Insurance Federation.

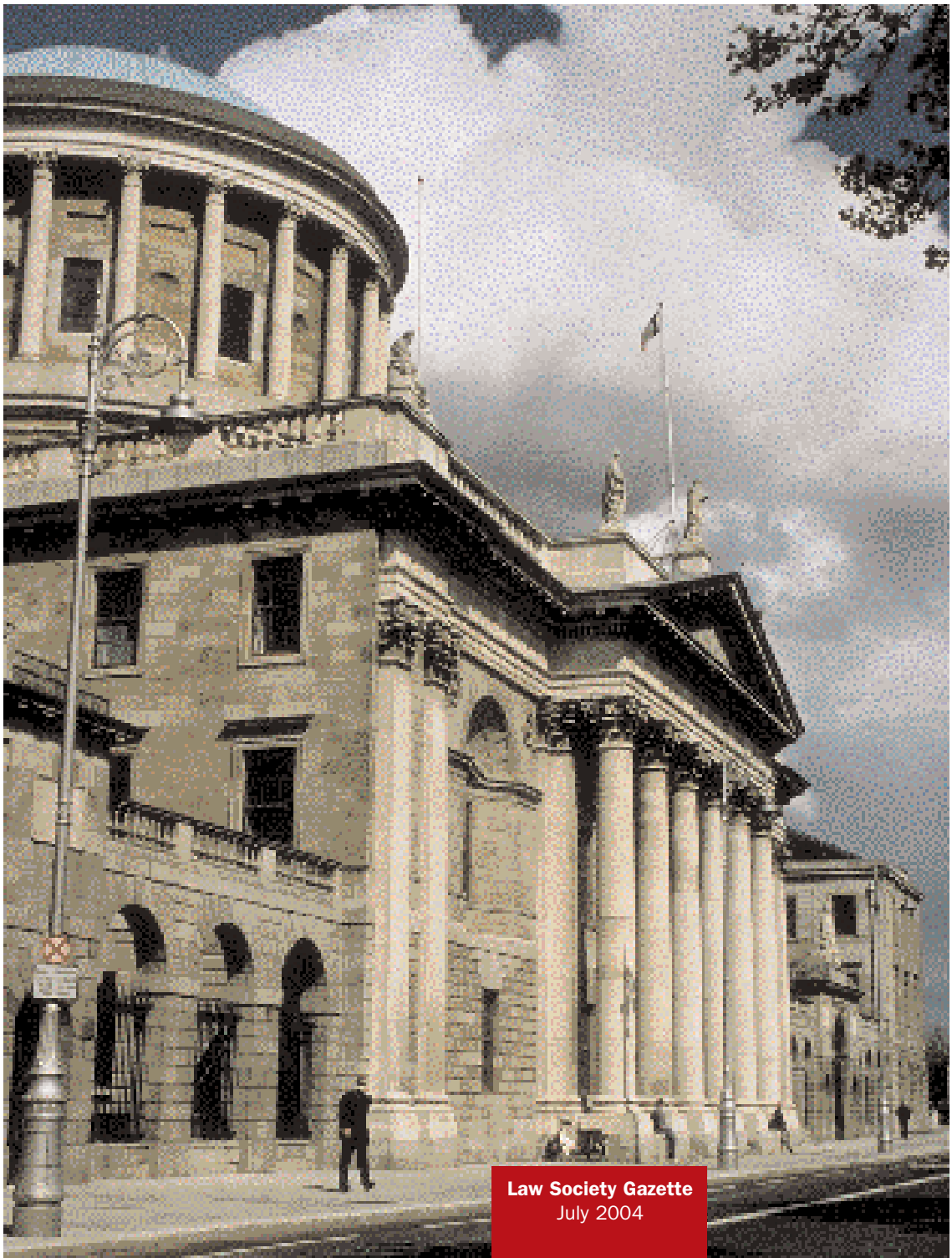
The problems in personal injury court procedure – as perceived by those making submissions to the committee – related to, among other matters, delay, cost, lack of effective court management, lack of consistency in awards, the slow and cumbersome nature of discovery and the difficulty in striking out unmeritorious claims or defences. The committee listed a full litany of complaints by those who made submissions.

Rays of light

In the High Court, once the case is set down for trial, it was reported that there were no significant delays in Dublin, with cases given a date for hearing within weeks of being set down. However, the hearing may be subject to the availability of judges. At venues outside Dublin, cases can usually be heard within three to six months of setting down. The only exception is Cork, where the delay is two years.

The committee was conscious that section 13 of the *Courts and Court Officers Act, 2002* makes provision for the extension of the jurisdiction of the

& PROCEDURE



'The committee was to consider whether the present system was appropriate to modern personal injuries litigation. In short, the answer was 'no'

Circuit Court to €100,000 from its present jurisdiction of IR£30,000 (€38,092.14). That provision has not yet been brought into effect. Bearing in mind that 79% of the awards made in the High Court during a period under review were within the €0 to €100,000 range, if the Circuit Court jurisdiction were extended (which could be done easily), it would undoubtedly have a significant effect on the volume of personal injury litigation in the Circuit Court. This would require adequate resources to be put in place in the Circuit Court.

The committee noted that 77% of the awards made in the Circuit Court during a period under review were within the range €0 to €20,000. Section 14 of the *Courts and Court Officers Act, 2002* makes provision for the extension of the jurisdiction of the District Court to €20,000 from its present jurisdiction of £5,000 (€6,348.69). If this were effected, it would have a significant effect on costs and related matters.

The committee considered that providing litigants with a swift and efficient system of determination of personal injury claims could be achieved by rules of court. The minister for justice, however, sought to achieve some of the same recommendations of the committee in the *Civil Liability and Courts Bill, 2004*. Nevertheless, the committee set out its advice, as they may assist the future development of rules of court.

Principal conclusions

In answer to the specific matters in the request from the minister for justice, the committee had three principal conclusions. First, the present system of practice and pleadings in personal injuries litigation in the High Court was not appropriate to modern personal injuries litigation and should be changed.

Second, the plaintiff and defendant should verify on oath the contents of the pleadings. The provision as to verification on oath, as distinct from the provisions creating criminal offences, should be provided by way of rules of court.

Third, the present procedures do not provide sufficient encouragement to litigants to avoid litigation in the first place and to arrive at an early settlement of litigation. However, pre-litigation mediation should not be made mandatory.

The committee recommended that the rules of court on personal injury litigation be amended to enable a just, efficient and effective system that promotes early co-operation, early exchange of information between parties and early settlement of cases. Draft rules to implement these recommendations are included in the report. Also, case management of personal injuries litigation should be introduced by the court in appropriate cases.

Procedural changes

In relation to procedural changes, the committee recommended that:

- Court rules should have a more realistic timetable for the different steps in pre-trial procedures and should then be strictly enforced
- The plaintiff should lose control of the pace of the litigation, and the courts (through judges, masters of the High Court and county registrars) should be proactive in case management in moving the case on
- Pre-trial meetings to narrow the issues should be compulsory in appropriate cases
- Pleadings should be realistic and give greater detail
- Pre-trial meetings should establish where written reports can be substituted for oral evidence
- Notice to admit should be used more widely.

Costs

The committee also made several recommendations in relation to costs:

- Judges should be given powers to determine the amount of costs in appropriate cases
- Costs of unnecessary expert witnesses should be disallowed
- The taxation of costs should be modernised
- Parties using procedures to enhance costs rather than advance the case should suffer a penalty, in costs or otherwise
- Public information should be available on the cost of litigating personal injuries actions
- As a matter of urgency, the minister for justice should establish an independent study, to include all claims – not just those litigated – as to the legal costs in personal injuries actions and how costs could be reduced. This inquiry should be carried out with the full involvement of the Law Society and the Bar Council
- Section 68 of the *Solicitors' (Amendment) Act, 1994*, in relation to solicitors providing clients with particulars in writing of their charges, should be enforced and developed. This could be done by a practice direction requiring that, at the beginning of a case, a copy of the letter be given to the court. Equally, there should be a practice whereby a schedule of fees would be provided by counsel (through the solicitor) to the clients as to the potential fees counsel may charge in the case
- Taxing masters should consider a system of publishing (through the Courts Service) a range of taxed bills of cost with no identifying information as to the parties.

COMMITTEE MEMBERS

Members of the committee included the chairman, Supreme Court judge Mrs Justice Susan Denham, High Court judges Mr Justice John Quirke and Ms Justice Finlay Geoghegan, president of the Circuit Court Mr Justice Esmond Smyth, District Court president Judge Peter Smithwick, and practising members of the legal profession such as Richard L Nesbitt SC, Dr Gerard Hogan SC, and solicitors John Fitzpatrick and Ann C Walsh.

SHORTCOMINGS IDENTIFIED BY THE COMMITTEE

The committee found fault with the current system of personal injury litigation and identified the following principal shortcomings:

- The costs of personal injury litigation
- A culture has developed in which claimants perceive that the institution of court proceedings will enhance the status of their claim and increase its value
- There is no sense of urgency in the initial processing of personal injury actions
- There are little or no incentives to settle an appropriate claim at an early stage
- Procedures are used that prolong court proceedings and increase the cost of the action
- Rules of court are not adhered to or strictly enforced
- The lack of case management leaves the parties in control of the pace of the litigation
- There is insufficient detail in the pleadings
- There are delays in bringing the pleadings to a close
- There are no incentives for the parties to bring an action to trial with reasonable expedition
- There is an absence of recorded data on the level of the awards of general damages
- There is little use of videoconferencing technology to obtain evidence, expert and otherwise
- There is room for further development of IT in the case management of personal injury pleadings, in the trial of personal injuries actions and in the obtaining and analysing of statistics on personal injuries
- There is an under-development of case management and a lack of sufficient appropriate officers such as masters and legally qualified court officials
- The current time-limits for the serving of pleadings are unrealistic and consequently cause expense in the seeking of an extension of time
- The discovery process is in need of revision.

The committee also had various specific recommendations with regard to information on awards, technology, transferring jurisdiction, and resourcing.

Court awards

In relation to information on court awards, the committee had four main recommendations. First, information on awards in general damages in personal injuries litigation should be published. Second, the Judicial Studies Institute should consider establishing a working group to gather, compile and publish such information. Third, resources should be made available to such a working group and the Courts Service to enable the gathering of relevant information and its compilation. Finally, the committee recommended that rules of court should be amended to enable counsel to bring to the attention of the court awards of general damages in earlier court decisions and (when completed) any relevant publication of the judicial studies board.

The committee also recommended the greater use of information technology in the courts. Videoconferencing technology should be developed in as many courts as possible in order to facilitate the giving of evidence, especially expert evidence, by witnesses in other locations in the state and internationally.

Transferring jurisdiction

In relation to transferring jurisdiction, the committee said that judges should be proactive in sending a case to a more suitable jurisdiction, not reactive as at present. There should be more penalties for proceedings in a higher court than was appropriate and those penalties should be more vigorously applied. There should be a short and inexpensive procedure to move a case from one jurisdiction to another.

On resourcing, the committee recommended the appointment of a sufficient number of judges to enable personal injuries litigation to proceed justly in an efficient and effective manner and also that resources should be made available to the Courts Service for the appointment of court officials, and to train and develop court officials, who may take an active part in modern case management.

Personal injury litigation will never be the same again. The *Personal Injuries Assessment Board Act, 2003*, the *Civil Liability and Courts Bill, 2004* (as passed by the Seanad on 15 June 2004), when fully enacted, and the implementation of this report on court practice and procedure in personal injury litigation will (or may) revolutionise the law, practice and procedure on personal injuries. If this succeeds, other types of litigation will be modelled on the successful aspects of this reform.

Certainly, there have been some excesses in the past in the context of personal injury litigation. Some plaintiffs benefited more than was their due. But it would be foolish to speculate that the courts will ignore the constitutional and human rights of the deserving litigant.

It would also be foolish to speculate that solicitors would no longer be required in this important area of law. The solicitor will still have a vital role to play in the Personal Injuries Assessment Board and before the courts. We must never forget that our constitutional and human rights law requires Ireland to provide a civil justice system that is fair to all. There is merit in simplifying court procedure. A deserving case will receive justice because it would be unthinkable were it otherwise. G

Dr Eamonn Hall is the chief solicitor of Eircom plc.

TOEING

Occupational health and safety is steadily climbing the management agenda. This year brings the smoking ban, proposals for a new offence of corporate killing, and the promise of a new health and safety bill by autumn. Geoffrey Shannon assesses some recent developments

MAIN POINTS

- **Stress in the workplace**
- **Corporate killing**
- ***Safety, Health and Welfare at Work Bill 2004***

An employer's duty of care to look after the health and safety of employees includes the reasonable prevention of stress-related injuries in the workplace. The Health and Safety Authority defines workplace stress as arising 'when the demands of the job and the working environment on a person exceeds their capacity to meet them'. The European Commission document *Guidance on work-related stress* defines the condition as 'the emotional, cognitive, behavioural and physiological reaction to aversive and noxious aspects of work, work environments and work organisations'. Work-related stress, according to the document, 'is characterised by high levels of arousal and distress and often by feelings of not coping'.

An employer's duty is not to provide a stress-free environment, but to take reasonably practicable steps to shield employees from exposure to stress and the consequences of unreasonably stressful working conditions.

Employers have both a statutory and common-law duty of care to protect their staff against stress. While few cases have been decided on this point, the potential for litigation in this area is growing. This can be seen from the case of *Saehan Media Ireland Ltd v A Worker* ([1999] ELR 41), where the Labour Court acknowledged work-related stress as a health and safety issue and held that 'employers have an obligation to deal with instances of its occurrence which may be brought to their attention'.

Health and safety law requires risks to be eliminated or reduced so far as is reasonably practicable. The 1989 act also requires employers to conduct risk assessments. Any such risk assessments should include assessments of activities that could potentially cause unreasonable stress to workers. Regulation 10 of the *Safety, health and welfare at work (general application) regulations 1993* provides that the results of these assessments should be documented.

The recent decision of the House of Lords in *Barber v Somerset County Council* (**see panel, page 27**) is unlikely to go unnoticed in this jurisdiction. It emphasises the need for the employer to carry out a risk assessment on an on-going basis in order to assess the individual employee's ability to do the work for which he is employed. While there is a detectable movement towards encouraging employers to manage health and safety issues, the House of Lords' decision demonstrates that this is particularly pertinent when addressing the identification of stress in the workplace.

REASONABLY PRACTICABLE

In *Boyle v Marathon Petroleum (Ireland) Ltd* ([1999] 2 IR 160), O'Flaherty J identified the onerous obligation imposed on management by the 'reasonably practicable' standard as follows:

'I am ... of the opinion that this duty is more extensive than the common-law duty which devolves on employers to exercise reasonable care in various aspects as regards their employees. It is an obligation to take all practical steps. That seems to me to involve more than that they should respond that they, as employers, did all that was reasonably to be expected of them in a particular situation. An employer might sometimes be able to say that what he did by way of exercising reasonable care was done in the "agony of the moment", for example, but that might not be enough to discharge his statutory duty under the section in question'.

Corporate killing

In the future, it is likely that individual members of management will face criminal charges arising from deaths and injuries at work where it is possible to connect the individual failures of senior executives with the corporate body. Where an employee's death results from a failure by an employer to comply with his or her statutory duties under the *Safety, Health and Welfare at Work Act, 1989*, this will give rise to a discrete offence under section 48(17) of the 1989 act. This section attracts a maximum fine of €1,905.

In its 2003 consultation paper on corporate

the LINE

killing, the Law Reform Commission (LRC) recommended that 'where there has been seriously culpable conduct by a corporation leading to death, the gravity with which this should be viewed can be marked only by an offence of a similar gravity to the common-law offence of gross negligence manslaughter' (p165).

It is interesting to note that the LRC consultation paper has recommended the introduction of a new statutory offence of 'corporate killing' in this jurisdiction, which would only be prosecuted on indictment and 'which would make an organisation responsible for a death arising from its gross recklessness'. The Labour Party introduced a private member's bill on corporate killing in April 2001, while the UK's Law Commission proposed such an offence in 1996.

The standard of culpability recommended by the LRC accords with the test for gross negligence manslaughter as laid down by Gavin Duffy J for the Court of Criminal Appeal in *The People (Attorney General) v Dunleavy* ([1948] IR 95):

I DON'T LIKE MONDAYS

Until recently, workers claiming compensation for stress in England and Wales had to satisfy strict rules laid down by the Court of Appeal in February 2002. The Court of Appeal made it clear that no job was inherently dangerous to an employee's mental health. In judgments that appeared to signpost a change in compensation awards for stress in that jurisdiction, the court overturned damages claims by four workers totalling nearly £200,000. Lady Justice Hale opined that it should not be the responsibility of an employer to make exhaustive investigations into the mental health of employees. Instead, the onus was on the stressed worker to decide whether to leave the job or carry on working and accept the risk of a mental breakdown.

On 1 April 2004, the House of Lords overturned the Court of Appeal's judgment in *Barber v Somerset County Council,* which had been one of the four cases heard as a composite appeal by the Court of Appeal ([2004] UKHL 13). While the House of Lords approved the practical guidance issued by the Court of Appeal, it held that the court had erred in concluding that the senior management team was not in breach of the employer's duty of care:

'The senior management team should have made inquiries about [the appellant's] problems and seen what they could do to ease them, in consultation with officials at the county council's education department, instead of brushing him off unsympathetically … or sympathising but telling him to prioritise his work'.

The House of Lords, quoting with approval the *dicta* of Swanwick J in *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd* ([1968] 1 WLR 1776, 1783), held that each case will depend on its own facts:

'The overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions. He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probable effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent'.

'A more unsatisfactory way of indicating to a jury the high degree of negligence necessary to justify a conviction for manslaughter is to relate it to the risk or likelihood of substantial personal injury resulting from it, rather than to attach any qualification to the word "negligence" or to the driver's disregard for the life or safety of others … If the negligence proved is of a very high degree and of such character that any reasonable driver, endowed with ordinary road sense, and in full possession of his faculties, would realise, if he thought at all, that by driving in the manner which occasioned the fatality he was, without lawful excuse, incurring, in a high degree, the risk of causing substantial personal injury to others, the crime of manslaughter seems clearly to be established'.

According to the LRC consultation paper (p92), for gross negligence manslaughter to occur, it must be proven that:

- The accused was, by ordinary objective standards, negligent
- The negligence caused the death of the victim
- The negligence was of a very high degree, and
- The negligence involved a high degree of risk or likelihood of substantial personal injury to others.

The LRC recommends a due diligence defence be available to an undertaking 'where its highest level of management adduces evidence that it had done all that was reasonably practicable to prevent the offence' (p185). An undertaking is defined by section 3(1) of the *Competition Act, 2002* as 'a person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service'.

It also recommends the imposition of criminal liability on a high managerial agent whose acts or omissions led to an undertaking being found guilty of corporate killing. The LRC defines a 'high managerial agent' as 'an officer, agent or employee of the undertaking having duties of such responsibility that his or her conduct may fairly be assumed to represent the policy of the undertaking' (p180).

This new offence of corporate killing would, therefore, facilitate the prosecution of company directors and policymakers within an organisation and render them liable for unlimited fines and imprisonment for up to five years, as well as 'possible disqualification from acting as a manager in an undertaking for a defined period'. The LRC paper recommends that 'in imposing a fine, the court may take into account the means of the undertaking and the effect which a fine would have on the viability of the undertaking' (p190). It would not cover the acts and omissions of persons with only operational responsibilities. On conviction, the LRC recommends that a court should be able to order an undertaking to take preventive measures to avoid a recurrence. Further sanctions recommended by the commission include community service orders and adverse publicity orders.

The government's legislative agenda for 2004 includes a new *Safety, Health and Welfare at Work Bill*. Significantly, in the Dáil on 10 February this year, Frank Fahey, minister for labour affairs, signalled that this bill, which is due in the autumn, will provide for a statutory offence of corporate killing. G

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

Blood, swea

Sherlock Holmes knew the importance of using objective scientific evidence to investigate crime. Today, DNA testing is an established part of the criminal justice procedure and the Innocence Project aims to keep it there, writes Paula Scollan

Kirk Bloodsworth: guilty until proven innocent

Kirk Bloodsworth was the first person to be exonerated as a result of DNA testing in a capital conviction in the United States. A Baltimore court had found Mr Bloodsworth guilty of sexually assaulting and murdering nine-year-old Dawn Hamilton. The conviction was based on an anonymous tip, identification from a police artist's sketch, eyewitness statements and other evidence. Later he was retried and again found guilty. But in 1993, more than eight years after his arrest, prosecutors compared DNA evidence from the scene to Mr Bloodsworth's own DNA and found that they did not match. He was subsequently released and pardoned.

US senator Patrick Leahy stated at the time that the wheels of justice had broken down in the case and that Kirk Bloodsworth's nightmare of wrongful conviction had been repeated again and again across the country. He stressed the importance of preserving DNA evidence and making it available to help ensure that the truly guilty are convicted and the truly innocent exonerated.

Until proven guilty

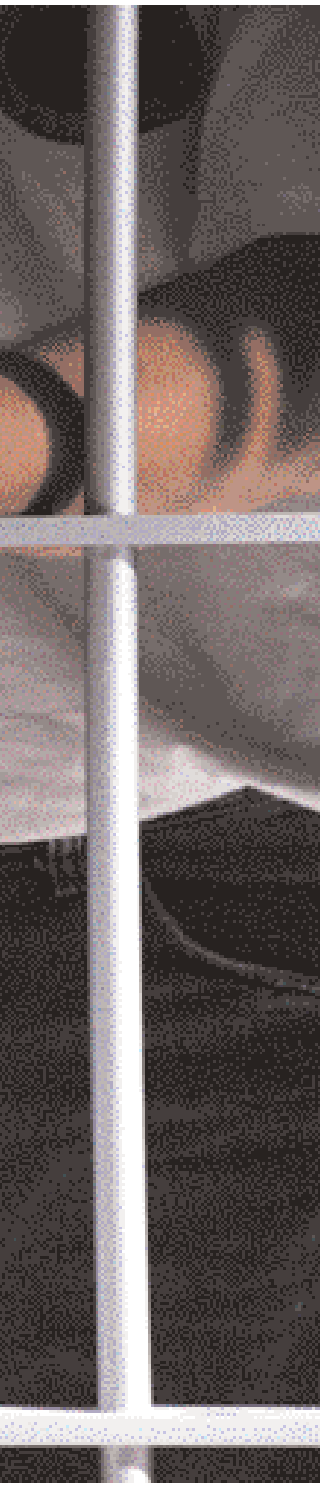
Barry Scheck and Peter Neufield, of OJ Simpson fame, founded and now direct the *pro bono* Innocence Project at Benjamin N Cardozo law school. The project seeks the release of wrongly-convicted people, using DNA analysis to ascertain conclusive proof of innocence or guilt.

Scheck and Neufield's book, *Actual innocence*, documents some extraordinary cases where a mixture of racism, fraud and defence attorney incompetence has led to the conviction of innocent people. In a system where some states use capital punishment, the need to get things right is absolute. It has been shown with modern DNA techniques that some who have suffered the ultimate punishment were actually

MAIN POINTS

- The Innocence Project
- Wrongful convictions
- The use of DNA evidence

t and tears



innocent. In this world of shadows, the Innocence Project has become a beacon of hope for the wrongfully convicted.

Interns are selected for the project from top universities in the United States and from similar institutions overseas. They are given a short but intensive course in the necessary skills so that they can handle the casework. They are then assigned their own cases to work on while supervised by a team of attorneys and clinic staff.

Burden of proof

Before the advent of forensic DNA testing, courts had to rely on conventional serological testing when dealing with biological samples. The conclusions derived from serological testing (the analysis of blood serums) are not nearly as probative as DNA analysis. In the past, prosecutors have put much more weight on these results than they deserve. In many cases, the results of such testing – which simply included the defendant in the percentage of the population that could have deposited a sample – was enough to be damaging, even if, statistically, they shed little light on the perpetrator's identity. Results were also often misinterpreted.

Some aspects of conventional serology are familiar. The most common test determines international ABO type. This test determines antigens that can be found on the cell membrane. There are three antigens in this system: A, B, and H. This gives rise to four blood types, A, B, O and AB. Between 75% and 85% of the population are 'secretors' – people whose antigens can be found in other body fluids. Secretor status is very important in determining whether or not a biological deposit can be attributed to a certain person. An example would be a rape case where there is one perpetrator and one victim. The perpetrator is known to have ejaculated and the victim has not had prior consensual sexual intercourse in a month. The serologist finds that the sample contains both A and B antigens, along with H. The victim is tested and is an A secretor. The defendant is tested and is an O secretor. Since this is a one-perpetrator, one-victim case, the defendant can be excluded as the contributor of the sperm.

As one narrows down the possible population by characteristic, one is able to rule out more people and thus narrow down the percentage of possible matches. At the project clinic, the focus is on using the differences in human DNA to exonerate innocent people. Evidence is assessed before it is destroyed and this evidence is then used to mount appeals to wrongful convictions.

Body of evidence

Most of the material required to perform DNA testing is found in cellular material, blood, spermatozoa, hair, saliva and skin. In the early 1990s, DNA testing based on polymerase chain reaction (PCR) was accepted by the courts. The newest forms of DNA testing are short tandem-repeat-based testing and mitochondrial DNA testing. Repeated sequences within the DNA strand are indicators of coding that is different in every individual. These are called tandem repeats.

Previously, in order to subject hair to DNA testing, an attached root was required. Without the root, there was not enough cellular material to perform the test. But with mitochondrial DNA testing, the material in the shaft of the hair can be tested. However, there are difficulties in this type of testing. The mitochondrial DNA in a hair from the front of your head and one from the back may differ, thus creating the possibility of false positive or negative results.

Two men were convicted in Oklahoma for a 1982 rape/murder in which the state relied upon microscopic hair comparisons. One was five days away from being executed when a federal judge ordered DNA testing. That testing not only demonstrated that the two defendants were innocent but it also resulted in a cold hit that led to the conviction of the actual perpetrator. How probative a test is, whether it is serological or DNA testing, is dependent on the factors of the crime. Multiple perpetrators, the question of whether a perpetrator ejaculated, prior consensual sex – all of these circumstances will complicate the issue of what the test results actually tell us.

Cruel and unusual

There is no better way to prevent wrongful conviction than to provide competent defence counsel. Wealthy defendants expect and receive this

Land Registry
Clárlann na Talún

Following consultation with the Law Society of Ireland, the Irish Mortgage Council, our customer representative group and other interested parties, it has been agreed that after the registration of a new ownership, the Land Certificate, where it has already issued, will not be reissued in respect of the new ownership and will, instead, be cancelled. This will apply to applications for registration of transfers or transmissions on death (assents) lodged on or after 1 September 2004.

Law Society of Ireland

CONVEYANCING COMMITTEE

■ The Conveyancing Committee of the Law Society fully supports the decision of the Land Registry to cancel Land Certificates on a change of ownership.

The committee also notes that lending institutions no longer have an automatic requirement that new Land Certificates be bespoken in respect of property taken as security by way of legal mortgage.

Practitioners, therefore, should no longer bespeak a Land Certificate, unless they have specific instructions from their clients to do so.

The next edition of the certificate of title documentation will reflect the new position.

IMC

Irish Mortgage Council

■ The Irish Mortgage Council, representing mortgage lenders in Ireland (listed at the foot hereof) has confirmed that the lending institutions no longer have an automatic requirement that Land Certificates be bespoken in respect of property taken as security by way of legal mortgage. The Irish Mortgage Council believes that this is a positive step towards simplifying conveyancing and mortgage transactions. Practitioners, therefore, should not bespeak a Land Certificate, unless they have specific instruction from their client to do so.

MEMBERS OF IRISH MORTGAGE COUNCIL
ACC Bank, AIB Bank, Bank of Ireland,
Bank of Scotland - Ireland, EBS Building Society,
First Active, ICS Building Society, IIB Homeloans,
Irish Nationwide Building Society, National Irish Bank,
permanent tsb, Ulster Bank

kind of representation, but many defendants are poor. Michael Graham spent 14 years on death row in Louisiana for a crime he did not commit. Represented at trial by two inexperienced attorneys, one of whom abandoned the case before the sentencing phase, Graham was convicted of murder in 1987. The case against him consisted of three witnesses who later recanted their testimony and a prosecution that withheld evidence of his innocence. In March 2000, with the help of *pro bono* lawyers, Graham won a new trial. He was freed from prison. By the time of his release, he had spent half of his adult life on death row.

And if Jimmy Ray Bromgard had had competent counsel with access to funds for investigators and experts, he would not have spent 15 years in a Montana prison before being cleared by DNA testing. In 1987, an eight-year-old girl was raped in Montana. Given the state of conventional serology at the time, the serologist could not determine a blood type from the semen recovered – but 15 years later, DNA testing on those semen stains proved Mr Bromgard's innocence. The only scientific evidence offered at trial was the testimony of the manager of the state crime laboratory. In 2002, top forensic examiners confirmed that the statistics the manager used were fraudulent. Back in 1987, Mr Bromgard was assigned an attorney from a county contract system. The lawyer was a drunk and met with his client only once before trial. He hired no investigator, he retained no expert to challenge the false scientific evidence, and he failed to conduct any investigation.

Many court-appointed attorneys are incompetent and are often very poorly paid. In Kentucky, a third of those sentenced to death had been represented by lawyers who were later disbarred, suspended or convicted of crimes. Post-conviction exonerations are evidence that the court-appointed attorney system is not working. Peter Neufield, co-director of the Innocence Project, has stated that, in the context of the administration of the death penalty, exonerations represent nothing less than a devastating breakdown in the meaning of justice.

The green mile

With every wrongful conviction, not only does an innocent person suffer in prison or on death row, but the real perpetrator remains free to commit serious crimes. In many of the post-conviction DNA exonerations in the United States, the actual perpetrator was identified through the same analysis, preventing more crime and protecting potential victims.

Since its introduction in the late 1980s, DNA testing has proven to be a very effective tool for both the prosecution and the defence. While an inclusion by DNA testing is still contestable, an exclusion by DNA testing is conclusive (absent mitigating circumstances and assuming the reliability of the test).

The prospect of innocents languishing in jail or even being put to death for crimes they did not commit should be intolerable to everyone. Most of the project's clients are poor, forgotten, and have used up all of their legal avenues for relief. The project is their last hope. G

POST-ARREST EXONERATION

In about 25% of the cases submitted to the FBI lab during the last decade, the crime-scene DNA did not match the DNA of the suspect. In other words, hundreds of arrested people are exonerated before trial each year by DNA test results. For example:

- A man was arrested in Indiana last year for raping a young girl. Five months later he was released from jail when DNA testing for evidence ruled him out as a suspect
- A Brooklyn man accused of raping a teenage girl was cleared because of DNA testing. When the indictment was dismissed on the district attorney's motion, the defence attorney was quoted as saying 'if not for DNA evidence, this man quite possibly could have been convicted'.

POST-CONVICTION DNA TESTING

When post-conviction DNA testing is conducted, the test results in about half the cases further implicate the defendant. For example, William Hayes was convicted in New York in 1989 for murder and sentenced to prison for life. When the victim's body was found, crime-scene investigators obtained material from under her fingernails and kept it as evidence. The Innocence Project filed a motion on his behalf for post-conviction DNA testing of the still extant material in an effort to prove his claim of innocence. The motion was granted and the evidence was tested. The testing of the material matched up with Hayes's DNA profile and the Innocence Project withdrew from his case.

CLOSING OLD CASES

DNA testing is capable of solving homicides that are decades old. For example, a woman was found shot to death in a field in California in 1971. Her murder went unsolved and almost forgotten for 32 years, until a cold-case squad detective sent some clothing stored in an evidence bag to the lab for DNA analysis. The profile matched Philip Arthur Thompson, who was serving a long sentence in the California State Prison for a series of rapes in the early 1980s. It's the oldest case solved by DNA in US history.

Paula Scollan is a trainee solicitor with the Dublin law firm Kenny Boyd and Company. She is currently on secondment with the Innocence Project in New York as part of her traineeship.

HOOK, LINE

If you've always wanted to fish but never knew how or couldn't find the time, now is your chance to take the bait. Pat Molloy and John Geary try to reel you in

MAIN POINTS

- Lawyers' Fishing Club
- New members needed
- September outing

Although the name may suggest that it's some sort of secret society, the Lawyers' Fishing Club is far from it. This sociable group has been in existence for quite a number of years and some of the present participants have been attending the club's annual trip for over ten years.

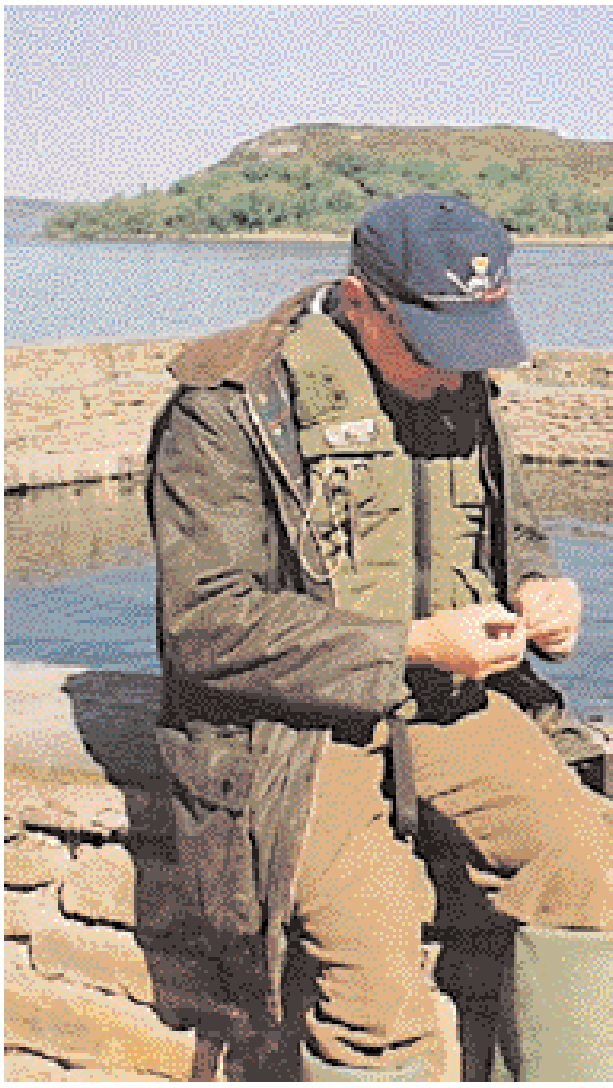
The club is unusual insofar as the participants are both barristers and solicitors and come from both Northern Ireland and the Republic of Ireland. There are usually a number of English lawyers who make the trip as well.

Over the last number of years, there has been one annual trip a year, typically involving a long weekend spent at one of the great lakes in the West of Ireland, such as Conn, Corrib or Melvin. This year's trip was well attended, with around 25 anglers making the journey. Having spent the last few years in Lough Corrib, a change of scene was decided upon and the venue selected was Lough Conn in County Mayo – the scene of many great fishing expeditions in the past.

The group, together with a number of locally-based Mayo solicitors and barristers, enjoyed the hospitality of the Pontoon Bridge Hotel, situated by the sandy shores of Lough Conn. Fishing at this time of the year requires wind, rain and cloud cover, but conditions yielded something of a heat wave over the weekend of 21-23 May. Notwithstanding this, the legal eagles managed to have a good day's fishing on the Friday and some excellent catches were enjoyed. These included a 2.5lb trout caught by Simon McAleese (from McAleese and Co in Dublin) on the wet fly and six good-size trout caught by Noel Phoenix (from Northern Ireland). Peter Mathison (chairman of the English lawyers' fishing club) also had a good day, landing four plump trout on a variety of flies.

Scales of justice

Clear blue skies on the Saturday made the fishing conditions difficult. A late start (much to do with the previous late night) and a couple of hours' fishing



Great anticipation: the boats head out on scenic Lough Conn

AND SINKER

Nick Fenton tackles up

Simon McAleese proudly displays a little Lough Conn monster that he released back to the water

without much success led the merry band of lawyers to a relaxed long lunch on Glass Island, amid the ruins of the nearby 12th century Cistercian Abbey. The afternoon was a little uneventful in the catch stakes but the tranquil surroundings, together with watching the splash of free-rising trout and the occasional salmon, made for a terrific end to this year's trip. The dinner, drinks and prize-giving that evening turned into a jovial affair while the sun set over the peaceful waters of Lough Conn in the shadow of Nephin Mountain.

The club is looking to expand its membership and invites both novice and experienced anglers from legal circles to enjoy the various forthcoming outings and events. New anglers and complete beginners are most welcome, particularly females who always wanted to learn the gentle art of fly fishing.

The club will have another trip next year around the same time, and interested parties should contact Patrick Molloy at patrick.molloy@mop.ie or telephone him on 01 619 9000. G

Patrick Molloy is a partner and John Geary a solicitor in the Dublin law firm Matheson Ormsby Prentice.

SPINNING A LINE IN SEPTEMBER

A one-day outing in September at the famous Kildare Hotel and Country Club (K Club) will take place on Saturday 25 September. New members are greatly encouraged to come along, and tuition will be provided by experienced guides. The fishing will be on two lakes surrounding the golf course, with some river fishing on the River Liffey which flows through the estate. Lunch, equipment and tuition is included in the price, which will be approximately €100 per person.

For further information, contact John Geary on 087 821 7368 as soon as possible so that numbers can be ascertained.

Intellectual Property Law in Ireland

Second edition

By Robert Clark, BA, LLM, PhD, BL, Professor of Law, University College, Dublin; and Shane Smyth, BCL, BSc (Comp), Solicitor, Partner, FR Kelly & Co

The NEW edition of this highly regarded textbook will bring you right up to date with all aspects of the legal framework relating to the area of intellectual property law, making sure you're well informed!

Incorporating all legislative and case law developments since the last edition was published in 1997, this new edition covers all the main aspects of intellectual property law including:

Copyright • Trade marks • Patents • Design law

This new edition of *Intellectual Property Law in Ireland* deals with topics such as passing-off and the law of confidence. It also includes full coverage of the Trademarks Act 1996.

In particular, this new edition covers the far-reaching changes introduced by the Copyright and Related Rights Act 2000, and the Industrial Designs Act 2001. Written by the leading experts in this area, it should prove invaluable to all IP practitioners and students.

Product Code: CSIP2
ISSN: 1854752340
Price: €140.00
Publishing Date: August 2004

Book reviews

Drunken driving and the law (third edition)

Mark de Blácam. Thompson Round Hall (2003), 43 Fitzwilliam Place, Dublin 2.
ISBN: 1-85800-287-7. Price: €95.

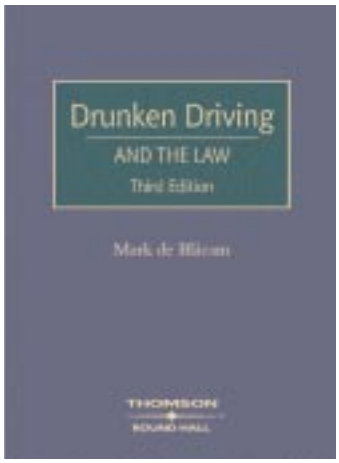
The lawyer who heads off to the District Court to defend a client charged with drunken driving without being totally familiar with the third edition of Mark de Blácam's *Drunken driving and the law* should give careful consideration to staying at home! This edition was published in 2003 and states the law as of 1 June 2003. This excellent book should be of immense assistance to prosecution and defence lawyers alike.

Many will share my recollection of the proofs required for a successful drunken driving prosecution long before the introduction of breathalysers and intoximeters. In those days, I spent many an hour attempting to convince the late District Justice William A Tormey that the defendant whose breath smelt of alcohol had consumed only one or two drinks, that his incapacity to walk a straight line was due to a war injury or being kicked by a farm animal shortly before the garda arrested him, and that his failure to touch his nose with his index finger was attributable to a detached retina! We did not then have the benefit of erudite legal texts such as Mr de Blácam's book for the very simple reason that we did not need them.

How things have changed in the area of drunken driving, just as they have in practically every other area of law. As in the earlier editions of this book, de Blácam once again sets out very clearly the essential elements of the offences of drunken driving and related offences and exactly what proofs are required in such prosecutions. He conducts a careful and detailed analysis of each of those proofs and presents them in a style that is very easy to follow and comprehend. The exercise of highlighting what the prosecution must prove in such cases inevitably leads you to identify the lines of defence that may emerge.

In chapter 4, de Blácam deals with the statutory procedure from detection to arrest. The treatment of the defendant in the garda station is then addressed in chapter 5. Evidential breath-testing cases are dealt with in chapter 6, and it is there that you will find the scientific and technical aspects of the intoxilyzer and the procedures for its operation. Also, it is there that he analyses the likely outcome of the prosecution where there is a failure to follow the operating procedures.

The statutory procedures governing blood or urine-specimen cases are dealt with in chapter 7, penalties in the following chapter, and the procedures for the commencement of charges in chapter 9. Within that, there is an interesting and comprehensive section dealing with delay. The remaining chapters deal with the hearing of the prosecution and appeals and other review procedures respectively. In chapter 10, he refers to the interesting decision of the Supreme Court in *O'Mahony v Ballagh* (unreported, Supreme Court, 13 December 2001) in which the court recognised that a judge hearing a case at first



instance had a duty to 'give a ruling in such a fashion as to indicate which of the arguments he is accepting and which he is rejecting and, as far as practicable in the time available, his reasons for so doing'.

This is clearly something of which all district judges are aware!

All the case law up to June 2003 is carefully considered and put in context. It should be noted that this book was published before the decision of the Supreme Court was delivered on 1 March 2004 by Geoghegan J in *Whelan v Kirby and the Director of Public Prosecutions*. In that case, the solicitor for a defendant accused of an offence under section 49(4) of the *Road Traffic Act, 1961*, as inserted by section 10 of the *Road Traffic Act, 1994*, indicated to the court that he was seeking an order that the intoximeter used in the garda station be independently inspected by a suitably qualified expert. There were a number of adjournments of the matter, and ultimately the judge refused the application without hearing the solicitor for the defendant. The Supreme Court held that was in violation of the defendant's constitutionally-guaranteed right to fairness of procedures.

Such procedures require, in the absence of exceptional circumstances indicating abuse of process of the court, that a pre-hearing application to a judge of the District Court for an order requiring the production of documents and/or a request for inspection of equipment ought to be entertained where the documents sought or the equipment used are permitted by statute to be used for the purpose of producing a statement of facts that are essential to the prosecution case and are deemed to be true unless rebutted. The court must consider such an application and it is then a matter for the judge, at his or her discretion, to decide whether to grant the order.

Prosecution lawyers will look to this book to alert them to what must be proved in drunken driving and related prosecutions. Defence lawyers will be mainly interested in identifying what possible lines of defence may be available to them. The book will not disappoint either of them. Everything is covered. De Blácam is to be congratulated for updating us on the law on this subject. His book, which has a comprehensive index, is well written and easy to follow. G

Patrick Groarke is the managing partner of the Longford law firm Groarke & Partners.

Irish planning law factbook

Berna Grist BL and James Macken SC (eds). Thompson Round Hall (2003), 43 Fitzwilliam Place, Dublin 2. ISBN: 1-85800-357-1. Price: €345 (updates to this edition are currently available at €140).

The editors, in putting their team of writers together, instructed them to 'avoid jargon, be it legalese or planning speak' as far as possible. The purpose was to ensure that this book would be accessible and valuable to both lawyers and non-lawyers. To a large extent the authors, and that includes the editors, have been admirably true to the principle of 'simple language' but occasionally the turgid language of the statutes and regulations peeps through the text.

Berna Grist BL has written a chapter entitled *Who regulates planning?*. The chapter draws together a lot of information that is usually spread throughout a planning textbook. This is a useful chapter and contains much information that is not always easily accessed.

Colin McGill wrote on planning policies and, in the course of his chapter, he summarises a host of planning guidelines dealing with all sorts of useful matters from guidelines on wind farms to guidelines on childcare facilities. It is often difficult to lay your hands on planning guidelines and policy directives, and this is a useful chapter too.

Jim Brogan wrote chapters 3 and 6 entitled, respectively, *Is planning permission required?* and *Appeals*. Chapter 3 deals both with the meaning of development and with the necessity to obtain permission. The chapter also deals with material change of use, intensification and abandonment. The new system of making submissions and observations, within five weeks of the application, is fully explained and much of the chapter deals with exempted development in its many and varied forms. This is the longest chapter in the book and perhaps a little more time should have been devoted to the concept of 'development', which is fundamental to an understanding of the planning process. Both the statutory and regulatory provisions dealing with exempted development are comprehensively covered.

In chapter 6, Brogan deals with the structure of An Bord Pleanála and the planning appeal mechanism in a clear and effective manner.

Berna Grist, Hugh Mannion and Rachael Kenny collaborated in writing chapter 4, which deals with the planning application. Information on day-to-day matters is easily found among these pages. The types of permission in respect of which an application can be made are set out, including the new and more useful system for outline permission. Outline permission is dealt with in two distinct parts of this chapter, and I feel that it might have been clearer to finish off the subject under one heading. For solicitors, the most valuable part deals with the making of an application. Figure 4.1 provides an overview of the whole process, and the chapter goes on to provide information that gives easily-found references to such matters as time limits, site notices, newspaper notices, the application form and other matters to be submitted with the application. It is important to remember that the fees to be lodged change fairly frequently. If the wrong fee is submitted, the application will be invalidated. You should always check with the planning authority before lodging any documents in respect of which fees are payable. The appendix to this chapter contains forms and precedents that are in common use.

Chapter 5, by Rachael Kenny, deals with the making of the planning decision.

Figure 5.1, which is laid out on two pages, sets out the procedure between receipt of application and final decision. Information on all relevant time-limits is clearly stated and the question that we, as practising solicitors, are often asked to advise on is the question of further information. Although an application may have been validated, a planning authority may require further information, and details of the type of information and the procedures and time limits are set out in this chapter. Examples of standard conditions are also given and, in the case of refusal, sufficient and adequate reasons must be given. The new procedure dealing with refusals for past failures is also briefly summarised.

Chapters 7, 8 and 11 are by James Macken SC. Chapter 7 is entitled *Conservation*. Protected structures have received some mention elsewhere in this book but the authoritative statement on them appears in this chapter. The information on protected structures is logically and amply set out. It makes it clear that ownership of such a structure carries onerous responsibilities. Pre-contract planning searches are essential to establish whether or not a structure is a protected structure or a proposed protected structured.

Architectural conservation areas in their varying forms and conservation of amenities by special amenity area orders, landscape conservation areas and tree preservation orders are economically but effectively covered.

Chapter 8 deals with infrastructure and covers topics that are not always included in books dealing with planning law. Roads, water supply, gas, electricity and communications are all included, as are harbours, railways, airports and development of the foreshore. Paragraph 8.1 gives the reader a very good introduction to this chapter and shows how the development of public infrastructure has, necessarily, held a special position in its relationship with ordinary planning principles. The argument is on-going as to whether or not the expedient 'fast-track' approach is one that should be adopted in relation to development that is considered to be of national and/or strategic importance. Somehow, a balanced view must be adopted – because if it is not, God help the Hill of Tara.

Macken's final chapter deals with compensation under two headings:

- Compensation under the *Planning and Development Act, 2000*, and
- Compensation under other acts where land is acquired by a planning, local or other authority.

One might start off on a very high note if you only had time to read paragraphs 11.2.1 to 11.2.8. When you get to grips with schedules 3, 4 and 5 of the PDA 2000, you suddenly realise that there are a very considerable number of restrictions.

Chapter 11 is particularly well presented by the author, who is clearly very familiar with the whole concept of compensation. There is just about the right amount of information, and a reading of these 34 pages will be of great advantage to anyone who is about to advise a client on compensation issues.

Chapter 9 is written by Tom Flynn, who has in the past given a number of planning lectures to solicitors. Here again we see the increasing interaction between planning law and environmental law, an interaction that is fast becoming recognised by writers of planning textbooks. Paragraph 9.2 is well worth reading. It deals with the interaction between pollution control and planning control. Various types of licenses, which are now becoming a regular part of conveyancing and commercial transactions, are dealt with, including integrated pollution-control licences, waste licenses, water pollution, air pollution, noise pollution and litter pollution licenses.

For some time, our profession has been without a comprehensive textbook on environmental law and I understand that Dr Yvonne Scanaill's publication is at an advanced stage.

The law in this area is changing so rapidly that it is difficult to keep up to date.

Tom Flynn has given us a very useful and workman-like synopsis of the environmental licensing system and of the manner in which it is controlled, principally under the *Protection of the Environment Act, 2003*. Undoubtedly, there is much more to be written about this act.

Chapter 10, by Berna Grist, deals with enforcement. I detect a slight note of disillusionment in Grist's writing and it is a view I share. One of the key aims of the PDA 2000 was to 'deliver a quality planning service'. Without effective enforcement, it is not possible to do so. Berna Grist draws attention to the outspoken criticisms made by the ombudsman, and in the initial stages of PDA 2000 we have certainly seen little to encourage confidence in the enforcement procedures. Mary Moylan (the assistant secretary of the development and planning division in the Department of the Environment) is quoted, from a paper she delivered to the Irish Planning Institute, where she concluded: 'until we have a culture of enforcement, we will not have a quality planning system'.

Planning enforcement is dealt with in a step-by-step manner in this chapter and includes both the warning letter and enforcement notice and also the planning injunction. Another method of planning enforcement, which heretofore has not been commonly used, is detailed in paragraph 10.5 – namely, criminal prosecution. The PDA 2000 eases the path of the planning authority in prosecuting planning offences. These prosecutions will be much more frequent in future. Ms Grist draws attention to the fact that with offences under the PDA 2000, section 151 reverses the normal burden of proof and it is not a matter for the prosecution to show that the subject matter of the prosecution constitutes development that is not exempted development. That burden rests with the accused. When one considers that the maximum conviction on an indictment is €12,697,380 and/or imprisonment not exceeding two years, one can readily believe that offenders will soon sit up and take notice.

The *Irish planning law factbook* is a useful addition to any practitioner's library. It is easily readable and you can get to grips with the basis and essentials of many planning and environmental issues in a very short time indeed. There is some repetition of various topics in some of the articles, but I do not think that this is a serious drawback. The book is published in a binder, and while I appreciate that it can be easily brought up to date, I find that it is sometimes difficult to turn the pages and the earlier pages tend to get damaged, and I am quite depressed when I remember what happened to my copy of O'Sullivan & Sheppard as I struggled to keep it up to date.

I am sorry that the editors did not consider a separate chapter for social and affordable housing. Much, but not all, of the information on this subject is contained in the book but it is scattered around and about. It is an important subject for solicitors, planners and architects working in the area of housing development. G

John Gore-Grimes is partner in the Dublin law firm Gore & Grimes and is the author of Key issues in planning and environmental law.

Report of Law Society Council meeting held on 28 May 2004

Motion: interest on clients' monies regulations

'That this Council approves the draft regulations cited as the Solicitors (interest on clients' monies) regulations 2004'.

Proposed: Simon J Murphy
Seconded: Orla Coyne

Simon Murphy explained that, essentially, the regulations were a matter of housekeeping, with references in the old regulations to the *Solicitors' accounts regulations* of 1984 being replaced by references to the *Solicitors' accounts regulations 2001*. In addition, a minor amendment had been made to regulation 5, so that a solicitor was not liable to account for interest amounting to less than €100, rather than €95, which had been the limit under the 1984 regulations. The Council approved the regulations.

Annual reports of the independent adjudicator and the lay members of Registrar's Committee

John O'Connor briefed the Council in relation to the sixth annual report of the independent adjudicator, together with the tenth annual report of the lay members of the Registrar's Committee. Mr O'Connor noted that the independent adjudicator's report was a very positive endorsement of the society's complaints-handling system. He had identified two issues requiring action: a) the constraints on the society investigating complaints in relation to solicitors involved in family law proceedings, and b) the number of solicitors attracting multiple complaints, many on a regular and on-going basis. Mr O'Connor noted that the former issue was to be dealt with by the *Civil Liability and Courts Bill*, currently before the Oireachtas, and the latter issue had been addressed in the 2002 *Solicitors (Amendment) Act*, and the new powers were now being exercised by the society.

Mr O'Connor referred the Council to the eight action steps taken during 2003 by the society and cited, with approval, by the independent adjudicator in his report. These included the achievement of the ISO quality mark by the Complaints Section in March 2003, the customer survey conducted by the society, which disclosed 'a gratifying level of satisfaction with the services provided', contacts made by the Complaints Section with local authorities and libraries with a view to raising the profile of the Complaints Section among members of the public, and the inclusion on the society's website of the details of how to lodge a complaint against a solicitor.

Administration of oaths

The Council discussed the difficulties presented by the increasing numbers of documents requiring the administration of oaths by solicitors and whether solicitors should be allowed to administer oaths and take statutory declarations for their own clients. John P O'Malley reported on an examination of the issue by the Guidance and Ethics Committee, which had concluded that there should be no change to the current prohibition on solicitors administering oaths or taking declarations for their own clients.

In addition, it was the recommendation of the committee that there should be strict adherence to all the formalities required by law, both by the deponent's own solicitor and by the solicitor administering the oath or taking the declaration. Furthermore, the Law Society should educate solicitors as to the importance of the proper administration of oaths.

The society should prepare a client information pamphlet about oaths and declarations, explaining the matter in simple terms, and the note contained in the *Law directory* in relation to the taking of oaths should be expanded to clearly set out the duties of both the deponent's own solicitor and the solicitor administering the oath. Finally, the society should ensure that the fee for the administration of oaths or the taking of declarations was reviewed on an on-going basis so that the fee reflected the importance of the task.

James MacGuill suggested that the society might examine the range of documents that was required to be sworn and seek to reduce the list to the minimum, with an increase in the use of certification as a means of validating documents. The Council approved the recommendations of the Guidance and Ethics Committee and also agreed that a fact-finding exercise should be conducted to identify those documents that were required by statute to be sworn and those that had evolved as a matter of practice.

Refurbishment of bed and breakfast accommodation area at Blackhall Place

The Council approved a proposal to upgrade the bed and breakfast accommodation area at Blackhall Place.

Indemnities sought by banking institutions

The Council discussed correspondence from the Irish Bankers' Federation, in response to a letter from the society outlining the society's grave concerns about the form of indemnity being sought by banks to facilitate faxed and telephone instructions in relation to the transfer of funds and electronic transfers. The IBF had responded that, while it was happy to bring the issues to the attention of its members, it was a matter for each individual and his or her financial institution to resolve.

The Council agreed that the president should write to the chairman of the Irish Bankers' Federation seeking an urgent meeting to discuss the matter.

PIAB

Ward McEllin reported that members of the task force had met with members of PIAB on the eve of the press launch of PIAB on 12 May 2004. The meeting had been attended by Dorothea Dowling, chairperson of PIAB, and Patricia Byron, chief executive officer of PIAB, as well as a number of departmental officials.

Civil Liability and Courts Bill, 2004

The president reported that the society continued to press for a number of amendments to the bill, particularly in relation to the proposed reduction in the limitation period from three years to one year, which the society regarded as too short and as unfair to claimants. G

In briefing this month...

Committee report

BUSINESS LAW

The following measures have been adopted as part of the EU financial services action plan (FSAP) and will be implemented into Irish law in the coming months.

Directive 2003/6/EC on market manipulation and insider dealing. The directive is designed to prevent fraud or market manipulation in any way, shape or form on European capital markets. It will aid integration of European financial markets and build investor and public confidence. The deadline for implementation into Irish law is 12 October 2004.

Directive 2003/71/EC on prospectuses. This directive aims to harmonise the rules applicable to prospectuses (offering documents for securities), making it easier and cheaper for companies to raise capital throughout the EU on the basis of approval from a regulatory authority in just one member state. It reinforces protection for investors by guaranteeing that all prospectuses, wherever in the EU they are issued, provide them with clear and comprehensive information needed to make investment decisions. The deadline for implementation in Ireland is 1 July 2005.

Directive 2004/39/EC on investment services and regulated markets. The directive, commonly known as the second *Investment services directive*, gives investment firms a 'single passport', allowing them to operate throughout the EU on the basis of authorisation in their home member state. It amends current EU rules of the provision of investment services (implemented by the *Investment Intermediaries Act, 1995*). The deadline for implementation of the new directive in Ireland is 30 April 2006.

Directive 2004/25/EC on takeover bids. The *Takeover bids directive* was formally adopted on 21 April 2004. It includes harmonised rules governing the bid procedure and provisions to protect minority shareholders. The directive is viewed as a compromise document by the European Commission, which tried to broker a far more ambitious agreement. It is to be implemented in Ireland by 20 May 2006. G

Business Law Committee

Practice direction

WRITTEN JUDGMENTS TRANSMITTED BY ELECTRONIC MEANS (NO HC 33/2004)

Where it is intended to produce to the High Court a copy of an unreported judgment which has been issued by the High Court Central Office by electronic means, counsel or the solicitor on record is required to certify as follows on the printed version: 'I certify that this is a copy of a judgment issued electronically by the Central Office of the High Court'.

In the event of any doubt, parties should bespeak an attested copy of the judgment in the Central Office.

Joseph Finnegan,
President of the High Court,
9 June 2004

Practice notes

DATING OF CERTIFICATE OF TITLE

The Conveyancing Committee would like to remind the profession that a certificate of title given to a lending institution in relation to a client's mortgage transaction should be dated as of the date of parting with the loan funds.

Conveyancing Committee

ATTORNEY GENERAL'S SCHEME

Practitioners will be aware that, heretofore, the Chief State Solicitor's Office (Accounting Section) has refused to pay practitioners in respect of affidavits drafted by practitioners and settled by counsel where both junior and senior counsel had marked fees for them. This resulted in practitioners receiving no payment where they had done a great deal of work in researching the material for the affidavits and had drafted the first version of the affidavit. Practitioners should note that the CSSO has recently agreed to pay fees to practitioners for the drafting of such affidavits but will pay one counsel only in relation to same.

Criminal Law Committee

PRACTICE NOTE

PURCHASERS' SOLICITOR'S FEE PAID BY THE VENDOR: CONFLICT OF INTEREST?

This is an issue which has arisen in the context of certain arrangements which individual builders are making with solicitors.

A typical arrangement involves a builder who is developing a housing estate. He has his own solicitor. He approaches a second solicitor in the locality suggesting that the second solicitor makes himself/herself available to act on behalf of all the purchasers of the houses in the estate. The builder wants to have this arrangement in place to avoid, as the builder sees it, unnecessary delay. Undoubtedly when each purchaser has a different solicitor, each solicitor may raise at least some different queries in relation to the title and other matters so that in total there are numerous queries to be dealt with by the builder's own solicitor. If every purchaser could be encouraged to go to the one solicitor, it would mean that the number of queries is minimised. Crucially, part of the arrangement is that the builder will pay the purchasers' solicitor all the legal fees for the individual purchases.

Such an arrangement does not contravene any regulation. It is to be distinguished from SI 85 of 1997, which places a restriction on solicitors acting in a conveyancing transaction on behalf of both the builder and purchaser of residential units. In the arrangement under discussion, the builder has his own solicitor.

However, the view of the Guidance and Ethics Committee is that solicitors who enter into such arrangements may be placing themselves in an impossible position. In the event that their purchaser-clients become dissatisfied, solicitors may not be in a position to demonstrate that they have been professionally independent, and it may be difficult to argue against a conclusion that a conflict of interest existed to the extent that the interests of the clients were compromised.

When a purchaser instructs a solicitor, it is implied in the instructions that the purchaser is, firstly, asking the solicitor to take the necessary steps to achieve a proper conveyance of the property; secondly, to advise, as necessary, as to the best course of action, in particular circumstances, especially if difficulties arise in the course of the transaction; and, thirdly, that the solicitor has no conflict of interest in accepting instructions. It is in the context of advice that the potential conflict lies.

Solicitors who enter into such arrangements say that they will have no difficulty in carrying out their clients' instructions. They must be sufficiently independent to pursue their clients' interests as necessary. They must stand their ground against the builder and delay the completion of any sale should this be necessary.

Such arrangements undoubtedly appeal to the consumer because of the possible saving in legal fees. However, purchasers require the protection which, arguably, the employment of an independent solicitor of their choice would give. There should be some recognition of the fact that most purchasers are not legal experts and accordingly will be attracted to the arrangement on the basis of the reduced fees only, with no appreciation of difficulties which might arise.

Currently, there is no prohibition in relation to these arrangements. Solicitors are free to make their own professional judgement in relation to the matter. However, solicitors who enter into one of these arrangements should consider the matter very carefully and, if they decide to proceed, do so fully aware of the potential pitfalls.

Solicitors must realise that their professional duty is to the purchaser, their own client, and must represent the client's interest without taking into account the interest of the builder.

Guidance and Ethics Committee

SOLICITORS DISCIPLINARY TRIBUNAL

This report of the outcome of a Solicitors Disciplinary Tribunal inquiry is published by the Law Society of Ireland as provided for in section 23 (as amended by section 17 of the *Solicitors (Amendment) Act, 2002*) of the *Solicitors (Amendment) Act, 1994*

In the matter of Thomas Flood, solicitor, carrying on practice under the style and title of Esmond Reilly Solicitors at Dargan House, Fenian Street, Dublin 2, and in the matter of an application by the Law Society of Ireland to the Solicitors Disciplinary Tribunal, and in the matter of the *Solicitors Acts, 1954 to 2002* [4412/DT415]
Law Society of Ireland (applicant)
Thomas Flood (respondent solicitor)

On 6 April 2004, the Solicitors Disciplinary Tribunal found that the respondent solicitor was guilty of misconduct in his practice as a solicitor in that he had:

a) Failed to reply to the correspondence of the society
b) Failed to attend at the Registrar's Committee meetings
c) Failed to respond to his client
d) Failed to refund fees as directed by the Registrar's Committee in a timely manner.

The tribunal ordered that the respondent solicitor:

a) Do stand censured
b) Pay a sum of €2,500 to the compensation fund
c) Pay the whole of the costs of the Law Society of Ireland as taxed by a taxing master of the High Court in default of agreement. G

LEGISLATION UPDATE: 19 MAY – 21 JUNE 2004

Details of all bills, acts and statutory instruments since 1997 are on the library catalogue at *www.lawsociety.ie* (members' and students' areas) with updated information on the current stage a bill has reached and the commencement date(s) of each act.

ACTS PASSED

Child Trafficking and Pornography (Amendment) Act, 2004

Number: 17/2004

Contents note: Amends the *Child Trafficking and Pornography Act, 1998* to provide that nothing in that act shall prevent: a) the giving of a direction by a committee of either or both of the houses of the Oireachtas under s3 of the *Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act, 1997* or compliance with such a direction, or b) the possession, distribution, printing, publication or showing by either house, a committee (within the meaning of that act) or any person, of child pornography in connection with the performance of the functions conferred on those houses by the constitution or by law, or on a committee by resolution of those houses or a resolution of either house

Date enacted: 2/6/2004

Commencement date: 2/6/2004

Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) (Amendment) Act, 2004

Number: 16/2004

Contents note: Amends s3 (power of committee to obtain evidence) of the *Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act, 1997* to provide that, notwithstanding s3(4) of that act, the section shall apply to a judge of a court specified in that sub-section where a committee is established for the purposes of a matter relating to that judge arising: i) under art 35.4 of the constitution or ii) pursuant to s39 of the *Courts of Justice Act, 1924* or s20 of the *Courts of Justice (District Court) Act, 1946*, and provides for related matters

Date enacted: 2/6/2004

Commencement date: 2/6/2004

Copyright and Related Rights (Amendment) Act, 2004

Number: 18/2004

Contents note: Inserts a new subsection 7A into section 40 of the *Copyright and Related Rights Act, 2000* in order to remove any doubt as to the right of any person to place literary or artistic works protected by copyright or copies thereof on public exhibition without committing a breach of copyright as provided for by part II of the *Copyright and Related Rights Act, 2000*

Date enacted: 3/6/2004

Commencement date: 3/6/2004

Electoral (Amendment) Act, 2004

Number: 15/2004

Contents note: Provides for the conduct of European Parliament, local and presidential elections and referendums using voting machines and electronic vote counting. Provides for the establishment on a statutory basis of the Commission on Electronic Voting to report on the secrecy and accuracy of the chosen electronic voting and counting system for the European and local elections in June 2004. Amends and extends the *Electoral Acts, 1992 to 2002*, the *European Parliament Elections Acts, 1992 to 2004*, the *Presidential Elections Acts, 1992 to 2001*, the *Local Government Acts, 1925 to 2003*, the *Local Elections Acts, 1974 to 2002* and the *Referendum Acts, 1992 to 2001*

Date enacted: 18/5/2004

Commencement date: Commencement order(s) to be made (per s1(8) of the act); 19/5/2004 for part 1 (ss1-3), part 3 (ss17-29), sections 33, 34 and 35 of part 4, and schedule 5 of the act (per SI 215/2004)

Health (Amendment) Act, 2004

Number: 19/2004

Contents note: Provides that the members of the health boards established under the *Health Act, 1970* as well as the Eastern Regional Health Authority, the Northern Area Health Board, the East Coast Area Health Board and the South-Western Area Health Board shall cease to hold office upon the commencement of this act; provides that the functions of those bodies shall be performed by their chief executive officers and, in certain circumstances, by the minister for health and children; removes the distinction between reserved and executive functions; amends the *Health Act, 1970*, the *Health (Amendment) (No 3) Act, 1996*, the *Health (Eastern Regional Health Authority) Act, 1999* and other enactments and provides for related matters

Date enacted: 8/6/2004

Commencement date: 15/6/2004 (per SI 378/2004)

SELECTED STATUTORY INSTRUMENTS

An Bord Bia (Amendment) Act, 2004 *(commencement) order 2004*

Number: SI 220/2004

Contents note: Appoints 1/7/2004 as the commencement date for part 3 (other than ss21 and 22) and part 4 (other than s24(a)ii) of the act

An Bord Bia (Amendment) Act, 2004 *(transfer day) order 2004*

Number: SI 221/2004

Contents note: Appoints 1/7/2004 as the transfer day for the purposes of part 2 of the act

Credit Union Act, 1997 *(exemption from additional services requirements) regulations 2004*

Number: SI 223/2004

Contents note: Prescribe services that individual credit unions can offer that are exempt from the additional services requirements, as provided for by s48(2)(b) of the *Credit Union Act, 1997* as amended by item 26 of part 24 of sched 1 to the *Central Bank and Financial Services Authority of Ireland Act, 2003*

Commencement date: 1/6/2004

European Communities (milk quota) (amendment) regulations 2004

Number: SI 208/2004

Contents note: Amend the *European Communities (milk quota) regulations 2000* (SI 94/2000), as amended, by modifying some of the definitions and some of the provisions relating to milk-quota transfers, milk-production partnerships, dormancy, temporary transfers, milk-purchaser obligations and producer records; give effect to reg 1788/2003 and reg 595/2004

Commencement date: 6/5/2004

European Communities (reorganisation and winding-up of credit institutions) regulations 2004

Number: SI 198/2004

Leg-implemented: Dir 2001/24

Commencement date: 5/5/2004

Finance Act, 2003 *(commencement of chapter 1 of part 2) order 2004*

Number: SI 373/2004

Contents note: Appoints 1/7/2004 as the commencement date for chapter 1 (ss73-86) of part 2 of the *Finance Act, 2003*. This chapter consolidates and updates the law of excise duty on alcohol products, to be known as alcohol products tax

Finance Act, 2003 *(section 102) (commencement) order 2004*

Number: SI 232/2004

Contents note: Appoints 28/5/2004 as the commencement date for section 102 of the *Finance Act, 2003* (amendment of s131 [registration of vehicles by revenue commissioners] of the *Finance Act,*

1992 to provide for the issue of a new single vehicle registration certificate by the minister for the environment, heritage and local government)

Intoxicating Liquor Act, 2003 *(section 21) regulations 2004*
Number: SI 271/2004
Contents note: Designate national sporting arenas and prescribe areas of the arenas for the sale and consumption of alcohol under s21 of the *Intoxicating Liquor Act, 2003*
Commencement date: 1/7/2004

Local Government Act, 2001 *(commencement) order 2004*
Number: SI 217/2004
Contents note: Appoints 19/5/2004 as the commencement date for section 5(1) of, and part 1 of sched 3 to, the *Local Government Act, 2001* for the purposes of the repeal of s21 of the *Local Government Act, 1955* and for the purposes of the repeal of s25 (other than s25(6)) of the *Local Elections (Petitions and Disqualifications) Act, 1974*; appoints 21/5/2004 as the commencement date for s169 (other than s169(4)(a)ii and s169(4)(b)(ii) and references to a code of conduct in ss166(1), 167(2), 170(1) and 174(6); appoints 1/1/2005 as the commencement date for s169(4)(a)(ii) and s169(4)(b)(ii) and 171(1)(b)

Merchant shipping (pleasure craft) (lifejackets and operation) (safety) regulations 2004
Number: SI 259/2004
Contents note: Make provisions governing the operation of pleasure craft and personal watercraft, including provisions relating to age restrictions, the carriage and use of lifejackets and restrictions on the use of alcohol and drugs
Commencement date: 3/6/2004

Personal Injuries Assessment Board Act, 2003 *(commencement) (no 2) order 2004*
Number: SI 252/2004
Contents note: Appoints 1/6/2004 as the commencement date for the provisions of the act not already in operation, with the exception of ss3(b), 3(c) and 3(d) of the act. This means that from 1/6/2004 all personal injury claims arising from workplace accidents (where an employee is seeking compensation from his/her employer) must be referred, in the first instance, to the Personal Injuries Assessment Board

Personal Injuries Assessment Board (fees) regulations 2004
Number: SI 251/2004
Contents note: Prescribe the charges the Personal Injuries Assessment Board may make on claimants and respondents in respect of the processing by the board of applications under section 11 of the *Personal Injuries Assessment Board Act, 2003*
Commencement date: 1/6/2004

Personal Injuries Assessment Board rules 2004
Number: SI 219/2004
Contents note: Prescribe the rules of procedure for the making of applications for assessment under s11 of the *Personal Injuries Assessment Board Act, 2003* and for related matters
Commencement date: 12/5/2004

Road Traffic Act, 2002 *(commencement of certain provisions) order 2004*
Number: SI 248/2004
Contents note: Appoints 4/6/2004 as the commencement date for ss8 and 22 of the *Road Traffic Act, 2002* insofar as they apply to offences under s52 of the *Road Traffic Act, 1961* (as substituted by s50 of the *Road Traffic Act, 1968*), and so much of part I of the first schedule (penalty points) to the *Road Traffic Act, 2002* as relates to the offence of careless driving specified at reference no 9 of that part; appoints 4/6/2004 as the commencement date for s25(2) of the *Road Traffic Act, 2002* insofar as it applies to ss36(1) and 36(2) of the *Road Traffic Act, 1961* (as amended by s49(1)(d) of the *Road Traffic Act, 1994*) in respect of the offence of careless driving specified at reference no 9 in part 1 of the first schedule to the *Road Traffic Act, 2002*

Road vehicles (registration and licensing) (amendment) regulations 2004
Number: SI 213/2004
Contents note: Facilitate the introduction of a single document, called a registration certificate, to be issued by the minister for the environment, heritage and local government under s131 of the *Finance Act, 1992* as amended by s102 of the *Finance Act, 2003,* which replaces the two documents (the vehicle registration certificate and the vehicle licensing certificate) used when registering and taxing a vehicle for the first time
Leg-implemented: Dir 1999/37
Commencement date: 28/5/2004

Rules of the Superior Courts *(amendment to order 118) 2004*
Number: SI 253/2004
Contents note: Amends order 118 (sittings and vacations) of the *Rules of the Superior Courts* by the substitution of a new rule 2 and a new rule 4(2). The effect of these amendments is to provide that the offices of the Supreme Court and High Court will be open for public business from 10.30am to 4.30pm throughout the year, during the court vacations as well as during the sittings
Commencement date: 21/5/2004

Rules of the Superior Courts *(right of attorney general and Human Rights Commission to notice of proceedings involving declaration of incompatibility issue) rules 2004*
Number: SI 211/2004
Contents note: Insert a new order 60A (right of attorney general and Human Rights Commission to notice of proceedings involving declaration of incompatibility issue) to the *Rules of the Superior Courts*. The order provides that if any issue as to the making of a declaration of incompatibility within the meaning of s1(1) of the *European Convention on Human Rights Act, 2003* shall arise in any proceedings, the party having carriage of the proceedings shall forthwith serve notice upon the attorney general and the Human Rights Commission. Such notice shall state concisely the nature of the proceedings in which the issue arises and the contention or respective contentions of the party or parties to the proceedings
Commencement date: 7/4/2004

Solicitors (interest on clients' moneys) regulations 2004
Number: SI 372/2004
Contents note: Make provision in relation to the liability of a solicitor to account for interest on clients' money; revoke SI 108/1995 as amended by SI 504/2001
Commencement date: 1/7/2004, with saver for continuation in force *of Solicitors (interest on clients' moneys) regulations 1995* (SI 108/1995) in relation to clients' monies received prior to 1/7/2004

Taxi Regulation Act, 2003 *(section 37(1)) (commencement) order 2004*
Number: SI 260/2004
Contents note: Appoints 2/8/2004 as the commencement date for s37(1) of the act. This section requires the production of a tax clearance certificate to the licensing authority by an applicant for the grant or renewal of a small public-service vehicle drivers or vehicle licence

Valuation (revisions and new valuations) (fees) regulations 2004
Number: SI 381/2004
Contents note: Prescribe fees for (1) an application to the commissioner of valuation under s27 of the *Valuation Act, 2001*; and (2) each additional entry on the valuation list resulting from an application referred to at (1) above; revoke SI 64/2002
Commencement date: 19/5/2004. G

Prepared by the Law Society Library

First Law Update
www.firstlaw.ie

News from Ireland's on-line legal awareness service
Compiled by Karen Holmes for FirstLaw

COMPENSATION

Judicial review

Alternative remedies – scheme of compensation for personal injuries criminally inflicted – judicial review of first instance decision of the respondent – whether applicant failed to exhaust alternative remedies by not bringing appeal as envisaged under scheme

The applicant was the wife of a man who died as a result of an assault. She was awarded compensation under the scheme. However, she was dissatisfied with the award made in respect of loss of earnings. She decided against appealing the award as envisaged under the scheme and applied for judicial review, contending that the respondent had erred and acted *ultra vires* in calculating the award. The respondent contested the applicant's application on the merits and also argued that, regardless of the merits, the court ought to refuse to entertain the application because the applicant had failed to exhaust alternative remedies.

Kelly J refused the application, holding that the court should not intervene before the process envisaged under the scheme had been exhausted. The applicant should have exercised her right of appeal before applying for judicial review. There was no time-limit in the scheme for the bringing of an appeal against a determination, so the applicant was not prejudiced in that regard.

***Tomlinson v Criminal Injuries Compensation Tribunal*, High Court, Mr Justice Kelly, 3/3/2004** [FL9020]

CRIMINAL

Delay, judicial review

Prosecutorial delay – application for prohibition of prosecution of offences – whether applicant prejudiced as result of delay – whether prosecution of offences should be prohibited

The applicant had been convicted of sexual offences, which he appealed and which appeal was allowed. A re-trial was directed by the Court of Criminal Appeal. He then applied to prevent the respondent from proceeding with the re-trial on the grounds that he had been prejudiced by the delay in prosecuting the offence. The applicant further argued that there was inexcusable and culpable prosecutorial delay and that the capacity of the applicant to defend himself had been impaired. The respondent alleged that the complainant delay was due to the dominion exercised by the applicant over the complainant.

Murphy J granted an injunction restraining the respondent from prosecuting the applicant, holding that, in assessing the delay, the court had to look not to the date of the original trial but to the date of the pending re-trial. The court also had to take into account the prejudice suffered by the applicant due to having suffered anxiety and served a prison sentence.

***JH v Director of Public Prosecutions*, High Court, Mr Justice Murphy, 2/4/2004** [FL9006]

Detention

Application for release – whether detention lawful – whether transitional arrangements on coming into force of European Arrest Warrant Act, 2003 *applied – interpretation of 'produced' in s43(1)(b) of* Extradition Act, 1965 – Bunreacht na hÉireann 1937, *article 40.4.2*

The applicant applied for his release pursuant to article 40.4.2 of the constitution on the grounds that his detention was unlawful. It was contended that the assistant commissioner of An Garda Síochána who endorsed the warrants was not entitled to do so pursuant to section 43 of the *Extradition Act, 1965*, since the section was spent following the coming into force of the *European Arrest Warrant Act, 2003*. The central issues concerned the interpretation of the word 'produced' in section 43(1)(b) of the 1965 act and whether the transitional arrangements on the coming into force of the 2003 act applied.

Peart J refused the application for release, holding that, in interpreting a statute, the court had to, where necessary, refer to the entire act in order to glean the intention of the legislature. The receipt of warrants in the office of the commissioner of An Garda Síochána constituted the warrants being 'produced' and therefore the applicant's detention was lawful since it was covered by the transitional arrangements set forth in section 50(2) of the 2003 act.

***O'Rourke v Governor of Cloverhill Prison*, High Court, Mr Justice Peart, 26/2/2004** [FL9025]

DAMAGES

Personal injuries

Road traffic accident – general damages – damages for pain and suffering into the future

The plaintiff was involved in an accident on 20 May 2000 in which she sustained injuries to her neck and back. Liability was conceded and so the matter in the High Court proceeded solely on the issue of damages. The evidence before the High Court consisted of the oral evidence of the plaintiff, the oral evidence of her surgeon, Mr Barry, and two medical reports, one from Dr Connolly, the plaintiff's general practitioner, and one from Mr Scannell, who examined the plaintiff on behalf of the defendants. In giving his judgment, the trial judge referred to the fact that he felt the plaintiff had given very strong evidence of the various types of pain that she had suffered. He did, however, go on to say that pain was subjective and on medical evidence her case did not appear to be as bad as other similar cases that he had heard that day. The trial judge also emphasised the *viva voce* evidence of Mr Barry, in which he described degenerative changes in the plaintiff's back shown in her MRI scan. The trial judge awarded €30,000 for pain and suffering up to the date of the hearing in the High Court and €50,000 for pain and suffering into the future. The defendants appealed the *quantum* of damages.

The Supreme Court (McGuinness, Geoghegan, McCracken JJ) dismissed the appeal, holding that:

1) There were objective signs of the plaintiff's injury. This was not merely a soft tissue injury showing no objective signs. In giving evidence, Mr Barry pointed out that the MRI scan showed degenerative changes in the discs of both L45 and L5SI level, with some loss of disc space and some disc bulging. He further stated that the presence of some degenerative change in the discs would be relatively less common in a younger person than an older person. Mr Barry's evidence as to contin-

uing degenerative change was fairly strong
2) The sum awarded by the trial judge for pain and suffering to the present day was a reasonable sum and the court would not interfere with it
3) There was evidence that degenerative change was likely to continue. The plaintiff's young age was a factor to be taken into consideration. The sum awarded for pain and suffering into the future, although somewhat on the high side in the face of the evidence, did not exceed the normal range sufficiently for the court to interfere with it.

***Breen v Fagan and MIBI*, Supreme Court, 14/5/2004** [FL9094]

HEALTH AND SAFETY

Fatal accident

Fatal accident at work – fine – proportionality – Safety, Health and Welfare at Work Act, 1989 – *whether the fine imposed on the applicant company was grossly excessive*

On 3 September 2001, three employees of the applicant were at a client's site in Charlestown, Co Mayo, for the purpose of replacing a cracked roof gutter, which weighed two-and-a-half tonnes. That gutter was to go on the side of a building, access to which was restricted by the narrowness of the space between it and a neighbouring building. A mobile expandable work platform was placed and elevated in order to replace the gutter.

Two of the employees successfully removed the gutter from the building and elevated the new gutter to roof level. It was only then that they discovered that insufficient roof sheets had been removed to allow for the proper placement of the new gutter. The removal of the roof sheets had been done by a roofing sub-contractor on the instructions of the client. Accordingly, the two men were required to go onto the roof in order to reposition the chains. However, the employees did not have any fall protection. Consequently, one of the employees was involved in a fatal accident when he fell 30 feet from the roof. As a result of that accident, the applicant was prosecuted for five offences contrary to the *Safety, Health and Welfare at Work Act, 1989*. Those five charges were brought against the applicant company by summons and were returnable to the District Court at Charlestown on 22 November 2002. On that date, the Health and Safety Authority was willing to proceed summarily but the district judge refused to accept jurisdiction. Subsequently, the applicant company entered signed pleas of guilty and the matter came before the Circuit Court on 3 July 2003. On that date, the circuit judge imposed a fine of €500,000 on the first count and took the others into consideration. Consequently, the applicant sought leave to appeal on the basis that the fine was grossly excessive, that it was disproportionate to the offence, that it was disproportionate and inconsistent with levels of fines imposed in other cases, and that it failed to reflect the mitigating factors.

The Court of Criminal Appeal (Hardiman, O'Sullivan, Herbert JJ) allowed the appeal and varied the order of the Circuit Court judge by imposing a fine of €100,000 on the first count and taking the others into consideration. It held that:

1) Where a fine is unlimited as it was in this case, care and restraint must be used in the exercise of the power to fine. The actual level of fault is the principal consideration, and the financial state of the company to which the fine relates cannot be irrelevant and cannot be ignored, unless of course the court were informed that any level of fine could be absorbed
2) There was insufficient effort to isolate gravely aggravating features putting this case so dramatically in a different category from any of the recorded cases in Ireland or Britain. Furthermore, the failure of the court to attempt to obtain evidence of the means of the company was an error of principle
3) The courts are required to work within the framework actually provided by the legislature and, when exercising their power to impose a fine, must impose a fine that is proportionate to the level of fault and to the means of the offender
4) The principal factor in assessing a penalty for the type of offence as occurred in this case is the degree of fault. The second factor is the context of the company itself, that is to say, its record and how it has behaved since the events in issue. The third factor is the ability of the company to pay any particular fine
5) The fact that a fatality occurred was an aggravating factor in relation to the amount of the fine imposed. Other relevant factors are the failure to heed warnings and the presence of risks run specifically to save money.

***People (DPP) v Oran Pre-Cast Limited*, Court of Criminal Appeal, 16/12/2003** [FL9058]

IMMIGRATION AND ASYLUM

Deportation

Immigration – deportation order – asylum – legitimate expectation – Illegal Immigration Act, 1999 – Illegal Immigrants (Trafficking) Act, 2000 – *article 40, section 4, sub-section 2 of the constitution – whether the applicant had a legitimate expectation to remain in the state following the issuing of a work permit and visa*

The applicant is a native of Romania. He was arrested on 7 February 2000 by Garda Whelan pursuant to the provisions of section 5(1) of the *Immigration Act, 1999* as amended by section 10(b) of the *Illegal Immigrants (Trafficking) Act, 2000*. Garda Whelan gave evidence that she arrested the applicant because she had reasonable cause to suspect that he was a person who had sought asylum in the state on 14 December 2000 in the name Ady Singeorz and in respect of whom a deportation order had been made by the minister for justice, equality and law reform on 8 November 2001.

It was stated by Garda Whelan that she was informed by Detective Garda Cullen that a notice under section 3(3)(b)(ii) of the 1999 act, as amended, had been served on Ady Singeorz but that he had not presented himself to the Garda National Immigration Bureau as required by the notice. The applicant possessed a passport that had been issued on 19 April 2001. That passport contained an Irish visa issued at Bucharest and a visa issued at Dublin. He also possessed a Romanian and an Irish driving licence, a Garda National Immigration Bureau certificate of registration and a work permit, all of which were in the name Adrian Singeorzan. The applicant submitted that the visas and work permit suspended the operation and effect of the deportation order and that the respondents were estopped from seeking to rely upon it.

Consequently, the applicant applied for an order directing his release from detention by virtue of article 40(4)(2) of the constitution.

Herbert J determined that there were lawful and *bona fide* grounds for the applicant's detention and, accordingly, the applicant was not entitled to the relief sought. He held that:

1) A member of An Garda Síochána was required to have reasonable cause to suspect that a person against whom a deportation order was in force failed to comply with any provisions of the order or with a requirement

ADVERTISEMENT

Yes, it is me.

I am sick to death of watching you lot fighting over my money. I am not dead yet. So here you go. I'm spending it. I am putting this message in every magazine I can find and will keep doing so until the money is gone. Then maybe you can stop all the bickering. Shame on you all.

Bernie

in a notice under section 3(3)(b)(ii) before arresting such person. The information conveyed to Garda Whelan from Garda Cullen caused her to have a genuine suspicion that the applicant was an evader. A reasonable person in her position, assumed to know the law and possessed of the information which, in fact, she did possess, would believe that there was reasonable and probable cause to arrest the applicant

2) The evidence adduced proved that the applicant was the same person as Ady Singeorz, who was the subject matter of a deportation order made on 8 November 2001 and, accordingly, he returned unlawfully to the state. The applicant's knowledge or lack thereof of the existence of the deportation order and/or the notice did not affect the validity of those documents, which were deemed to have been validly served on him by virtue of section 6(2) of the *Immigration Act, 1999*. There was no evidence that the applicant informed the authorities to whom he had applied for the visas and work permit that he had previously applied for asylum in this state under the assumed name of Ady Singeorz. Those documents were obtained by deceit or misrepresentation and, accordingly, could not be relied upon by the applicant
3) In relation to the applicant's arguments regarding legitimate expectation, he had not adduced any evidence that he actually had that expectation. Furthermore, there were no substantial grounds to show that the applicant's expectation to remain in the state by reason of the work permit and visas was objectively justifiable. The issuing of the visas and additionally or alternatively the work permit did not amount to a representation of or on behalf of the first-named defendant to the applicant that he could lawfully re-enter this state.

***Singeorzan v The Minister for Justice, Equality and Law Reform*, High Court, Mr Justice Herbert, 24/2/2004** [FL9100]

PLANNING AND DEVELOPMENT

Certiorari, judicial review

Planning permission – material contravention of development plan – City and County Management (Amendment) Act, 1955 – Local Government (Planning and Development) Acts, 1963 to 1999 – Local Government Act, 1991

The second-named notice party applied for planning permission for a proposed development, which consisted of the conversion of a milking parlour and the installation of a cremator at Oghill, Redcross, Co Wicklow. Patrick Doran, who was an elected member of Wicklow County Council, gave evidence that he received a large number of representations from members of the public who expressed concern about the nature of the proposed development. The majority of the concerns related to health issues, but concern was also expressed that the proposed development constituted a material contravention of the Wicklow county development plan.

Consequently, Mr Doran and other councillors formulated a motion pursuant to section 4 of the *City and County (Amendment) Act, 1955* directing the respondent to refuse the planning permission sought. That motion came before a meeting of the county council and there was a wide-ranging discussion concerning the motion. A vote was taken on the motion and the unanimous view was that the respondent manager should refuse the planning permission sought. Notwith-standing the passing of the section 4 motion, the respondent made a decision to grant planning permission for the proposed development and he issued an order to that effect on 13 July 2000, subject to five conditions. That decision was made without any prior notification to the applicant. As a result of that decision, the members of the county council considered that the democratic will of the county council had been ignored and the members called a special meeting of the council. A further section 4 motion was proposed and a fresh resolution was passed, but again the executive of the county council refused to comply with the motion. Proceedings were instituted seeking leave to apply by way of an application for judicial review for an order of *certiorari* of the respondent's decision to grant to the second-named notice party planning permission for the aforementioned proposed development. Furthermore, an appeal was taken to An Bord Pleanála from the decision of the respondent by aggrieved members of the public.

O Caoimh J refused to grant leave, holding that:

1) In order to be granted leave, the applicant was required to advance to the court substantial grounds for contending that the decision of the respondent was invalid insofar as he considered the resolution of the applicant to be invalid and not to be binding upon him. The decision of the respondent would only be capable of being valid if he was entitled to disregard the section 4 resolution
2) The respondent was entitled to consider the views expressed that there was not sufficient demand for a pet incinerator and that medical waste would be incinerated at the proposed development to be irrelevant matters to a proper consideration of the planning application. Furthermore, if a decision was to be taken in opposition to the views contained in the technical reports, it would have been necessary for the councillors to have evidence to support their contention and to reject the technical advice given to them
3) The applicant, in relying upon the ground that the proposed development was likely to cause serious air pollution, had no basis for refusing to accept the advice of experts either in the form of an opinion from another expert or a reasoned judgement as to why the advice of the expert officials was incorrect. Furthermore, in relying upon that ground as a basis for refusing the planning permission, the applicant failed to have regard to the restriction contained in section 98 of the *Environmental Protection Agency Act, 1992* in relation to the risk of environmental pollution from the proposed development
4) There was material before the respondent that entitled him to conclude that the resolution arising from the section 4 motion was invalid and was not binding upon him. The applicant councillors failed to establish substantial grounds to show that the conclusion of the respondent was incorrect and, accordingly, the respondent was entitled to treat the section 4 motion as being invalid and not binding upon him.
5) *Obiter:* that a section 4 resolution may not direct a county manager to refuse to grant planning permission.

***Wicklow County Council v Wicklow County Manager*, High Court, Mr Justice Ó Caoimh, 26/2/2003** [FL9024] G

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

Eurlegal

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

Implementation of EU competition rules

The Council of Ministers adopted a regulation to implement the main EU competition rules that are set out in article 81 and 82 of the *EC treaty* (council regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in articles 81 and 82 of the treaty, OJ 2003 L1/1). The regulation is the most significant change to the implementation of EC competition rules since 1962. The new regulation came into force on 1 May 2004.

Article 81(1) of the *EC treaty* prohibits agreements between undertakings, decisions by associations of undertakings, and concerted practices that affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the EU. An agreement, decision or concerted practice that infringes the above prohibition is void and unenforceable. Article 81(3) allows for the grant of exemptions from the prohibition in article 81(1) if certain conditions are met. The commission is empowered to adopt block exemption regulations that grant an automatic exemption to a defined category of agreements. Article 82 prohibits companies that hold a dominant position in a product or service market in the EU or a substantial part of the EU from abusing that position. The commission is empowered to impose fines for a breach of the above rules, and third parties may initiate proceedings before the national courts asserting a breach of the competition rules, which, if successful, may result in the grant of remedies including damages.

The Irish competition rules are contained primarily in the *Competition Act, 2002*. Section 4(1) of the act prohibits all agreements between undertakings, decisions by associations of undertakings, and concerted practices that have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the state or any part of the state. An agreement, decision or concerted practice that infringes the above prohibition is void and unenforceable. An agreement, decision or concerted practice may be exempted by satisfying certain conditions set out in section 4(5) of the 2002 act. The Competition Authority is empowered to issue declarations to a defined category of agreements and practices, which, if applicable, provide an automatic exemption to the relevant agreements and practices concerned. Section 5(1) of the 2002 act prohibits any abuse by one or more undertakings of a dominant position in trade for any goods or services in the state or in any part of the state. The entry into or implementation of an agreement, or the making or implementation of a decision, or the engagement in a concerted practice, or acting in a manner that is an abuse of a dominant position constitutes an offence by the undertakings concerned, punishable by given sanctions. Directors and other persons may also be personally liable for a breach of the above prohibition and exposed to given sanctions in certain circumstances, and 'any person aggrieved' may initiate proceedings before the courts seeking various remedies, including damages.

The former framework for the implementation of article 81 was largely set out in regulation 17/62, which provided a centralised system under which the commission was effectively given exclusive jurisdiction to grant individual and block exemptions and under which the commission was the executive body principally responsible for the enforcement of EU competition law. The above created a largely notification-based system, where the parties to an agreement notified the commission of an agreement requesting a decision that the agreement in question was either not an infringement of EU competition law or that it qualified for the grant of an exemption. Furthermore, the above resulted in the commission receiving many complaints of breaches of EU competition law. The regulation is designed to decentralise the implementation of EU competition rules so that implementation occurs principally at a national as opposed to European level. Decentralisation is designed to allow the commission to concentrate its resources on combating the most significant breaches of EU competition law, such as price fixing cartels.

Below, we summarise the rules set out in article 3 of the regulation regarding the relationship between EU and national competition law, under the following headings:

- Obligation on national competition authorities and national courts to apply EU competition rules
- The circumstances where national competition laws are excluded
- The exceptions to the above exclusions of national competition law, and
- The concept of trade between member states.

Obligation on national competition authorities and national courts to apply EU competition law

Article 3 of the regulation imposes an obligation on the competition authorities of the member states and the national courts to apply article 81 of the *EC treaty* to agreements, decisions or concerted practices in circumstances where they apply national competition law to agreements, decisions and concerted practices that may affect trade between member states within the meaning of article 81(1) of the *EC treaty*. Similarly, the national competition authorities and the national courts are obliged to apply article 82 of the *EC treaty* when applying national competition law to any abuse prohibited by article 82 of the *EC treaty*.

Exclusion of national competition law

The regulation specifically excludes the application of national competition laws to the following agreements, decisions and practices:

- Those that may affect trade between member states but do not restrict competition within the meaning of article 81(1) of the *EC treaty*. The above principle excluding the application of national com-

petition law is significant in practice, in that if an agreement is entered into and it is clear that the agreement has an appreciable affect on trade between member states and that it does not involve a breach of article 81(1) of the *EC treaty*, there will, as a general rule, be no need to examine whether or not the agreement complies with the national law equivalent of article 81(1) of the *EC treaty* in the relevant jurisdictions. The application of the above in an Irish context would mean that the relevant agreement would not have to be considered under section 4(1) of the 2002 act

- Agreements, decisions or concerted practices that fulfil the conditions for an exemption under article 81(3) of the treaty, or
- Those that are covered by a block exemption regulation. The above is significant from a practical perspective in that, if an agreement can be shown to fall within the parameters of an EU block exemption regulation and therefore article 81(1) of the *EC treaty* is disapplied, there will in many cases be no need to look at the domestic competition rules of a member state in order to see whether or not its provisions are being infringed. For example, if a distribution agreement involving an Irish distributor and a German supplier has an appreciable effect on trade between member states and involves an appreciable restriction of competition contrary to article 81(1) of the *EC treaty*, and falls within commission regulation EC 2790/1999 of 22 December 1999 on the application of article 81(3) of the treaty to categories of vertical agreements and concerted practises (OJ 1999 L336/21, the vertical restraints block exemption), there is no need to examine the application of section 4(1) of the 2002 act to the agreement concerned.

Exceptions to the exclusion of national competition law

There are a number of exceptions to the above, which can be summarised as follows:

- The regulation specifically provides that member states are not precluded from adopting and applying on their territory stricter national laws that prohibit or sanction unilateral conduct engaged in by undertakings. As a result, in our example involving the appointment by a German supplier of an Irish distributor, the Competition Authority or any other complainant could assert that the distribution agreement infringes section 5(1) of the 2002 act
- The regulation provides that the competition authorities and the courts of the member states are free to apply national merger control laws. As a result, part 3 of the 2002 act regarding mergers and acquisitions is still applicable, notwithstanding the possible application of articles 81 and/or 82 of the *EC treaty*
- The regulation provides that the competition authorities and the courts of the member states are also free to apply national laws that predominately pursue an objective different from that pursued by articles 81 and 82 of the *EC treaty*.

The concept of trade between member states

An agreement, decision or concerted practice is caught by article 81(1) of the *EC treaty* if it (a) appreciably affects trade between member states and (b) appreciably restricts competition in the EU. The commission's current thinking on the circumstances where an agreement will be viewed by the commission as appreciably affecting trade between EU member states (as opposed to appreciably restricting competition) are set out in the recently published commission notice on the 'effect on trade' concept contained in articles 81 and 82 of the treaty (OJ C 2004 C101/81). The notice sets out the circumstances in which the commission considers an agreement unlikely in general to be capable of appreciably affecting trade between member states (the non-appreciable affectation of trade or 'NAAT' rule). In its notice, the commission specifies that it will apply a negative rebuttable presumption that agreements are not capable of appreciably affecting trade between member states when the following cumulative conditions are met:

- **Market share** – the aggregate market share of the parties on any relevant market within the community affected by the agreement does not exceed 5%, and
- **Turnover** – the turnover of the parties must not exceed the following thresholds, depending on the nature of the agreement:

  a) In the case of horizontal agreements, the aggregate annual community turnover of the undertakings concerned in the products covered by the agreement must not exceed €40,000,000. In the case of agreements concerning the joint buying of products, the relevant turnover is the parties' combined purchase of the products covered by the agreement, or

  b) In the case of vertical agreements, the aggregate annual community turnover of the supplier in the products covered by the agreement must not exceed €40,000,000. In the case of licence agreements, the relevant turnover is the aggregate turnover of the licensees in the products incorporating the licensed technology and the licensors' own turnover in such products. With regard to agreements concluded between a buyer and several suppliers, the relevant turnover is the buyer's combined purchases of the products covered by the agreement.

In its notice, the commission specifies that the above negative presumption shall apply where, during two successive calendar years, the above turnover threshold is not exceeded by more than 10% and the above market threshold is not exceeded by more than two percentage points.

The €40,000,000 threshold is calculated on the basis of the total community sales (excluding tax) during the previous financial year by the undertakings concerned of the product covered by the agreement, and sales between the entities that form part of the same undertaking are excluded.

It is important to note that in the case of networks entered into by the same supplier with different distributors, sales made through the entire network are taken into account. The notice

provides that contracts that form part of the same overall business arrangement constitute a single agreement for the purposes of the NAAT rule.

The commission points out that where the agreement concerned is an emerging and therefore not yet existing market and where, as a consequence, the parties neither generate relevant turnover nor accumulate any relevant market share, the commission will not apply the above presumption. The commission points out that in such cases, appreciability may have to be assessed on the basis of the position of the parties on the related product markets or their strength in technologies relating to the agreement.

The commission specifies that it will apply a positive rebuttable presumption that trade may be affected within the meaning of article 81(1) of the *EC treaty* to agreements that by their very nature are capable of affecting trade between member states to an appreciable extent where either – as opposed to both – of the above turnover or market-share thresholds are met. The commission identifies various types of agreement that would be regarded by their very nature as being capable of affecting trade between member states.

Agreements and abuse covering or implemented in different member states

The commission points out that agreements covering or implemented in several member states are in almost all cases, by their very nature, capable of affecting trade between member states. The commission continues by giving examples of such types of agreements:

- **Agreements concerning imports and exports**. The commission points out that this category includes agreements between undertakings in two or more member states and agreements that impose restrictions on imports and exports, including restrictions on active and passive sales and resale by buyers to customers in other member states. The commission points out that in the case of restrictions on imports/exports, there is an inherent link between the alleged restriction of competition and the effect on trade, since the very purpose of the restriction is to prevent flows of goods and services between member states that otherwise would be possible. The commission points out that it is immaterial whether the parties to the agreement are located in the same member state or in different member states
- **Cartel agreements covering several member states**. The commission points out that cartel agreements such as those involving price-fixing and market-sharing covering several member states are, by their nature, capable of affecting trade between member states
- **Horizontal co-operation agreements covering several member states**. The commission refers to joint-venture agreements. It points out that joint ventures that perform on a lasting basis all the functions of an autonomous economic entity are covered by the EU *Merger control regulation* and are therefore outside the scope of articles 81 and 82 of the *EC treaty*, except in cases where article 2(4) of the *Merger control regulation* is applicable. The notice points out that joint ventures that engage in activities in two or more member states or that produce an output that is sold by the parents in two or more member states affect the commercial activities of the parties in those areas of the community and are therefore normally, by their very nature, capable of affecting trade between member states. The notice points out that trade may also be capable of being affected where a joint venture produces an input for the parent companies, which are subsequently processed or incorporated into a product by the parent companies. The notice provides that trade is likely to be capable of being affected where the input in question was previously sourced from suppliers in other member states, where the parents previously produced the input in other member states or where the final product is traded in more than one member state. The notice points out that the assessment of appreciability requires that account be taken of the parents' sales of products related to the agreement and not only those of the joint venture entity created by the agreement, given that the joint venture does not operate as an autonomous economic entity on any market
- **Vertical agreement implemented in several member states**. The commission points out that vertical agreements and networks of similar vertical agreements implemented in several member states are normally capable of affecting trade between member states in the following situations:
  a) If they cause trade to be channelled in a particular way. The commission provides the example of networks of selective distribution agreements implemented in two or more member states that channel trade in a particular way because they limit trade to members of the network, thereby affecting patterns of trade
  b) Vertical agreements that have foreclosure effects. The commission provides the example of agreements whereby distributors in several member states agree to buy only from a particular supplier or to sell only its products. The commission points out that foreclosure may result from individual agreements or from networks of agreements
  c) Agreements between suppliers and distributors that provide for resale price maintenance and that cover two or more member states
- **Abuses of a dominant position covering several member states**. The commission divides abuses into two categories, namely exclusionary abuses (for example, loyalty rebates and conduct aimed to eliminate a competitor) and exploitative abuses (price discrimination). The commission points out that a dominant undertaking that engages in exclusionary or exploitative abuse in more than one member state will normally, by its very nature, be capable of affecting trade between member states.

Agreements or abuse covering a single, or only part of, a member state

With respect to agreements that cover the territory of a single member state, the commission points out that it may be necessary to make a more detailed inquiry into the ability of the agreement or abusive practice to affect trade between member states. The commission confirms that it is not necessary for trade to be reduced to establish an effect on trade between member states. The notice specifies that in many cases involving a single member state, the nature of the alleged infringement, and in particular its propensity to foreclose the national market, provides a good indication of the capacity of the agreement or practice to affect trade between member states. The commission provides the following examples of agreements that are confined to the territory of single member state but can be considered to be capable of affecting trade between member states:

- **Cartels covering a single member state**. The notice specifies that horizontal cartels that cover the whole of the member state are normally capable of affecting trade between member states

- **Horizontal co-operation agreements covering a single member state**. The commission points out that horizontal co-operation agreements and, in particular, non-full function joint ventures that are confined to a single member state and that do not directly relate to imports and exports are not by their very nature capable of affecting trade between member states, and that therefore a careful examination of the capacity of the individual agreement to affect trade between member states may be required. The commission states that horizontal co-operation agreements may, in particular, be capable of affecting trade between member states where they have foreclosure effects, and in this context the commission provides the example of agreements that establish sector-wide standardisation and certification regimes that either exclude undertakings from other member states or are more easily fulfilled by undertakings from the member state in question. The notice also points out that trade may be affected where a joint venture results in undertakings from other member states being cut off from an important channel of distribution or source of demand, and the notice gives the example of two or more distributors, established in the same member state and accounting for a substantial share of imports of the products in question, who establish a purchasing joint venture combining purchases of the product and resulting in the reduction in the number of distribution channels, thereby limiting the possibility for suppliers from other member states gaining access to the national market in question
- **Vertical agreements covering a single member state**. The notice specifies that vertical agreements that cover the whole of a member state may, in particular, be capable of affecting patterns of trade between member states when they make it more difficult for undertakings from other member states to penetrate the national market in question either by means of exports or by means of establishment (foreclosure effect). The commission points out that foreclosure may, for example, occur when suppliers impose exclusive purchasing obligations on buyers. The notice points out that vertical agreements that cover the whole of the member state and relate to tradable products may also be capable of affecting trade between member states even if they do not create direct obstacles to trade. The commission states that agreements involving resale price maintenance may have direct effects on trade between member states by increasing imports from other member states and by decreasing exports from the member state in question
- **Agreements covering only part of a member state**. The commission states that the assessment of agreements that cover only part of the member state is to be made in the same way as agreements covering the whole of the member state. The commission acknowledges that the above two categories must be distinguished, given that in this context, only part of the member state is covered by the agreement. The proportion of the national territory susceptible to trade must be taken into account. The notice specifies that where an agreement forecloses access to a regional market, the volume of sales affected must be significant in proportion to the overall volume of sales of the products concerned inside the member state in question for trade to be appreciably affected. The commission points out that the market share of the parties must also be given 'fairly limited weight'. Even if the parties have a high market share in a properly defined regional market, the size of the market in terms of volume may still be insignificant when compared to total sales of the products concerned within the member state in question. The commission points out that the best indication of the capacity of the agreement appreciably to affect trade between member states is considered to be the share of a national market in terms of volume that is being foreclosed
- **Abuses of dominant positions covering a single member state**. Where an undertaking holding a dominant position in the whole of a member state engages in exclusionary abuses, trade between member states is normally capable of being affected. The commission points out that in the case of exploitative abuse such as price discrimination and excessive pricing, the situation may be more complex. Price discrimination between domestic customers will not normally affect trade between member states. However, if the buyers are engaged in export activity and are disadvantaged by the discriminatory pricing, or if the practice is used to prevent imports, trade may be affected. The commission points out that for so long as an undertaking is in a dominant position that covers the whole of the member state, it is normally immaterial whether the specific abuse engaged in by the dominant undertaking only covered part of its territory or affects certain buyers within the national territory. The notice points out that if the abuse is purely local in nature or involves only an insignificant share of the sales of the dominant undertaking within the member state in question, trade may not be capable of being appreciably affected
- **Abuse of a dominant position covering only part of a member state**. The commission states that if the dominant position covers part of the member state that constitutes a substantial part of the common market and the abuse makes it more difficult for competitors from other member states to gain access to the market where the undertaking is dominant, trade between member states must normally be considered capable of being appreciably affected. The notice states that regard must be had in particular to the size of the market in terms of volume. The commission states that trade may not be capable of being appreciably affected if the abuse is purely local in nature or involves only an insignificant share of the sales of a dominant undertaking.

Agreements and abuses involving imports and exports with undertakings located in third countries and agreements and practices involving undertakings located in third countries

The commission confirms that articles 81 and 82 apply to agreements and practices that are capable of affecting trade between member states even if one or more of the parties are located outside the EU. Articles 81 and 82 apply irrespective of the location of the undertakings or the place where the agreement has been concluded, provided that the agreement or practice is either implemented inside the EU or produces effects inside the EU. It suffices that the agreement or practice involving third countries or undertakings located in third countries is capable of affecting cross-border economic activity inside the EU. The commission states that it is necessary to ascertain the object of the agreement or practice as indicated by its content or the underlying intent of the undertakings

involved. Where the object of the agreement is to restrict competition inside the community, the requisite effect on trade between member states is more readily established than where the object is predominantly to regulate competition outside the community. The commission looks at the following in the context of this category:

- **Arrangements that have as their object the restriction of competition inside the community**. With respect to imports, this category includes agreements that bring about an isolation of the internal market (for example, the sharing of markets by competitors in the community and in third countries by agreeing not to sell in each other's home markets or entering into reciprocal exclusive distribution agreements), and in the case of exports this category includes cases where undertakings that compete in two or more member states agree to export surplus quantities to third countries with a view to co-ordinating their market conduct inside the community
- **Other arrangements**. The commission points out that in the case of agreements and practices whose object is not to restrict competition inside the community, it is normally necessary to proceed with a more detailed analysis of whether or not cross-border economic activity inside the EU is capable of being affected. The commission points out that it is relevant to examine the effects of the agreement or practice on customers and other operators inside the community that rely on the products in question. The notice specifies that trade may also be capable of being affected when the agreement prevents re-imports into the community. The commission provides the example of vertical agreements between community suppliers and third-country distributors imposing restrictions on resale outside a given territory, including the community. The commission points out that for such effects to be likely, there must be an appreciable difference between the price of the products charged in the community and those charged outside the community and that the price differential must not be eroded by customs duties and transport costs. Furthermore, the volumes exported compared to the total market of those products in the territory of the common market must not be insignificant. The commission points out that regard must be had not only to the individual agreement between the parties but also to the cumulative effect of similar agreements concluded by the same and competing suppliers. G

Marco Hickey is head of the EU and Competition Law Department of LK Shields Solicitors.

Recent developments in European law

ESTABLISHMENT

Case 153/02 *Valentina Neri v European School of Economics (ESE Insight World Education System Ltd)*, 13 November 2003. Ms Neri enrolled at Nottingham Trent University (NTU) to acquire a BA degree in international political studies. The course was actually provided by ESE, a UK limited company with branches in other member states, including 12 in Italy. ESE organises courses with study plans validated by NTU and NTU awards a final degree. The quality of the course was validated by the UK Quality Assurance Agency for Higher Education. After she had enrolled with ESE, she learned that Italy did not recognise ESE as authorised to organise university-level courses and that it would not recognise degrees obtained through study of this nature, even though these degrees were legally recognised in the UK. Ms Neri sought a refund of the fees she had paid (over €2,000). The Italian court made a reference to the ECJ, asking whether the Italian practice of refusing to recognise degrees of universities in other member states where the course of study was not undertaken in that state was compatible with articles 39, 43 and 49 of the treaty. The ECJ held that there was a breach of article 43. For ESE, the recognition of degrees awarded after completing its courses is of considerable importance. The Italian practice of non-recognition of degrees obtained in this manner is likely to deter students from attending these courses and thus seriously hinder the pursuit by ESE of its economic activity in Italy.

SERVICES

Case C-42/02 *Diana Elizabeth Lindman*, 18 November 2003. Ms Lindman is a Finnish national who resides in Finland. In early 1998, she won a prize in the Swedish lottery. She had purchased her ticket during a stay in Sweden. The Finnish state regarded this as earned income, which was chargeable to Finnish taxes. Ms Lindman argued that this should not be regarded as earned income in Finland or alternatively should be regarded as income from capital, which is taxed at a lower rate. Prize income from Finnish lotteries is not liable to tax. The Finnish court referred the matter to the ECJ, querying the compatibility of the tax legislation with article 49 of the *EC treaty*. The court held that the Finnish legislation was incompatible with article 49. The Finnish legislation manifestly discriminated between prizes won from lotteries established in Finland and those established in other member states. G

Meeting of the Law Society Council

The May meeting of the Law Society Council was an historic occasion – the first meeting ever held in Dundalk. Aidan O'Reilly reports

On Friday 28 May, for the first time in its 152-year history, a Law Society Council meeting was held in Dundalk town. The meeting took place in Dundalk Courthouse, which was made available by kind permission of the Courts Service Board, county registrar Mairead Ahern and with the assistance of Hugh Clarke. Delegations from the Louth, Drogheda, Meath and Cavan bar associations attended as observers.

On the previous evening, the president of the Law Society, Gerard Griffin, chaired a meeting for the local bar associations. Members were briefed on a number of issues, including the commencement of the Personal Injuries Assessment Board, the *Civil Liability and Courts Bill, 2004* and the Competition Authority's study of the profession.

The meeting was followed by a reception in the courthouse, which was attended by Dundalk solicitors and barristers, local politicians, members of the judiciary and by the popular singing group The Corrs, currently riding high in the hit parade with their seasonal sensation, the snappily titled *Summer sun*. The minister for communications, marine and natural resources Dermot Ahern also dropped by *en route* from Brussels, where he was attending to government business.

The holding of the meeting in Dundalk forms part of an initiative by the president to have contact and consultation with as many members of the profession as possible. The president took advantage of the occasion to congratulate the Courts Service Board for its continuing programme of modernisation and renovation of courthouses throughout the country. He said that the board was to be commended for the very significant progress that had already been made in its relatively short history.

Dermot Lavery and Derek Williams

Pauline Barry, Alison Quail and Patricia Hickey

Tim Ahern, Roger McGinley, Donal P O'Hagan, John Woods, Don McDonough and Louth Bar Association president James Murphy

Addressing local solicitors, Griffin noted that the profession was undergoing a period of unparalleled change. 'These are certainly challenging times', he said, 'but we will survive because, at the end of the day, the ordinary member of the public is increasingly aware of the need for impartial legal advice. The legal profession has always adapted well to change in the past and I have full faith that it will continue to do so in the future'.

The reception was followed by a visit to the Spirit Store on George's Quay, where the Council was treated to a production of *Hickock's last ride* starring Dermot 'The Doc' Lavery. With more *double entendres* than you could shake your stick at, the cast pulled off a virtuoso performance. A fantastic night was had by all. G

Aidan O'Reilly is the Law Society's policy development executive.

at Dundalk Courthouse, May 2004

The Council of the Law Society in session

President Gerard Griffin and Louth Bar Association president James Murphy

Niall Lavery, Council member James MacGuill and Council member John Fish

Brian Berrills, Pat O'Reilly, president Gerard Griffin and Paul Brady

Junior vice-president John D Shaw, deputy director general Mary Keane, director general Ken Murphy, president Gerard Griffin, senior vice-president Owen Binchy and immediate past president Geraldine Clarke

County registrar Mairead Ahern and director general Ken Murphy

Not such a long way after all

Law Society president Gerard Griffin and director general Ken Murphy visited Thurles recently for a meeting of the Tipperary Bar Association. Pictured are the TBA council and *(seated, from left)* TBA honorary secretary Maura Hennessy, Law Society president Gerard Griffin, TBA president Eugene Tormey and Law Society director general Ken Murphy. Also pictured *(standing, from left)* are Brendan Hyland, Law Society Council member Donald Binchy, Paul Kingston, Law Society Council member Philip Joyce, Tim Treacy, Joe Kelly, Peter Reilly, Brendan Looby, Donal Smyth, Mark Hassett and Maura Derivan

Yes, prime minister

Law Society president Gerard Griffin and director general Ken Murphy in discussion with *(left)* Slovenian prime minister Anton Rop and Slovenian Law Society president Miha Kozinc, at the annual conference of the Law Society of Slovenia in Moravske Toplice in June. Griffin and Murphy were special guests at the 'Days of Slovenian lawyers' in the first annual conference to be held since Slovenia's accession to the EU on 1 May. On that date, Miha Kozinc had been a guest of the Law Society of Ireland in Dublin

Celebrity in Slovenia

President Gerard Griffin gives an interview to Slovenian television, on justice and the rule of law in Ireland, following his address to the annual conference of Slovenian lawyers in Moravske Toplice. The president chose to speak in English rather than Slovenian

Commercial break

Pictured at the recent CPD seminar on *The new Commercial Court* were *(from left)* Law Society CPD co-ordinator Barbara Joyce, Mr Justice Peter Kelly and former Law Society president Geraldine Clarke

Czech mates

Among the speakers at a conference in Praguen organised by the Law Society of the Czech Republic in June were Vladimir Jirousek, president of the Czech law society, Peter Williamson, president of the Law Society of England and Wales, the vice-president of the Law Society of Slovakia, and president Gerry Griffin

Calcutta Run 2004





This year's event took place on Saturday 29 May at Blackhall Place. There were over 1,500 runners/walkers who followed a 10km course through the Phoenix Park, finishing up in Blackhall Place for a monster barbeque, with entertainment provided by the Guinness Jazz Band, a samba band and a DJ. The gods were good and the sun shone.

The event will reach its fund-raising target of €200,000. This brings the total raised over six years to €1m. GOAL's orphanage in Calcutta will receive €100,000 and Fr Peter McVerry's Arrupe Society for homeless boys in Dublin will also receive €100,000.

Put it in your diary for May 2005!

Member services

At the recent Beauchamps Solicitors conference *Representing your members effectively* were *(from left)* Gary Rice, public and regulatory law partner at Beauchamps, Bar Council director Jerry Carroll, and Des Cummins, chief executive of the Driving Instructor Register of Ireland Ltd

Men in black

Hugh Hannigan *(left)*, recently appointed partner in Simon McAleese Solicitors, with the firm's managing partner Simon McAleese

The view from the summit

A solicitors' 'summit meeting' took place in Blackhall Place last month. The leaders of the 135,000 solicitors in Ireland and Britain meet twice a year in either Dublin, Belfast, London or Edinburgh, with each society hosting the event once every two years. Among the issues discussed over the two-day meeting in Dublin were the Clementi review of regulation of legal services in England and Wales, regulatory models, complaints and discipline, governance and accountability, alternative business structures, competition issues, the Personal Injuries Assessment Board and the possible effect on the legal profession and the public of developments in the law on conflicts of interest and solicitor/client privilege.

Pictured are *(front row, from left)* Duncan Murray, president of the Law Society of Scotland; Peter Williamson, president of the Law Society of England and Wales; president Gerard Griffin; John Pinkerton, president of the Law Society of Northern Ireland. Standing are *(from left)* Attracta Wilson, vice-president, Law Society of Northern Ireland; Aidan O'Reilly, policy development executive, Law Society of Ireland; Ed Nally, senior vice-president, Law Society of England and Wales; Janet Paraskeva, chief executive, Law Society of England and Wales; director general Ken Murphy; Caroline Flanagan, senior vice-president, Law Society of Scotland; Douglas Mill, secretary and CEO, Law Society of Scotland; and senior vice-president Owen Binchy

DSBA Young Members' Ball

A judge of the High Court, the DSBA president and vice-president, an honorary senator from Louisiana and a host of young solicitors all wearing their finest clobber turned up at the Gresham Hotel for the inaugural DSBA Young Members' Ball on 19 June. After a generous banquet and even more generous supply of wine, John O'Connor launched the event, followed by Judge Michael Peart, who electrified the audience with 10,000 volts of judicial guidance. Once the band started, power of a different sort surged as the Young Members invaded the dance floor and occupied it until the batteries went dead. The Young Members Committee would like to thank the guest speakers and all the main sponsors: BrightWater Selection, Ellis & Ellis, Rochford Brady, First American Title Insurance, as well as Behan & Co, Vodafone Ireland plc, McCann FitzGerald, Orpen Franks and John Schütte & Co.

Scene, not herd

Pictured *(from left)* are DSBA Young Members Committee vice-chairman John Hogan, Pauric Heraghty, chairman Keith Walsh, Claire O'Regan, Tony O'Sullivan, Áine Burke, Deirdre Crowley, Martin Hayes, Darragh Lenehan and John O'Malley

Dancing in the moonlight

Pictured *(back row, from left)* are Deirdre Walsh, Tony O'Sullivan, BrightWater Selection's Ciara O'Loughlen, John O'Connor, Kevin O'Higgins and Keith Walsh; *(front row)* Eileen Malone of BrightWater Selection and John Glynn

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 9 July 2004)

Regd owner: Pierce Brophy; folio: 4676F; lands: Killinane and barony of Idrone West; **Co Carlow**
Regd owner: William Shannon; folio: 9199F; lands: Tullowphelim and barony of Rathvilly; **Co Carlow**
Regd owner: Patrick Griffin; folio: 11678F; lands: Grangewat, Slaneyquarter, Straboe and barony of Carlow, Rathvilly; **Co Carlow**
Regd owner: Philip and Nora Clarke, Institute Road, Bailieborough, Co Cavan; folio: 17513; lands: Coppanagh; area: 11.741 hectares; **Co Cavan**
Regd owner: Patrick J Dixon and Maura Dixon; folio: 888F; lands: townland of Cappagh More and barony of Bunratty Upper; area: 1 rood, 30 perches; **Co Clare**
Regd owner: Ennis Urban District Council; folio: 8110F; lands: townland of Cloghleagh and barony of Islands; **Co Clare**
Regd owner: Castlelyons Co-op Creameries Ltd; folio: 21307; lands: plots of ground being part of the townland of Curraghdermot in the barony of Barrymore and county of Cork; **Co Cork**
Regd owner: Fermoy Urban District Council; folio: 33038; lands: plots of ground being part of the townland of Duntahane on the barony of Condons and Clangibbon and county of Cork; **Co Cork**
Regd owner: Timothy Humphreys; folio: 25093; lands: known as the townland of Monard situate in the barony of Cork and the county of Cork; **Co Cork**
Regd owner: Ralph and Mary Hill; folio: 6028L; lands: plots of ground being part of the townland of Coolroe in the barony of Muskerry East and county of Cork; **Co Cork**
Regd owner: David and Elia Kirwan; folio: 22475; lands: plot of ground situate on the east side of South Abbey in the town of Youghal and the barony of Imokilly and county of Cork; **Co Cork**
Regd owner: Industrial Development Authority; folio: 36933; lands: plots of ground being part of the townland of Foxhole in the barony of Imokilly and county of Cork; **Co Cork**
Regd owner: Patrick Madden (deceased); folio: 23210F; lands: plots of ground being part of the townland of Ballyfoyle in the barony of Kinalea and county of Cork; **Co Cork**

Regd owner: Agnes O'Brien; folios: 51890, 1240; lands: plot of ground being part of the townland of Ballycolman in the barony of Imokilly and county of Cork; **Co Cork**
Regd owner: Dolores Condon; folio: 24277F; lands: a plot of ground being part of Ballyvongane and barony of Muskerry East in the county of Cork; **Co Cork**
Regd owner: Henry Crone; folio: 13516L; lands: plot of ground situate to the south-west of Dock Cottages, being part of the townland of Maulbawn in the town of Pasage West and county of Cork; **Co Cork**
Regd owner: Michael and Mary Wall; folio: 15619; lands: plots of ground being part of the townland of Ballinlegane in the barony of Barrymore and county of Cork; **Co Cork**
Regd owner: Joseph and Louise Whyte; folio: 59179; lands: county Cork; **Co Cork**
Regd owner: Denis and Mary O'Sullivan; folio: 7694F; lands: plots of ground situate on the west side of Meadow Park Road, being part of the parish of St Anne's, Shandon, and county borough of Cork; **Co Cork**
Regd owner: Tadgh Finnegan; folio: 9758F; lands: plots of ground being part of the townland of Kilcolman in the barony of Duhallow and county of Cork; **Co Cork**
Regd owner: Rosaleen Tonson Rye; folio: 54053F; lands: townland of Farnanes and barony of Muskerry East; area: 0.4124 hectares; **Co Cork**
Regd owner: Andrew J Carr, Meenadreen, Glencolmbkille, Co Donegal; folio: 32604; lands: Meenadreen; area: 9 acres, 2 roods and 20 perches and four undivided 33rd parts of 110 acres, 1 rood and 33 perches; **Co Donegal**
Regd owner: Sean Porter and Carol Devlin, Magherenture, Buncrana, Co Donegal; folio: 28764F; lands: Ballymacarry; **Co Donegal**
Regd owner: William Costigan and Kathleen Costigan; folio: DN 110681F; lands: property known as 47 Ellenfield Road, Whitehall, in the parish and district of Clonturk; **Co Dublin**
Regd owner: Martin Carey and Emily Carey; folio: DN51114L; lands: property known as no 4 Seagrange Avenue situate, in the parish and district of Baldoyle; **Co Dublin**
Regd owner: Knapsack Limited (limited liability company); folio: DN80073L; lands: property known as unit 235A Level 2, The Square, Tallaght, Dublin; **Co Dublin**
Regd owner: Stephen Murray and Orna Murray; folio: DN54256L; lands: property situate in the townland of Balally and barony of Rathdown; **Co Dublin**
Regd owner: Thomas McQuaid; folio: 100268F; lands: property known as 27 St Fintan's Crescent, in the townland of Sutton South and barony of Coolock in the county of Dublin; **Co Dublin**
Regd owner: Patrick O'Connell; folio: DN3697L; lands: property known as 99 Errigal Road, Crumlin, situate on the west side of the said road in the parish and district of Crumlin; **Co Dublin**
Regd owner: Chee Hong Cheng; folio: DN54092F; lands: property situate in the townland of Kiltalown and barony of Uppercross; **Co Dublin**
Regd owner: Western Health Board; folio: 12074F; lands: townland of Lackagh More and barony of Clare; area: 0.073 hectares; **Co Galway**
Regd owner: Bridget Feehan; folio: 11902F; lands: townland of Knockaunhcarragh and barony of Galway; area: 0.413 hectares; **Co Galway**
Regd owner: Dr John C Horan; folio: 9175F; lands: townland of (1) and

(2) Townparks and barony of (1) and (2) Dunmore; area: (1) 0.156 acres, (2) 0.038 acres; **Co Galway**

Regd owner: Thomas Murphy and Bridget Murphy; folio: 3901; lands: townland of Bullaun (Clare By) and barony of Clare; area: 16.5465 hectares; **Co Galway**

Regd owner: Mary Downing; folio: 32780; lands: townland of Gortrooskagh and barony of Glanarought; **Co Kerry**

Regd owner: Donal James McCarthy; folio: 33941; lands: townland of Cromane Upper and barony of Trughanacmy; **Co Kerry**

Regd owner: John F Sayer; folio: 34047; lands: townland of Faha and barony of Iveragh, **Co Kerry**

Regd owner: Peter and Lisette Kal; folio: 18300F; lands: townland of Clogherane and barony of Glanarought; **Co Kerry**

Regd owner: John Hartnett; folio: 27741; lands: townland of Canfee and barony of Glanarought; **Co Kerry**

Regd owner: Kerry Co-operative Creameries Ltd; folio: 1024; lands: townland of Ballyea and Barony of Trughanacmy; **Co Kerry**

Regd owner: Daniel Graham; folio: 12166; lands: townlands of Boston and Clonaghlis and baronies of South Salt; **Co Kildare**

Regd owner: Renley Engineering Limited; folio: 11808F; lands: townland of Kilcullenbridge and barony of Naas South; **Co Kildare**

Regd owner: Richard Holohan; folio: 548; lands: Whitecastle Lower and Bowersacre and barony of Knocktopher; **Co Kilkenny**

Regd owner: William Fitzpatrick; folio: 3880; lands: Doon and barony of Clandonagh; **Co Laois**

Regd owner: Patrick Lynch; folio: 2476F; lands: Lowran and barony of Upperwoods; **Co Laois**

Regd owner: Patrick Bateman; folio: 4953; lands: townland of Castleerkin North and barony of Clanwilliam; **Co Limerick**

Regd owner: Harry Coyne and Philippa King; folio: 30082F; lands: townland of Dooradoyle and barony of Pubblebrien; **Co Limerick**

Regd owner: Kathleen Gallagher; folio: 43484F; lands: Templeathea West and barony of Shanid; **Co Limerick**

Regd owner: Valfleur Limited; folio: 17056F; lands: St Munchin's; **Co Limerick**

Regd owner: Joseph G Chambers; folio: 27101F; lands: Lord Edward Street and parish of St Michael's; **Co Limerick**

Regd owner: Michael McNamara; folio: 10960F; lands: townland of Caheranardrish and barony of Pubblebrien; **Co Limerick**

Regd owner: Shannon Development; folio: 2761F; lands: townland of Towlerton and barony of Clanwilliam; **Co Limerick**

Regd owner: John McNulty; folio: 19198; lands: townland of (1) and (3) Doontrusk, (2) Knockalegan, (4) and (5) Treet, (6) Glendahurk, (7) Glenthomas, (8) Srahacorick and barony of (1) to (8) Burrishoole; area: (1) 8.5768 hectares, (2) 3.3336 hectares, (3) 128.1589 hectares (two undivided 16th parts), (4) 163.2224 hectares (an undivided moiety), (5) 322.7950 hectares (one undivided 58th part), (6) 485.8099 hectares (one undivided 58th part), (7) 0.7335 hectares (an undivided moiety), (8) 0.3794 hectares (an undivided moiety); **Co Mayo**

Regd owner: Joseph and Mary Armstrong; folio: 1810F and 24252F; lands: townland of Srahwee and (folio 24252F) Derrygarve and barony of Murrisk; area: (folio 1810F) (1) 18.675 acres, (2) 245 acres, 2 roods, 33 perches (one undivided tenth part) and (folio 24252F) 8.547 hectares; **Co Mayo**

Regd owner: Andrew Creighton; folio: 3003MY; lands: Clare and barony of Clanmorris; area: 1.7200 hectares; **Co Mayo**

Regd owner: Philip Gilsenan, Gibbonstown, Crosskiel, Kells, Co Meath; folio: 21517; lands: Gibbonstown; **Co Meath**

Regd owner: Pierce Nevin, Kellystown, Slane, Co Meath; folio: 1942; lands: Kellystown, Monknewtown; area: 69.962 acres, 1 acre; **Co Meath**

Regd owner: Owen Sherry, Drumhillagh, Monaghan, Co Monaghan; folio: 5916; lands: Drumhillagh; area: 4.522 hectares; **Co Monaghan**

Regd owner: William Burke; folio: 4609; lands: Ballygaddy and barony of Clonlisk; **Co Offaly**

Regd owner: Mary Ann Gallagher; folio: 34862; lands: townland of (1) Coolnageer, (2) Castlesampson and barony of (1) and (2) Athlone; area: (1) 10.9214 hectares, (2) 0.2883 hectares; **Co Roscommon**

Regd owner: Philip Hunt and Mary Ellen Hunt, Kiltymane, Frenchpark, Co Roscommon; folio: 10866; lands: Kiltymane, Frenchpark, Co Roscommon; area: 16 acres, 1 rood and 25 perches; **Co Roscommon**

Regd owner: Marcella Porter; folio: 310R; lands: townland of Kinard and barony of Roscommon; area: 3 acres, 3 roods, 25 perches; **Co Roscommon**

Regd owner: Lucy Brennan; folio: 17637; lands: townland of Cornageeha and barony of Carbury; area: 16 perches; **Co Sligo**

Regd owner: Kevin Hurley; folio: 11033; lands: townland of Ballymote and barony of Corran; area: 0.0252 hectares; **Co Sligo**

Regd owner: Patrick Nicholson (decd); folio: (1) 5151 and (2) 5252; lands: townland of Mountirvine and barony of Coolavin; area: (1) 12 acres, 3 roods, 8 perches and (2) 1 acre, 1 rood, 2 perches; **Co Sligo**

Regd owner: James Patrick Golden; folio: 23289; lands: townland of Doonmadden and barony of Tireragh; area: 5.6403 hectares; **Co Sligo**

Regd owner: Ms Anna Kingma Boltjes; folio: 474F; lands: townland of Ballinunty and barony of Slievardagh; **Co Tipperary**

Regd owner: John Bourke; folio: 17154; lands: Garraun and barony of Middlethird; **Co Tipperary**

Regd owner: Martin Reddan; folio: 16736; lands: townland of Ballyhaugh and barony of Lower Ormond; **Co Tipperary**

Regd owner: Jonathan and Frederique Coreau Hogg; folio: 33951F; lands: townland of Dromineer and barony of Lower Ormond; **Co Tipperary**

Regd owner: John Lennon (deceased); folio: 4669; lands: plots of ground being part of the townland of Lemybrien (ED Comeragh) in the barony of Decies without Drum and county of Waterford; **Co Waterford**

Regd owner: Jean and Marlene Rijckmans; folio: 2186F; lands: Ramstown and barony of Shelburne; **Co Wexford**

Regd owner: William Kavanagh; folio: 1231; lands: Craan (ED Ferns) and barony of Scarawalsh; **Co Wexford**

Regd owner: James McDonald & Son Limited; folio: 14865; lands: Kildermot and barony of Ballaghkeen North; **Co Wexford**

Regd owner: Wexford County Council; folio: 21701; lands: Coolcots and barony of Shelmaliere West; **Co Wexford**

Regd owner: Philip and Josephine McGarr; folio: 14843F; lands: Middletown and barony of Ballaghkeen North; **Co Wexford**

Regd owner: Antoinette Kiernan, Ballinaleck, Mullingar, Co Westmeath; folio: 12436; lands: Rathbennett, Cappagh; area: 0.0280 hectares, 0.6829 hectares; **Co Westmeath**

Regd owner: Michael Rynn (senior) and Michael Rynn (junior), Millcastle, Castlepollard, Co Westmeath; folio: 11299F; lands: Lickbla; area: 18.350 hectares; **Co Westmeath**

Regd owner: Kevin Tuke; folio: 5419F; lands: townland of Killeagh and barony of Ballinacor South; **Co Wicklow**

Regd owner: Oliver Maher; folio: 9835; lands: townland of Woodland and barony of Newcastle; **Co Wicklow**

WILLS

Behan, Peter (deceased), late of St Patrick's Park, Rathangan, Co Kildare. Would any person having any knowledge of a will made by the above named, who died on 21 April 1991 at St Vincent's Hospital, Athy, Co Kildare, please contact Stephen Maher, Solicitors, Newbridge, Co Kildare; tel: 045 432 220, fax: 045 434 203

Cannon, Sean (farmer) (deceased), late of Lakeview, Frenchhill, Castlebar, Co Mayo. Would any person having knowledge of a will made by the above named deceased please contact Sean O'Ceallaigh & Co, Solicitors, 363 North Circular Road, Dublin 7; tel: 01 830 0565

Dempsey, Eileen (formerly Eileen Nugent) (deceased), late of 32 The Grove, Celbridge, Co Kildare. Would any person having knowledge of a will made by the above named deceased, who died on 11 April 2003, please contact Cannons Solicitors, 1-3 Sandford Road, Ranelagh, Dublin 6; tel: 01 497 6555, fax: 01 497 1409, e-mail: cannons@securemail.ie

Kenny, Margaret (deceased), late of Fortfield, Castlebar, Co Mayo and Hanstown, Ballinea, Mullingar, Co Westmeath. Would any person having any knowledge of a will made by the above named deceased, who died on the 29 January 2004 at Mayo General Hospital, please contact Mary Cowhey & Co, Solicitors, Main Street, Maynooth, Co Kildare; tel: 01 6285711; fax: 01 6285613

Murphy, John Anthony (deceased), late of 8 Kerry Park Terrace, Waterford. Would any person having knowledge of a will made by John Anthony Murphy, who died on 22 December 2003, please contact Hegarty & Company, Solicitors, 4 St Andrew's Terrace, Waterford; tel: 051 841 577 or fax: 051 841 579

EMPLOYMENT

Apprenticeship required. Law graduate (2.1). Ranking top five in class, hard-working, honest and reliable with legal advice experience. Passed all eight FE1s. Excellent computer skills, willing to pay own fees. Available now, all areas considered; tel: 087 676 4730

Apprenticeship required; all areas considered. A dynamic, personable, hard-working individual with excellent references available for immediate start. Strong academic background including honours law degree. All eight FE1s and first Irish exam passed. Extensive work experience with IT skills; tel: 087 904 2256

Cork city: solicitor required for conveyancing work with some probate, two years' PQE required. Immediate start. Apply with full CV in writing to Patrick Casey, Patrick Casey & Co, 30-31 Washington Street, Cork, or e-mail to pcasey@pcaseysolrs.ie. Contact: Patrick Casey, tel: 021 427 4282, fax: 021 427 7947

Experienced solicitor required for commercial and residential conveyancing and general civil litigation work with young rapidly expanding and dynamic practice. Excellent salary and prospects for right candidate. Apply in writing to principal. Catherine Allison & Co; Solicitors, Roden House, Roden Place, Dundalk, Co Louth; tel: 042 932 0854, e-mail: c.allison@eircom.net

Law graduate seeks apprenticeship. Over two years' experience as a legal executive in litigation, conveyancing and probate. Passed all eight FE1s. Excellent communication, administrative and computer skills. Preferably Dublin but all areas considered. Please reply to 086 892 0228

Seeking apprenticeship for immediate start at any location. Extensive educational background – BA (Cork), MA (Limerick), LLB (Galway), 2.1 standard. Also broad employment history including a permanent role with a large multinational company. Please phone Fiona on 086 306 7115. A copy of my CV can be forwarded at your request

Solicitor required for medium-sized Offaly practice – up to three to five years' post-qualification experience preferred for senior position. Replies to **box no 60/04** in strict confidence

Solicitor required for busy midlands general practice. Up to three years' PQE preferred. Please reply to **box no 61/04**

Solicitor required for Cork city practice. Experience particularly in conveyancing, probate and family law. Replies in writing to Colm S O'Riain & Co, Solicitors, 4 Washington Street West, Cork; e-mail: csoriain@iol.ie

Solicitor seeks part-time or locum position in Dublin area in general practice. Has one year of PQE (approx). Computer literate. Tel: 01 668 6901

Solicitor with four years' PQE required for conveyancing practice. Excellent prospects for progression in this rapidly expanding firm. Please reply by post to PJF McDwyer & Co, Solicitors, Belturbet, Co Cavan or e-mail: mcdwyerbelturbet@eircom.net

Via Ahascragh, the Gaeltacht and Cork, **solicitor with PQE available** to work part-time, commercial conveyancing, only in greater Dublin area; tel: 087 671 3671 or e-mail: flite@eircom.net

EXCITING OPPORTUNITY

Residential conveyancing solicitor with at least two years' PQE required for Limerick city practice. Ideal candidate will work with a dynamic team with a modern approach, excellent remuneration package and commissions guaranteed. We require a highly motivated ambitious self-starter who can work on his/her own initiative. Please apply by e-mail to: celina@fahylaw.com

Solicitor with some PQE experience sought for busy medium-sized firm in a large midland town. Excellent opportunity for a versatile multi-disciplined applicant with ability to take on varied case load. Please reply to **box no 62/04**

MISCELLANEOUS

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

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

England and 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 2088 17777, fax: 0044 2088 896395

London solicitors will be pleased to advise on UK matters and undertake agency work. We handle probate, litigation, property and company/commercial. Parfitt Cresswell, 567/569 Fulham Road, London SW6 1EU, DX 83800 Fulham Broadway; tel: 0044 2073 818311, fax: 0044 2073 816723, e-mail: arobbins@parfitts.co.uk

Solicitor's practice for sale. Dublin city, general practice consultancy considered. Reply in writing only to Slattery & Co, Chartered Accountants, Springfield Court, Ennis, Co Clare. Principals only

Wanted: seven-day pub licence; tel: 087 645 4663 or 061 311 133

Seven-day publican's licence for immediate sale. Full seven-day publican's licence. No endorsements. North Cork area. Offers: James Lucey & Sons, Solicitors, Kanturk, Co Cork; tel: 029 50300, fax: 029 50738, e-mail: luceylaw@eircom.net

TITLE DEEDS

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

Take notice that any person having any interest in the freehold estate of the following property: all that premises known as no 28 Hanover Lane situate in the parish of St Nicholas in the county of the city of Dublin.

Take notice that Charles Fleury and Denise Fleury intend to submit an application to the county registrar for the county of the city of Dublin for the acquisition of the freehold interest in the aforesaid property, and any party asserting that they hold a superior interest in the aforesaid premises are called upon to furnish evidence of title to the aforementioned premises to the below-named within 21 days from the date of this notice.

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

Date: 9 July 2004

Signed: KMB Solicitors (solicitors for the applicant), 20 Northumberland Road, Dublin 4

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

Take notice that any person having any estate in the freehold of or superior interest in the following premises: all that and those the dwelling house,

backyards, out offices and gardens bounded on the east by High Street, on the west by the garden in the possession of Peter Duggan/his successors in title, on the north by the garden and premises in the possession of Nicholas Russell/his successors in title and the houses and premises in the possession of Mary Farrell/her successors in title, on the south by the house and yards in the possession of Willoughby H Connor and by Agnes Biddy/their successors in title and by a yard in the possession of Andrew Ryan/his successors in title, and which said premises are situate and known as no 19 High Street, High Street in the parish of St Mary and city of Kilkenny, being the property comprised in an indenture of lease dated 15 June 1937 and made between Edwin Angus Swanton of the one part and John H Fennell of the other part.

Take notice that the applicant, Roy Coogan, intends to apply to the county registrar for the county of Kilkenny for the acquisition of the freehold interest in the aforesaid property, and any party asserting that they hold an interest superior to the applicant in the aforesaid property are called upon to furnish evidence of title to same to the below named solicitor within 21 days from the date of this notice.

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

Date: 9 July 2004

Signed: Reidy & Foley (solicitors for the applicant), Parliament House, Parliament Street, Kilkenny; REF: C633/EF/RH

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

Take notice that any person having an interest in the freehold estate of the premises known as no 128 Harold's Cross Road, formerly known as no 103 Harold's Cross in the barony of Donore and county of Dublin, being the property held under a lease dated 18 April 1918 and made between Joseph George Thompson Carruthers and Ada Jane Lorentz Eliott of the one part and William Brennan and Ellen Brennan of the other part for the term of 99 years from 25 March 1918 at a yearly rent of £9.

Take notice that Smallacre Holdings Limited intends to submit an application to the county registrar for the city of Dublin for the acquisition of the freehold interest in the aforesaid property, and any party or parties asserting that they hold a superior interest in the aforesaid premises are called upon to furnish evidence of title to the aforementioned property to the below named within 21 days from the date of this notice.

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

Date: 9 July 2004

Signed: McEvoy Partners (solicitors for the applicant), Canada House, 65-68 St Stephen's Green, Dublin 2

Exceptional Opportunities

PRACTICE

Head of Commercial Property
Medium sized firm. Outstanding opportunity to manage and develop commercial property department. 6+ years PQE
Salary: to €120K + Bonus

Senior Construction Lawyer
Leading medium practice. Seeking candidates with 5+ years PQE in large contracts, dispute resolution & arbitrations.
Salary: to €100K + Bonus

Banking & Financial Services
Medium sized firm require a Senior Lawyer, circa 5 years PQE in structured finance, project finance, securitization.
Salary: to €85K + Bonus

Investment Funds Lawyer
Medium sized firm require candidates with 3-5 years PQE, with domestic experience in investment funds.
Salary: to €80K + Bonus

Corporate Lawyer
Medium firm. 3-5 years PQE. M &A, IPO's, Joint Ventures, General Commercial.
Salary: €60-75K + Bonus

Intellectual Property
Contentious I.P. including; trademark infringement, passing off & copyright enforcement. 2-4 years PQE
Salary: €50-65K + Bonus

Residential Property
3-4 years PQE in housing & apartment developments, and mixed residential & commercial developments.
Salary: to €60K+

Commercial Litigation
Medium firm. 1-2 years PQE. Experience of alternative dispute resolution.
Salary: to €45K + Bonus

IN-HOUSE

Interim Head Of Legal
Global Pharmaceutical company. 6 month contract. Strong lawyer with 6+ years PQE in pharmaceutical/healthcare related areas.
Salary: €120K + Completion Bonus

Senior Legal Counsel
Excellent opportunity. Senior Management position. Candidates with 5-7 years experience in Life & Pensions.
Salary: to €90K + Benefits + Bonus

Senior In-House Counsel
Multinational organization. General role. 4-5 years PQE 2+ years experience in a corporate, multinational environment.
Salary: to €90K + Benefits + Bonus

In-House Counsel
International Software company. 3-4 years PQE in commercial contracts, licensing, employment law and corporate governance.
Salary: to €80K + Benefits

In-House Counsel
Financial Services. Strong corporate, commercial and banking experience. 3+ years PQE with Multi-Jurisdictional exposure.
Salary: to €80K + Benefits

In-House Lawyer
Solicitors with 3-4 years PQE in Personal Injury Defence, EL, PL, Defamation.
Salary: to €70K + Benefits

Assistant Lawyer
Excellent varied role for candidates with circa 2 years PQE in banking or general commercial environment.
Salary: to €50K + Benefits

Legal Advisor - Compliance
Global Financial Services company. 1-2 years PQE. Legal and compliance role within investment funds.
Salary: to €45K + Benefits

HRM RECRUITMENT GROUP

Contact Eamonn O'Reilly (01 632 1870) or Justin Loughnane (01 632 1885)
47 Fitzwilliam Square, Dublin 2. e: legal@hrm.ie www.hrm.ie