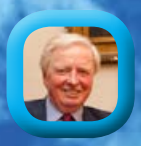
Making it clear
Advance healthcare directives are to be placed on a statutory footing

The labours of Sisyphus
In debt recovery cases, the courts may be ignoring key EU rights



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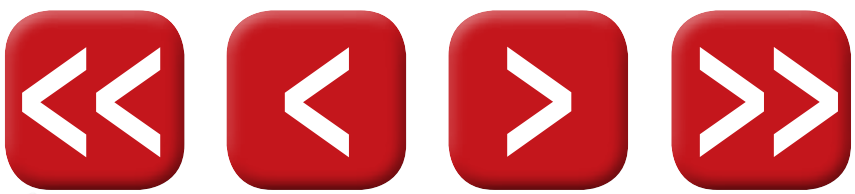

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TIME TO SAY GOODBYE

This is my last president's message, which is difficult to believe, given that it seems like only yesterday when people were referring to me as 'the new president'.

"How long have you left to go?" has been the question I have been most frequently asked in the past month. And by the time you read this, I will be gone.

For me personally, being president this past year has been tremendous, and I hope it has been good for the Law Society and for the profession also, as the economy continues to pick up – although I am acutely aware of the challenges that still exist for the profession, particularly outside the Pale.

The past year has taken me the length and breadth of the country, including my trip in the company of the senior vice-president and the director general to Sligo and Mayo in the last few weeks, where we had excellent meetings with our colleagues.

Supportive ear

It has also been great to interact with colleagues here in the 'aspiring' capital of Dublin (the 'real capital', of course, being my native city of Cork!). Apart from the numerous events held during the year in Blackhall Place, I attended the joint Law Society/Dublin Solicitors' Bar Association event on the *Legal Services Regulation Act* last March in the Radisson Blu Hotel, Dublin. During my year, I also visited the very impressive offices of both Arthur Cox and William Fry.

Further afield, I had the pleasure of representing the Society at the annual dinner of the Law Society of Northern Ireland on 7 October, at the invitation of their president John Guerin, whom I have got to know and with whom I have become good friends over the past year.

I also travelled to our counterparts in Scotland and in England and Wales, and we in the Law Society continue to offer a supportive ear in relation to all of the anxieties being expressed by our colleagues in those jurisdictions in the wake of Brexit.

Well received

Rather perversely, I enjoyed preparing and giving speeches, and it was certainly a great compliment to the office of President of the Law Society that I felt so well received wherever I went.

There are people too numerous to thank in this message – and I have done that in the Law Society's *Annual Report*, which I would encourage all members to read, and to play the embedded short video presentation. Having got over my own inhibitions and self-consciousness, I certainly consider it an excellent and professional production – even if the part where Ken Murphy and I gesticulate furiously at each other on some topic was just a tad OTT!

I leave office, like every other president before me, hoping that I have done my bit. I know that I have a colleague of great calibre about to succeed me in the person of my senior vice-president Stuart Gilhooly. I have no doubt that Stuart will do an excellent job, and I wish him the very best for his term in office.

Finally, thanks to you, my fellow members of our great profession, for giving me the opportunity of representing you during the past year. It has been a great privilege.

Simon Murphy
President

LAW SOCIETY OF IRELAND

> I leave office, like every other president before me, hoping that I have done my bit

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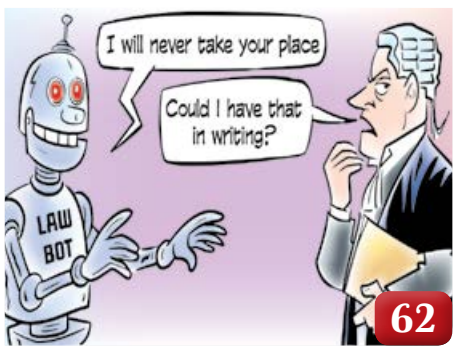
Law Society Gazette
Volume 110, number 9
Subscriptions: €60 (€90 overseas)

Editor: Mark McDermott FIIC
Deputy editor: Dr Garrett O'Boyle
Art director: Nuala Redmond
Editorial secretary: Catherine Kearney
Printing: Turner's Printing Company Ltd, Longford

regulars



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nationwide

News from around the country

Keith Walsh is principal of Keith Walsh Solicitors, where he works on civil litigation and family law cases

DUBLIN

Presidential mantle for Sligo woman

Sligo woman Aine Hynes (St John Solicitors, Dublin) was elected president of the Dublin Solicitors' Bar Association at its AGM in the Westbury on 26 October 2016. She succeeds Galwegian Eamonn Shannon. Robert Ryan takes over as vice-president.

Aine is chair of the DSBA's Mental Health and Capacity Committee and is highly regarded in the commercial and litigation fields of law. We wish her and her council well in the coming year.

MAYO

New team at the helm

PIC: JOHN O'GRADY

Brendan Donnelly hands over the chain of office to James Ward

Alison Keane (secretary, Mayo Solicitors' Bar Association) tells 'Nationwide' that their AGM took place on 11 October in Breaffy House Hotel, Castlebar. The new officer team comprises president James Ward (Patrick J Durcan & Co), vice-president Dermot Morahan (Oliver P Morahan & Son, Westport), secretary Alison Keane (Michael Keane & Co), and treasurer Marc Loftus (Bourke Carrigg & Loftus, Ballina).

The AGM was followed by a meeting with Law Society President Simon Murphy, senior vice-president Stuart Gilhooly, and director general Ken Murphy. A lively discussion ensued on many topics, including the increase in insurance premiums, the Setanta case, the *Legal Services Regulation Act*, taxation of costs, cuts to criminal legal aid, and the appointment of solicitors as judges.

GALWAY

Galway CPDs

It has been a busy year for the Galway Solicitors' Bar Association. Over 30 hours of free CPD have been provided to all members, included in the membership fee.

Two free CPD events will take place in Galway Courthouse at 2pm on the following dates:

- Friday 18 November 2016 (three hours' general) – Shane Caulfield BL, 'Developments in judicial review'; Shane MacSweeney (solicitor), 'Recent developments on the law relating to stress, bullying and harassment at work'; Patricia McLoughlin (solicitor), 'Pre-action protocol for clinical negligence disputes under the *Legal Services Regulation Act 2015*',
- Friday 25 November 2016 (two hours' general) – co-hosted by the Irish Centre for European Law: Marguerite Angelari (attorney), 'Open Society Justice Initiative – the debtor as a consumer: an overview of the key provisions of the UCTD and relevant case law'; Dr Padraic Kenna (NUI Galway), 'The key role of the *Charter of Fundamental Rights* in debt cases'; Gary Fitzgerald BL (director of the ICEL), 'Getting to the European courts: the role of the preliminary reference procedure in debt litigation'; Madeleine Thornton (solicitor), 'Putting this into practice: applying EU law to the mortgage contract'.

The ICEL seminar is free, but registration is essential. A wine reception will follow in Blake's Brasserie. To register, email icel@tcd.ie or call 01 896 1845.

The GSBA AGM will take place at 5pm in Galway Courthouse on Thursday 8 December 2016. A guest speaker will provide an update on legal costs. It garners one hour of regulatory and one hour of general CPD.

Annual lunch raises €12k for Irish guide dogs

A four-legged friend tells 'Nationwide' that, on 16 September last, almost 130 legal (b)eagles and two wonderful dogs arrived bright-eyed and bushy-tailed at the Fire Restaurant in the Mansion House for the annual Corporate and Public Lawyers (CPLA) fundraising lunch for the Irish Guide Dogs for the Blind.

Long a staple in the CPLA calendar, this year's lunch proved to be as popular as ever, providing an opportunity for lawyers from the private and public sectors to rub noses.

This year, representatives attended from private law firms, the DPP, CSSO, Revenue, the ESB, banks, IBP Insurance and the CIArb.

Top dogs and stars of the show were Poncho, an assistance dog, with his owner Conor Simpson, who is a board member of Irish Guide Dogs for the Blind. Conor spoke passionately about the benefit to his family of having an assistance dog. Barrister Martin Gordon and his guide dog Gola were also guests of honour. The event raised €12,000.

PIC: CONOR MCCABE PHOTOGRAPHY

Conor Simpson with his assistance dog Poncho, Terence O'Keeffe (president, CPLA), Coral Browne and Martin Gordon BL with his guide dog Gola

Destruction of Four Courts' public records

The next lecture in the series hosted by the Courts Centenary Commemoration Committee will focus on the destruction of public records, what was lost, and the efforts since made at reconstruction.

Dr Catriona Crowe (head of special projects at the National Archives) will speak in the Round Hall, Four Courts, on Wednesday 23 November at 5pm.

Entry is free, but booking is essential. Reserve your place by emailing courtscentenaryevents@courts.ie.

PIC: CIAN REDMOND PHOTOGRAPHY

IRC's new boss

Nick Henderson has been appointed chief executive of the Irish Refugee Council.

Henderson previously managed an initiative by Transparency International Ireland that promoted supportive working environments for whistleblowers. He has also managed Amnesty International Ireland's work on economic, social and cultural rights, was legal officer with the Refugee Council's independent law centre from 2011-2014, and worked with the Migrant Rights Centre Ireland on the criminalisation of forced labour. He was called to the Bar in 2015.

Committee for Judicial Studies conferences

The 2016 national conference will take place on Friday 18 November 2016. No cases should be listed for any court on that day, save on the instruction of the judiciary.

The 2017 Circuit Court conference will take place on Friday 23 and Saturday 24 June 2017. No cases should be listed for any Circuit Court on Friday 23 June, save on the instruction of the judiciary.

The 2017 District Court conference will provisionally take place on Friday 10 and Saturday 11 March 2017. No cases should be listed for any District Court on Friday 10 March, save on the instruction of the judiciary.

See the *Gazette* (Aug/Sept and October 2016) for provisional dates booked in 2017 for the Supreme Court, Court of Appeal and High Court conference, as well as the national conferences from 2017 to 2021.

New chair at Sutherland law school

Prof James Devenney has been appointed to the McCann FitzGerald Chair of International Law and Business at University College Dublin's Sutherland School of Law. He replaces outgoing chair Prof John Flood.

Devenney is widely recognised as a leading expert on transactional commercial law and was previously head of Exeter University Law School.

Devenney will oversee the master's degree in international law and business at UCD. The programme, established in 2014, offers a specialised degree for students who have successfully completed an undergraduate degree in law, business or related disciplines. The course is being offered jointly by the UCD Sutherland School of Law and the UCD Smurfit Graduate School of Business.

PIC: CHRIS BELLEW/FENNELL PHOTOGRAPHY

Barry Devereux (managing partner, McCann FitzGerald) congratulates Prof James Devenney on his new appointment

Prof Devenney will work with McCann FitzGerald to coordinate joint activities that will benefit the school, its students and the wider business and legal communities.

Irish firms honoured at Innovative Lawyers Awards

A&L Goodbody has been named Ireland's most innovative law firm in the *Financial Times* Innovative Lawyers Awards 2016 for the third time in four years. The award recognises the firm's "innovative approach to complex legal matters, engaging with stakeholders and corporate responsibility".

In the same awards, William Fry received a 'standout' ranking in the 'Innovation in legal expertise' category. The ranking acknowledged the firm's role in advising on the landmark Microsoft 'warrant case'.

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Mayo solicitors gather for training and networking event

Over 100 solicitors from across Connaught gathered at the Breaffy House Hotel, Co Mayo, on 29 and 30 September for the Connaught Solicitors' Symposium 2016 – a learning and networking 'cluster' event tailored to meet the needs of solicitors serving the local area.

The symposium was hosted by the Mayo Solicitors' Bar Association (MSBA) in conjunction with Law Society Skillnet. It is just one of a nationwide programme of similar events taking place throughout the country this year. Solicitors were updated on developments in criminal law, the *Children and Family Relationships Act 2015*, legal costs, probate, taxation and regulatory issues.

Swinford-based president of the MSBA, Brendan Donnelly, said that, while the recovery of the local economy was slow, Mayo solicitors were beginning to see an increase in conveyancing business. "This would tend to indicate an upturn in the overall economy of the area," he said.

At the Law Society Skillnet Cluster in Mayo were *(l to r)*: Tristan Lynas (Poe Kiely Hogan Lanigan, Kilkenny), Michelle McLoughlin (M McLoughlin & Co, Sligo), Katherine Kane (Law Society Skillnet), John Elliot (director of regulation), Kathy McKenna (Law Society), Damien Colton (investigating accountant), Brendan Donnelly (president, MSBA), Anne Stephenson (Stephenson Solicitors), Alison Keane (Michael Keane & Co) and Úna Burns (Stephenson Solicitors)

Teri Kelly (Law Society director of representation and member services) commented: "In designing this seminar, the Mayo Bar Association and Law Society Skillnet have been guided strongly by what the people of Mayo and Connaught need from their solicitors."

Cork law firm criticises delay in commencing assisted decision-making legislation

Cork-based FitzGerald Solicitors has called for the commencement of the *Assisted Decision-Making (Capacity) Act 2015*, which was signed into law last December.

"Thousands of people throughout Ireland have been patiently awaiting the implementation of the law," the firm said. "When the new provisions commence, it will mean that adults with diminished mental capacity will be granted the same human rights, respect, dignity and independence to make decisions for themselves, when possible."

The law was heralded as a long-overdue milestone that would allow people with intellectual disabilities, diminished capacity or dementia, and those whose capacity had been affected by traumatic injury, to better manage their property, financial and personal affairs.

Noel Doherty: 'Law will grant same human rights, respect, dignity and independence for everyone'

Noel Doherty, a partner with FitzGerald Solicitors, said: "The *Assisted Decision-Making Act* allows all of us to put advance healthcare directives and/or enduring powers of attorney in place to provide for decisions that we may not be able to make at some future time in our lives. If there are clear directions as to how the decision in question is to be made, then those directions need to be applied."

He added that it was not just people who currently have diminished capacity who would benefit from the commencement of the act. "Every citizen in the country currently has the power to put in place an enduring power of attorney and, once the act comes into force, to put in place an advance healthcare directive to ensure that their wishes are honoured if they do not have the capacity to make important decisions at some point in their future.

"We should all have the right to retain control over important decisions that affect us and it is imperative that the Government commences the legislation immediately and makes the resources available to implement the provisions effectively."

CRO appeal

In adddition to dealing with the usual peak filing of annual returns in October/ November, the Carlow office of the Companies Registration Office (CRO) will also be responsible for processing applications from companies converting to a new company type (LTD or DAC) before the 18-month transition period ends on 30 November.

The CRO is asking customers seeking information or assistance to target their emails as follows:

- **Annual returns general:** crocarlow@djei.ie,
- **e-B1 queries:** eb1@djei.ie,
- **Conversions:** conversions@djei.ie,
- **Business names:** rbn@djei.ie,
- **District Court cases:** dcet@djei.ie,
- **Credit card refunds:** epayments.cro@djei.ie,
- **Customer accounts:** cro.customer.accounts@djei.ie.

A daily update is available in the 'what's new' section of the CRO website. For more information, see www.cro.ie.

Monaghan cluster proves a draw for north-east solicitors

PIC: JAMES LS PHOTOGRAPHY

A total of 180 solicitors from Monaghan and across the north-east gathered at the Glencarn Hotel in Castleblayney on 14 October for a networking and training event.

The North East CPD Day 2016, organised by Law Society Skillnet in association with Monaghan Solicitors' Bar Association, Cavan Solicitors' Bar Association, Drogheda Solicitors' Bar Association and Louth Solicitors' Bar Association, is focused on the specific needs of the region's solicitors and the communities they serve. Topics included farming matters, conveyancing and the new *Book of Quantum*.

Maria Connolly (secretary, Monaghan Bar Association) commented that a solicitor's advice can be vital when facing many different, and sometimes difficult, situations in life. She gave the example of farming families, who she encouraged to talk to their solicitors when approaching complex taxation and inheritance matters.

"The increase in the threshold for inheritance tax announced in the recent Budget is good news for farming families wishing to pass the business to the next generation. Your solicitor can help to plan the future of the farm and negotiate the often complex tax implications," she said.

She reminded those considering buying or selling homes that the conveyancing process had become much more complex in recent years. "While Monaghan solicitors are seeing an increase in conveyancing – a good indicator for the local economy – the recession has left a lasting impact in the form of new charges and legacy issues. Your solicitors will be invaluable in helping to navigate these issues to a successful house purchase or sale. Talk to your solicitor early in the process."

Law Society director of representation and member services Teri Kelly said: "The Law Society Skillnet team has worked with local solicitors to ensure that the seminar delivers the professional updates that are most relevant to their clients in Monaghan and the North East."

Trainee solicitors get down on the Street

The Law Society has launched its latest Street Law programme. Street Law prepares trainee solicitors to teach secondary school students about the law in a practical way.

Originally developed in Georgetown University, the Law Society set up Street Law in Ireland in 2013. Georgetown law professor Richard Roe, a renowned pioneer of Street Law, attended the launch on 30 September, as well as the weekend-long orientation programme in Blackhall Place.

Prof Roe said: "This training programme is designed to coach trainee solicitors on the learner-centred teaching methods used in Street Law. Learner-centred teaching ensures that both the trainee and the student gain a deeper understanding of the law by allowing the student to take a more active role in their learning.

"Once the trainees have completed the orientation, they will visit local secondary schools to teach students about the law. Street Law aims to encourage civic engagement and break down barriers to legal education from a young age."

TP Kennedy (director of education) added: "As the first institution to bring Street Law to Ireland, we are pleased to see it flourishing in its third year. Demand from trainee solicitors to participate in the programme has grown, year on year. Street Law is a great way to enable our incoming solicitors to engage with young people in the community and help them see how law affects their everyday lives."

PIC: CIAN REDMOND PHOTOGRAPHY

At the launch of the Law Society's Street Law programme 2016 were trainee solicitors Dean Bracken (Offaly) and Hayley Maher (Cork), with Street Law's founder, Prof Richard Roe

Street Law will be taught in 12 schools across Dublin, most of which are in the 'Delivering Equality of Opportunity in Schools' (DEIS) scheme. Schools participating include Mercy Goldenbridge, Loreto College Crumlin, Marian College Lansdowne Road, Assumption Secondary School Walkinstown, Tallaght Community School, Balinteer Community School, Moyle Park College Clondalkin, Coláiste Bride Clondalkin, Pobalscoil Iosolde Palmerstown, St Joseph's Rush, Stanhope Street and St Declan's Cabra.

The course will be taught over six weeks by 40 trainee solicitors. The Law Society has also recently expanded the programme to Wheatfield Prison to educate young offenders, with the aim of helping them break the cycle of reoffending.

For more information, see www.lawsociety.ie/Public/Transition-year-programmes/Street-Law.

Managing partner survey: have your say

The Law Society's Performance and Sentiment 2017 survey will be issued in November by direct email.

The views of leaders within the profession will be sought on the current and forthcoming years. Key themes explored will include:

- **The implications of Brexit,**
- **Succession planning,**
- **Areas of practice, and**
- **Human resourcing.**

The results of the survey will inform the Society and our members as to the resilience and flexibility of the profession and how we can further support firms.

Register your details

Firms with no nominated principal are urged to register a nominee for the purposes of the survey. For other firms, where your managing partner details are not registered or have changed over the past year, it is important to update us; email: mpsurvey@lawsociety.ie.

Profit margins fall at Britain's largest law firms

Growing pressure from clients on fees, increasing associate salary costs, and declining productivity are causing profit margins to fall at Britain's largest law firms. That's according to a new survey by Big Four accounting firm PricewaterhouseCoopers.

A quarter of Britain's top 100 firms are experiencing decreased revenues, due to the tough market conditions – up from 18% last year.

Despite this, firms are still managing to maintain average equity partner profits through "tight control" of their equity.

David Snell (head of PwC's Law Firms' Advisory Group) said that, while the sector was in "good shape" overall, many firms have been left with too many lawyers as a result of overestimating client demand. The total number of lawyers in Britain's top 50 firms jumped 7.6% in the past 12 months.

"As confidence returned to the sector last year, firms increased headcount in anticipation of continued improving market conditions," he said. "However, with the market turning out to be more challenging than expected, and with increased competition from US firms and new entrants, spare capacity is now an issue for firms."

He added that this situation was likely to be exacerbated by market uncertainty following the Brexit vote.

Firms were now facing a period of "significant financial investment" in order to keep up with technological advancements.

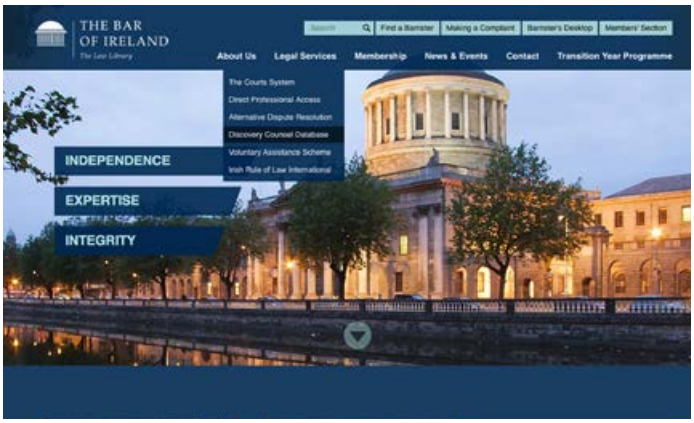
Snell predicted that the use of artificial intelligence (AI) would become widespread across the industry.

"Law firms can't ignore the need to invest heavily in technology," he said. "The successful firms of the future are likely to provide global services supported by virtual collaboration and widespread use of AI. The adoption of new technologies, however, will make it imperative for firms to redefine roles of the existing workforce to avoid further spare capacity."

Discovery database should appeal to solicitors and clients

Earlier this year, the Bar of Ireland launched a Discovery Counsel Database, *writes Eoin Martin (member of the Young Bar Committee 2015/16)*. The database lists over 190 barristers, stating when they were called to the Bar and the circuits they cover. It also indicates whether they specialise in discovery, title review or both.

The purpose of the database (at www.lawlibrary.ie, under the 'legal services' tab) is to make it easy for solicitors to identify which barristers are willing and available to do document-review work – whether discovery, title review or pre-litigation review of files. Drop-down menus that allow searching by location and specialisation mean that finding a discovery or title-review expert is a doddle.



Almost all of those listed on the database have worked in the past on large discovery project teams, where consistency and efficiency are key. They are also familiar with the most commonly used electronic document-review platforms.

The Bar of Ireland expects that the database will open up the resource of experienced discovery counsel to a wider number of solicitors. Every circuit in the country is represented and, where smaller firms in the past might have struggled to quickly assemble a skilled team for document review purposes, this expertise is now readily available. This reduces the need to use intermediary services to assemble discovery teams, which is expected to reduce costs and delays.

In conjunction with the database, the Bar of Ireland is promoting the use of a recommended checklist for terms of engagement when barristers are recruited for discovery projects.

The checklist provides clients with the assurance that the barristers engaged will, at all times, honour their duty of confidentiality as set out in The Bar of Ireland's *Code of Conduct*. Using the checklist also helps to ensure clarity at the outset about fees and payment, the times and locations where documents can be accessed, and the experience a particular barrister has to offer.

Celebrating *Magna Carta Hiberniae's* 800th anniversary

The Irish Legal History Society is holding a conference to mark the 800th anniversary of the sealing of the document known as *Magna Carta Hiberniae* in November 1216. Entitled 'Law and the idea of liberty in Ireland: from *Magna Carta* to the present', the conference will take place in the Music Room of Christ Church Cathedral, Dublin, on 25 and 26 November. A late 13th century copy of the charter of 1215 is contained in the *Liber Niger*, one of the treasures of the cathedral.

The keynote address, '*Magna Carta* in Ireland, 1215-1320', will be given on Friday 25 November at 6pm by Prof Paul Brand of All Souls, Oxford, who lectured at UCD from 1976 to 1983. Other contributions to the conference range from 'The political background to *Magna Carta*: King John and Ireland' to the position of *Magna Carta* on the Irish statute book following the recent statutory law reform.

Admission to the conference is free, but registration is essential and can be made through Eventbrite, accessed via www.ilhs.eu.

MH&C appoints director of client service

Nina Hourigan Smith (director of client service) and Declan Black (managing partner, Mason Hayes & Curran)

Mason Hayes & Curran has appointed Nina Hourigan Smith to its newly created position of director of client service. With over ten years' experience as a corporate lawyer, Nina will work with clients – free of charge – to enhance the service they receive. She will help to develop bespoke service plans tailored to individual client needs and preferences.

The law firm describes the role as unique in Ireland. As well as analysing and developing client service standards and improving efficiency across the firm, Nina will promote the adoption of new technologies and other service innovations where these are regarded as being beneficial to clients. She will also oversee training and lawyer development on service-related skills.

Prior to joining Mason Hayes & Curran, Nina worked in leading commercial law firms in Ireland and Australia. She held a senior in-house role in the financial services industry.

New voucher scheme aimed at long-term mortgage defaulters

A new State-funded voucher scheme to finance legal advice for people in serious mortgage arrears has been launched, *writes Lorcan Roche.*

People who are insolvent, in serious arrears, and at real risk of losing their homes – and who are deemed eligible for a new mortgage arrears resolution service – can avail of vouchers that can be used to obtain legal advice.

Under the recently launched 'Abhaile' mortgage arrears resolution service, such individuals can get assistance in court, have access to solicitors, and get help obtaining legal aid. The €15-million joint initiative will allow participants to avail of:

- A consultation and written legal advice from a solicitor on any legal aspect of putting together a solution for arrears resolution,
- Assistance at court by a 'duty solicitor' – rostered by the Legal Aid Board – for unrepresented borrowers facing repossession proceedings,
- Legal aid for new court reviews under section 115A of the *Personal Insolvency Act* where a borrower's proposal for a personal insolvency arrangement, including mortgage arrears, is refused by creditors.

The voucher and legal-aid aspect of the 'Abhaile' initiative went live on 22 July 2016 and 1,340 vouchers for financial or legal advice, or legal aid, have been issued by MABS up to 30 September.

Fitzgerald: 'Government wanted to help'; Varadkar: 'expertise for those most in need'

29,000 homes at serious risk

Mortgage arrears of more than 90 days are down from a peak of 12.9% in 2013 to 7.8%. The number of people in arrears has been falling for 12 consecutive quarters. However, there are still 35,000 people in arrears for 720 days or more, which corresponds to approximately 29,000 homes nationwide.

Of note is the fact that, of the 1,340 vouchers (for 982 homes) issued by MABs, approximately two-thirds were from the long-term defaulters' list.

According to the Minister for Social Protection Leo Varadkar, who spoke to the *Gazette*, it is those long-term defaulters who have not yet engaged with the resolution process that the Government is trying to target, while "avoiding putting further pressure on the rental market and on social housing requirements". He added that the State was now providing access to the most relevant expertise for those in most need of it.

Minister for Justice Frances Fitzgerald said that the Government "wanted to help people stay in their homes" and "to avoid foreclosing families into homelessness".

'Final piece of the jigsaw'

Tara Cheevers, a personal insolvency practitioner based in Trim, Co Meath, said the key challenge had been engaging with long-term defaulters. Many had previously failed to engage with the resolution process out of a fear of being subjected to fees. She said that there had been a lot of misinformation in the past, which created confusion.

Many in long-term arrears, she said, were living well below the poverty guidelines and were in urgent need of a holistic solution. Welcoming the amended service, she said a "final barrier" to engagement had been removed and that the "final piece of the jigsaw" had been inserted.

‘Golden greats’ celebrate in style at Royal Dublin Society

PIC: MICHAEL FINN

In one of the last duties of his presidency, Dublin Solicitors’ Bar Association president Eamonn Shannon hosted a lunch for solicitors who were celebrating 50 years’ service and more. The venue was the plush surrounds of the RDS, Dublin.

This year, they were joined by the ‘newbies’ from the class of 1966. John P ‘Spanner’ O’Malley shared some of the main events of that year, including England’s World Cup victory and the arrival of miniskirts.

President Shannon paid tribute to those celebrating their golden anniversaries, as well as the DSBA council, past-presidents, and Maura Smith for organising the event. Those from the class of ’66 included John Dockrell, Mr Justice Joseph Finnegan, John Fitzpatrick, Brian Magee and Judge Patrick McMahon.

Mayo solicitors elect new president at October AGM

PIC: JOHN O’GRADY

The Mayo Solicitors’ Bar Association AGM was held on 11 October in Breaffy House Hotel, Castlebar, at which James Ward (Patrick J Durcan & Co) was appointed president. *(Front, l to r)*: Louise Cresham, Dermot Morahan (vice-president), Alison Keane (secretary), Brendan Donnelly (outgoing president), Simon Murphy (president, Law Society), James Ward (president), Ken Murphy (director general), Stuart Gilhooly (senior vice-president, Law Society), Rosemarie Loftus and Marc Loftus (treasurer). *(Back l to r)*: Paul Cunney, Samantha Geraghty, John Geary, Patricia Lally, Peter Loftus, Ita Feeney, Charlie Gilmartin, Joan Clarke, James Cahill, Cathy McDarby, Kevin Bourke, Sandra Murphy, Michael McDarby, Vincent Deane and Stephen Lydon

Sligo greets president at Glasshouse get-together

PIC: BRENDA MCCALLION

The Sligo Bar Association held its annual meeting with the Law Society's president and representatives at the Glasshouse Hotel, Sligo, on 11 October 2016. Special guests included Law Society President Simon Murphy, senior vice-president Stuart Gilhooly and director general Ken Murphy. *(Front, l to r)*: Caroline McLoughlin, Niamh Ní Mhurchú, Dervilla O'Boyle, Noel Kelly, Ken Murphy, Simon Murphy, Michael Monahan (president, Sligo Bar Association), Stuart Gilhooly, Michele O'Boyle, Chris Callan, Aine Kilfeather and Claire Gilligan. *(Back, l to r)*: Nuray Demirkapi, Tanya Brady, Lorraine Murphy, Michael Mullaney, Eoin Armstrong, Gerry McCanny, Marian Ahern, Mark Mullaney, Eamonn Creed, Hugh Sheridan, Noelle Galvan, Morgan Coleman, Damian Martyn, Fergal Kelly, Ciaran Tansey, Michelle Quinn, Joe Keyes, Brian Gill, Donal Carroll, Maurice Galvin, Eamonn Gallagher and Rebecca Doherty

Murdoch & Hunt launch new and improved 6th edition

PIC: PAUL SHERWOOD

Bloomsbury Professional has just published the sixth edition of the excellent *Murdoch & Hunt's Dictionary of Irish Law*. Taoiseach Enda Kenny was the guest speaker at the launch at Mason, Hayes & Curran's offices in Barrow Street on 18 October.

It's hard to believe, but the last edition was published seven years ago. The new version is 500 pages longer, contains over 270 new entries, has had 1,000 dictionary entries revised, comes complete with alphabetical thumb-cuts – making it easier to find your subject matter – and represents great value at €145.

Celebrating the launch were Brian Hunt (updating author), Taoiseach Enda Kenny, Henry Murdoch (consulting editor), Sandra Mulvey (Bloomsbury Professional) and Declan Black (managing partner, Mason Hayes & Curran)

Hungarian rhapsody for 'on-song' Irish at Euro championship

Irish lawyers were on song at this year's European Lawyers' Tennis Championship in Budapest (22-25 June), beating the home side in a testing final.

The Irish team was the strongest sent to these championships in many years. And despite slow clay courts and 33-degree heat, the Irish tricolour flew proudly over the Vasas Sports club at the end of the event, signalling the first Irish win since London in 1997.

Incidentally, that was the year when Bill Clinton was inaugurated for his second term as US president and Mary McAleese was elected eighth President of Ireland.

The victorious Irish team: John Mark Downey (captain) (AIB), Niall Baragwanath (McCann FitzGerald), Morgan Dunne (McCann FitzGerald), Kevin Branigan (NAMA), Michael Coyle (Arthur Cox) and Patrick O'Shea (Arthur Cox)

Time out: Niall Baragwanath, Patrick O'Shea, Kevin Branigan and Morgan Dunne

Ireland's decisive clash was against the hosts, after they had dispensed with an under-strength Italian team.

Hungarian number one Tamas Porsze is a former nationally ranked junior, and no Irish player had made a dent on him in recent years. On this occasion, however, despite losing the first set, Ireland's Morgan Dunne (also nationally ranked as a junior) hit back with a victory in the second, and finally secured a win in the third set. This was an example for the rest to follow.

The tennis championships are held in a different European city every couple of years. Recent host cities include Regensburg, Rome, London and Valencia. Anyone interested in playing or attending future events should email johnmarkdowney@yahoo.ie. While no official women's event has been organised to date, it is hoped that this will be inaugurated in time for the next championship.

letters

Minister perpetuates negative stereotype of lawyers

From: Karen Fitzgerald, solicitor, John Lynch & Company, Newcastle West, Co Limerick

Minister for Health Simon Harris, in speaking of the treatment of women who suffer maternity tragedies, said on 29 September that: "The only people who benefit from the current system are the legal eagles. We are funding a system that benefits the lawyers and not the patients. We can't do that anymore, and we are not going to do it."

These words from a public representative yet again reinforce the negative stereotype continually foisted on solicitors and barristers. Mr Harris conveniently overlooks the fact that, if it were not for 'the legal eagles' who fought for justice on behalf of their clients, then the adverse events in maternity hospitals would never have come to light.

I have the very distinct pleasure of working in a career that I enjoy every day and find to be very rewarding on an emotional level. However, the one issue that has blighted my pride in my job is the perception held by many (or maybe even most) people that I am part of a wealthy, elitist group that charge exorbitant prices for little work.

Solicitors have quietly endured as much hardship as the rest of society over the last decade. I was very fortunate in being able to avoid having to emigrate or change careers in order to stay in employment but, even at that, it was not until 2012 (11 years after graduating with honours from university) that I finally began earning the average industrial wage. Yet solicitors are still the butt of jokes and disparaging remarks, even from people who should know better.

In making these comments, it seems to me that Mr Harris was detracting from the real issue here, which is that his department and the HSE are not taking responsibility for the failings that exist within our health system. He seeks instead to blame the legal system and the lawyers who have to work

Two-tier system no protection for sex workers

From: Wendy Lyon, KOD Lyons, Dublin

Frank Armstrong (April *Gazette*, p26) correctly warns that the pending legislation to criminalise the purchase of sexual services may have dangerous consequences for persons who sell sex, but his proposed solution – official registration of sex workers – is equally problematic. In jurisdictions that have introduced such policies, most sex workers do not register and simply continue to operate outside the law, resulting in a two-tier system that offers the majority no protection.

Mr Armstrong also endorses the retention of brothel-keeping laws. In Ireland, as well as the countries that criminalise clients, these laws are used mainly to prosecute sex workers who share premises for safety reasons. The *Criminal Law (Sexual Offences) Bill 2015* will double the penalty for this offence, while also bringing loitering for prostitution within the purview of section 8 of the *Criminal Justice (Public Order) Act 1994* – potentially subjecting street workers to imprisonment on a first offence. It is misleading to suggest that the bill treats the sex worker as a victim and not a criminal.

A social-justice approach that addresses the reasons for entry into the sex trade is, as Mr Armstrong argues, more likely to reduce the number of people who enter it. In the meantime, our lawmakers' attention should turn to the New Zealand model of regulation, which allows sex workers to work together collectively without fear of arrest, and brings their profession under the ambit of employment and labour law. Those who wish to exit should be given every assistance they need; those who continue to sell sex should be empowered to do so as safely as possible.

within it, while ignoring the fact that there is a complete lack of accountability within the Irish health system. There is no real enforceable obligation on any medical attendant to report to a patient when they have made a mistake and, indeed, the instances of voluntary disclosure of such mistakes appear to be the stuff of legend and folklore.

Mr Harris now calls for 'periodic payments' and 'reform'. Even after all the avoidable tragedies that have happened in our maternity hospitals have been uncovered, Mr Harris is still missing the point. Further deaths could have been prevented, and unnecessary stress, upset, and expense on the part of families could have been avoided, if the hospitals involved had acknowledged the errors made at the time of the events, apologised to those affected, and put in place real strategies to prevent the same thing from happening over and over again.

If he actually spoke to the families involved, I am confident he would find that many would say they would not have endured the stress and upset of taking a civil case (not to mention the initial costs in obtaining reports, often costing thousands for a single report and frequently paid for by the 'legal eagles' with a risk of no return) had they received an honest explanation and a heartfelt apology at the time. No amount of money can compensate a family for the loss of a child.

What is needed within the legislation is provision for mandatory reporting of medical negligence and misadventure. It has been proven in other jurisdictions that such disclosure to patients actually results in a decrease, rather than an increase, in litigation. If it were a criminal offence to hide, or to assist another in hiding, medical mistakes from a patient or their family and the hospital where you are employed, the result would be that patients and families would be given answers in a timely fashion, instead of having to fight the system for years and years to force answers. Hospitals would learn from mistakes made in the past, and medical staff would be on the lookout for possible warning signs, having the benefit of learning from past mistakes. Even in situations where cases for compensation were still pursued, the legal costs would be greatly reduced due to the early admission of wrongdoing. The treatment described by the minister as "barbaric", whereby "a woman would have to go in and be examined by two separate sets of medical experts and be degraded and demeaned in that way", would no longer be necessary.

Mr Harris would be better served in retracting his negative comments about the lawyers who represented the unfortunate families who have lost a child or who are raising a child with significant care needs, and instead put a stop to the hospital culture of hiding and ignoring medical negligence and mistakes.

Surely it's time to take a stand against public representatives perpetuating the negative image attached to our profession?

viewpoint

MISSION IMPOSSIBLE?

The new *Book of Quantum* represents a 'quantum leap' from its predecessor. But Stuart Gilhooly reckons that appeasing the insurance industry is a mission impossible

Stuart Gilhooly is a partner at HJ Ward & Co, Solicitors, Harold's Cross, Dublin

Not since *Harry Potter and the Deathly Hallows* has a sequel been so hotly anticipated. Though, in fairness, as impressive a follow-up as it is, the new *Book of Quantum* is unlikely to be made into a movie. With its legalistic title bordering on parody, the second edition has been long in the making but represents a (cough) 'quantum leap' from its predecessor.

Much of the last six months has seen an increasingly shrill insurance industry lurch from one desperate accusation to another in its attempts to deflect the blame from itself, while piling monumental increases in insurance premiums on the unfortunate consumer.

The laziest and most prevalent claim is that it is all the fault of the lawyers. Whether that is because of greedy solicitors and barristers seeking proper compensation for their client, or judges not being in tune with their European colleagues in handing out compensation, the message is depressingly familiar. If it wasn't for those pesky injury victims making claims for the negligence of our policyholders and depleting our hefty reserves, we wouldn't have to double your premium.

Their lies, exaggerations, and embellishments have been debunked so many times at this stage that we don't need to rehearse them again here. The real question is: what does the new *Book of Quantum* bring to the party? As upgrades go, is it IOS 10 or one of those annoying bug-fix ones that take forever, but achieve very little?

The Godfather, Part 2

As sequels go, then, I can confirm that this is in the *Godfather* and *Toy Story* category – a major improvement.

First off, and very superficially, it's better looking. Beautifully compiled by Verisk Analytics, global experts in this area, the colour coding, easily identifiable sections, and clearer explanations of each injury distinguish it from its predecessor. The 2004 version never revealed an author, which remains a mystery to this day, and would probably in literary circles simply be known as 'Anon'.

The devil, of course, is in the detail and most people – whether claimants, respondents, or merely interested onlookers – want to know about the numbers. Are they up or down?

The answer is both. A casual reader of the initial reaction to the book, led by the hysterical insurance industry, would believe that, in fact, it only contains increased values for what are pejoratively termed 'whiplash injuries'. While this term was originally used to describe a neck injury received in a car crash, the more general definition has been expanded over the years to include soft-tissue injuries to the back and shoulders as well.

> **While the insurers are happy to bandy the term 'whiplash' about as if it represents all that is wrong with the claims process, those who suffer from these painful injuries will testify that it is anything but a trifling matter**

While the insurers are happy to bandy the term about as if it represents all that is wrong with the claims process, those who suffer from these painful injuries will testify that it is anything but a trifling matter.

It is true to say that the new book does increase values to a small extent for neck injuries. There are now more categories for most injuries, and the section dealing with the neck, headlined 'Whiplash/soft tissue' has five such delineations. Two classifications are described as minor – with the first being regarded as the controversial one, as the sum appeared, albeit in slightly different form, in the last edition as "up to €14,400". The 9% increase to €15,700 has attracted much commentary, inviting comparisons with other jurisdictions, particularly Britain.

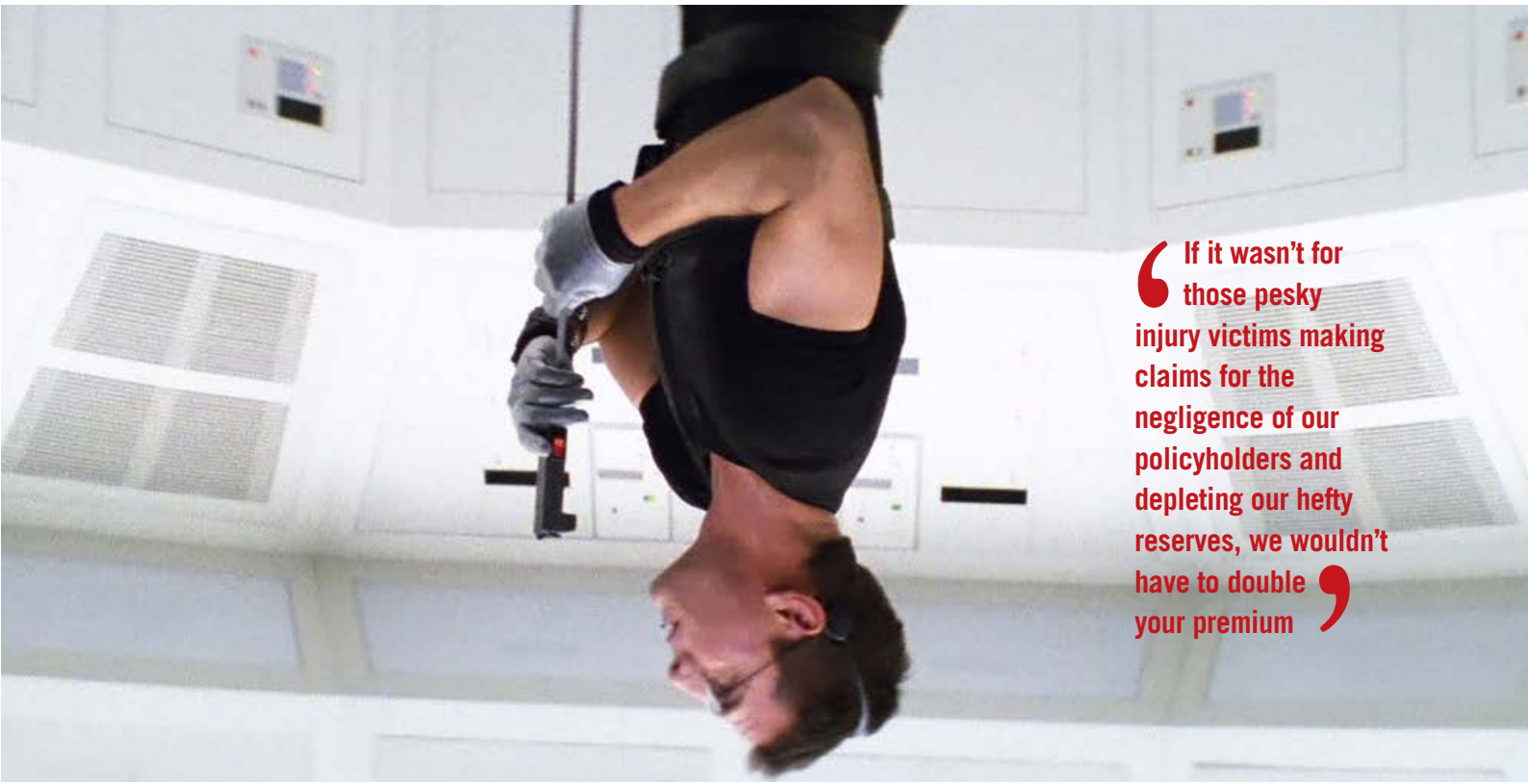
The most common criticism is that the €15,000 is now termed as the average sum received for a minor whiplash injury, while the equivalent sum in Britain is £5,000. This ignores the two very small but important words 'up to'. There is no average whiplash payout; it has not been calculated and, of course, many such injuries will attract a fraction of the maximum of €15,700 for a substantially recovered soft-tissue injury to the neck.

There are four more categories that include a longer-lasting minor injury, which is up to €19,400, and then moving on to more serious injuries, which range from moderate to moderately severe and, finally, severe and permanent.

The final definition includes a narrative that describes the injury as affecting the structure of the neck and discs, the requirement for surgery and then, quite bizarrely, "the necessity to wear a collar for long periods in the day". Given that collars are now rarely used to treat neck pain, and even then only briefly after cervical surgery, it seems a very strange reference in an otherwise helpful set of definitions.

The silence of the lambs

However, what was lost in the furore about the increase in values for minor neck injuries of 9% over a 12-year period is that an equally prevalent complaint in road traffic accidents – the 'minor – substantially recovered' soft-tissue back injury – has fallen by an almost identical percentage, from 'up to €16,300' to 'up to €14,800'. Not



> If it wasn't for those pesky injury victims making claims for the negligence of our policyholders and depleting our hefty reserves, we wouldn't have to double your premium

Not even Ethan Hunt reading the *Book of Quantum* while standing on his head could appease the insurance industry

surprisingly, the bleating from the insurance corner made no reference to the drop in these numbers.

And that essentially sums up the debate on this issue. Wildly inaccurate claims of yet further increases were blithely reported by many lazy media outlets who failed to read properly the commentary on the very first page of the new document. The latest edition is based on an examination of 51,000 settled or decided cases from 2013 and 2014, so it represents actual compensation paid out over that period.

Leaving aside the fact that the overall numbers of increases and decreases effectively cancel each other out, thus neutralising the total payouts made, it is patent nonsense to suggest that a document reflecting the history of paid claims over two of the last three years (when premiums have increased the most) could result in a further ramping-up of prices.

One of those most alarming decreases is the lowest value for jaw injuries, which falls from up to €35,100 to a range from €11,000 to €20,800. This is, perhaps, reflective of a greater understanding of an injury that has been treated more successfully over the intervening years.

The book contains many injuries that weren't considered originally. The most surprising omission in the 2004 edition was the injury to the eye (including the loss of one), which was always considered one of the most serious injuries a victim could receive. The loss of an eye figure is surprisingly low, at up to €138,000.

Other new injuries not previously covered include concussion, partial finger amputations, Achilles tendon injuries, lung lacerations and a welcome, if somewhat surprising, heading of 'food poisoning', which ranges from minor to moderate of up to €14,500 – and then more serious poisoning from €23,700 to €40,300.

While there are nearly 240 different classifications identified, some injuries simply cannot be distilled into a list. For instance, psychological injuries remain undefined, as do those involving scarring, largely due to the difficulty in placing the diverse effects of such injuries into a categorised table.

The fast and the furious

What difference will all of this make to the claimant and the conduct of personal injury claims?

The effect is likely to be significant. There will be less distinction between the awards made by the Injuries Board and those by the courts. The judiciary are obliged, under section 22 of the *Civil and Liability and Courts Act 2004*, to have regard to the *Book of Quantum*, though they may also take other factors into account. For the last few years, many judges have found the 2004 edition to be out of date and were reluctant to have as much regard to its content as they did initially. The promise to update every three years now ensures that this unsatisfactory situation won't arise again.

It will be a very useful tool for all judges and particularly for those with less experience in the area. They will still have plenty of leeway to take individual circumstances into account and will not be completely bound by it, which is essential, given the importance of oral evidence and specific effects on a person that simply cannot be catered for by the 'one-size-fits-all' approach adopted by the book.

Equally, the added granularity that the greatly enhanced detail in the book provides will encourage greater consistency in awards by the Injuries Board itself.

Not that any of this is likely to reduce the whining emanating from the insurance corner. History tells us that even when they get what they want, they always look for more.

Of course, the best sequels of all were in the *Mission Impossible* series, which neatly sums up any hope of keeping the insurance industry happy.

viewpoint

NEW 'CHILD-PROTECTION FRONTIER' NEEDS TARGETED INTERVENTION

The internet is the new child protection frontier. Geoffrey Shannon argues that the area needs targeted ongoing legislative intervention

Dr Geoffrey Shannon is a solicitor and the special rapporteur on child protection

As greater proportions of children spend more of their lives online, their time there inevitably becomes a target for predatory adults. As such, children engaging and socialising on forums that are difficult for parents and carers to monitor and supervise are acutely vulnerable. The technical complexity underlying this kind of online offending represents a very different regulatory challenge to child abuse that is not perpetrated or facilitated through 'traditional' channels – therefore, it necessitates targeted ongoing legislative intervention.

Children are vulnerable

The internet warrants a particular concern in relation to child pornography and the grooming of children for sexual exploitation. As the internet is accessible worldwide, robust regulation is required to ensure that a uniform and coherent system of child protection is engaged in.

Irish law currently fails to deal with sexual exploitation carried out through social media and the internet. The investigation of child pornography cases and sexual offences against children where ICT is involved is hindered in Ireland by the absence of a robust legislative framework that provides the gardaí with the appropriate powers.

The *Criminal Law (Sexual Offences) Bill 2015* is very much to be welcomed for creating a wide range of new criminal offences in relation to child pornography and the grooming of children for sexual exploitation and, in particular, for addressing the role of ICT in committing such offences.

> **'Child protection ought to be proactive and, having regard to those who use the internet to the detriment of children, this is a prime area where legislation needs to keep one step ahead of the issues as they develop'**

The bill addresses a key criticism of legislation introduced after the 2006 *CC v Ireland* decision, in which the 'strict liability' sexual offences under the *Criminal Law (Amendment) Act 1935* were found unconstitutional. The 2006 act added the defence of mistake as to the victim's age, replacing the 'strict' components of the 1935 act.

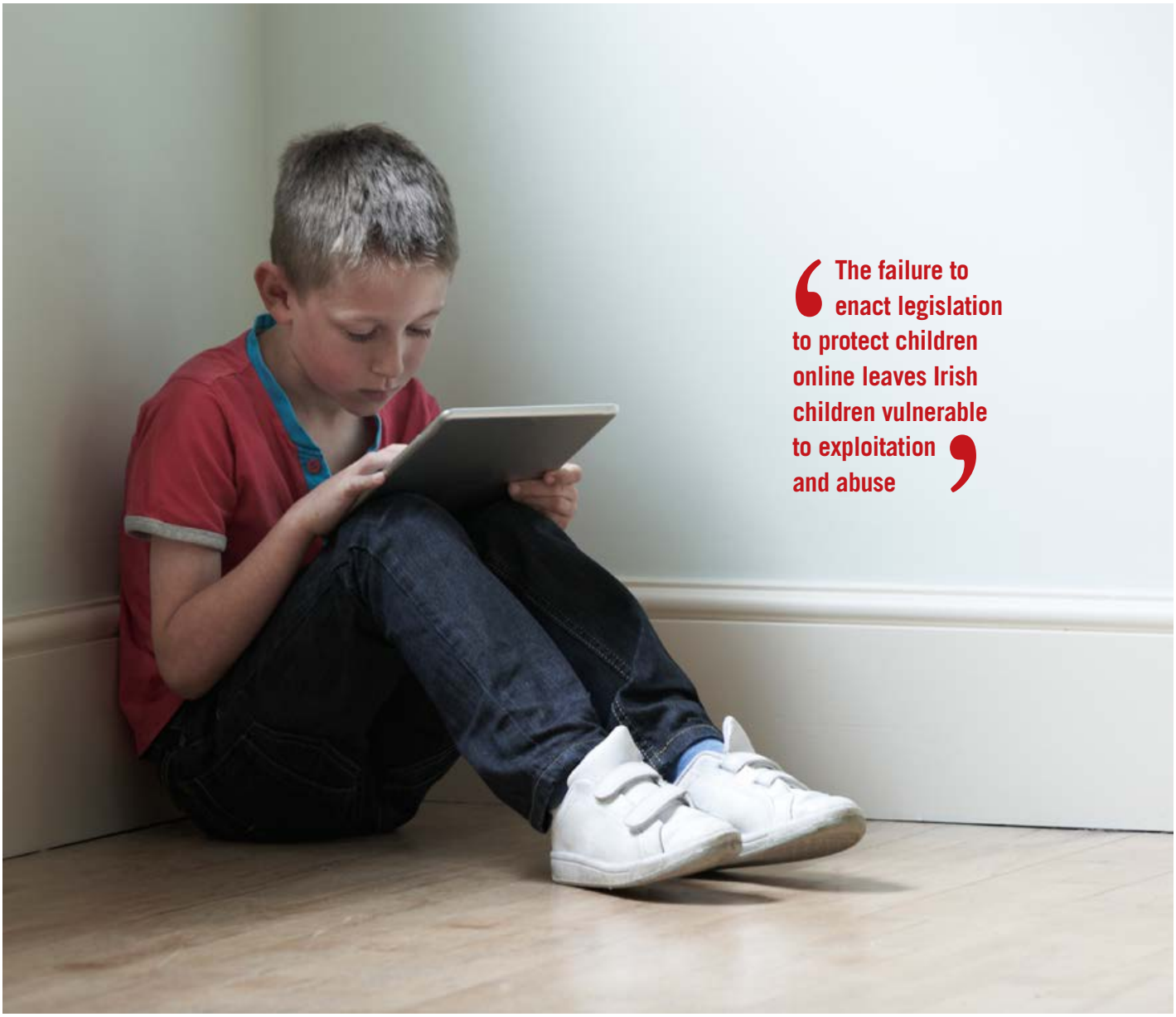
Where the court has to decide whether the offender was reasonably mistaken as to the age of the victim, under the 2015 bill, the court will be required to consider whether, in all the circumstances of the case, a reasonable person would have concluded that the child had attained the said age.

No longer is the standard a subjective one, and I believe this change will bring additional protection for children. The tribunal of fact will now be able to consider whether the defendant was acting reasonably in believing the child was aged 17 or over, rather than being required to focus on whether his or her belief, reasonable or not, was honestly held. As there are situations where an honest belief may be unreasonable, absurdities can arise. Introducing the objective standard prevents such situations from arising, protects victims of abuse and is a welcome strengthening of the law.

More to be done

Our response to child victims of sexual abuse at times re-victimises the child. The 2015 bill, in recognising children as vulnerable victims, provides for special measures, including that the child cannot in certain cases be cross-examined by the accused (section 35) and includes rules governing the disclosure of third party records, such as the child's counselling records (section 38). These provisions are to be warmly welcomed. However, despite Ireland's obligations, our laws have yet to transpose the EU *Victims Directive* – which, among other things, provides that victims should have access to confidential support services before, during, and after criminal proceedings – separate legislation is needed in this area. Sexual abuse has a devastating impact on children: it is imperative that the law requires joint interviewing by the gardaí and Tusla (the Child and Family Agency), and the provision of victim support services.

When the 2015 bill is commenced, our child pornography and grooming laws will be amended in order to keep pace with technological change. The viewing of child pornography will be criminalised, and the child grooming offence will be reformed so as to criminalise grooming itself, and activities in furtherance of, or as a result of such. The effect of these reforms should help to bring the Irish law in this area in line with international best practice.



> The failure to enact legislation to protect children online leaves Irish children vulnerable to exploitation and abuse

Ireland is a signatory to both the *Budapest Convention* and the *Lanzarote Convention*, but it has yet to ratify both. Child protection ought to be proactive and, having regard to those who use the internet to the detriment of children, this is a prime area where legislation needs to keep one step ahead of the issues as they develop. All of the relevant conventions and directives should therefore be implemented without reservation.

The Law Reform Commission (LRC), in a report titled *Harmful Communications and Digital Safety* (published on 26 September), sets out further reforms necessary to protect children and vulnerable persons in the online world. The report provides clear evidence that the existing legal framework does not readily accommodate the advances in technology in the last two decades.

New offences

The LRC identifies new forms of harassment that need to be provided for in our criminal and civil laws. It recommends expanding the harassment law in section 10 of the *Non-Fatal Offences Against the Person Act 1997* to include single uploads and indirect third-party communications.

A range of new offences is proposed, including a new criminal offence to cover the non-consensual publication of intimate images with intent to harm. This offence would deal with so-called 'revenge porn'. Moreover, a new criminal offence of online stalking is recommended, as well as the establishment of a new oversight agency – the Digital Safety Commission.

The LRC recommendations strike a sensible balance between competing fundamental rights and necessitate immediate legislative action.

The people of Ireland are unequivocal in their belief that children must be protected from abuse and, in particular, against heinous acts of sexual abuse and exploitation. It is nearly ten years since I first identified many of the deficits in our current law discussed in this article. Urgent action is now needed to finalise legislation, along the lines of the *Criminal Law (Sexual Offences) Bill 2015*, and place it before the Oireachtas. Any further delay means abusers go unpunished, children are left unprotected, and victims continue to be re-victimised.

viewpoint

THE ABC'S OF CPD

Why is CPD important? Why do we do it? Would it matter if we didn't? Rosemarie Hayden looks at the efficacy and necessity of continuing professional development

Rosemarie Hayden is a solicitor and CPD scheme executive at the Law Society

Continuing professional development is an important feature of all professions. The doctor who doesn't know about the new vaccine, or the accountant who hasn't reviewed the latest *Finance Act*, can't best serve their clients. A client is entitled to the comfort of knowing that a current practising certificate means that the professional they have hired has the up-to-date knowledge required to practise in that current year – not just that they had the knowledge to practise in the year they qualified.

CPD has often been seen more as a stick than a carrot. It can be seen as a hurdle that has to be overcome, rather than a useful tool in building a successful practice. Points are acquired to guard against audit, rather than for the intrinsic value of the information.

Decision theory

But should CPD be compulsory? There is an argument that professionals who have studied long and hard to gain their professional qualifications are more than qualified to decide what further professional development, if any, they require. Solicitors certainly have the training and capacity to decide and choose what training and development is most of benefit to them. Solicitors' work has expanded far beyond the traditional public perception of private practice, with roles in diverse contexts from private practice to in-house, state service, education and beyond.

Clearly, with such diversity of practice, a one-size-fits-all approach could never meet the needs of all members of the profession. That's why the Law Society has taken care to develop a CPD programme that allows solicitors to up-skill and keep abreast of developments in their chosen area of practice. Continuing professional development allows us to continue to hone our skills and keep them up to date in a constantly changing legal environment.

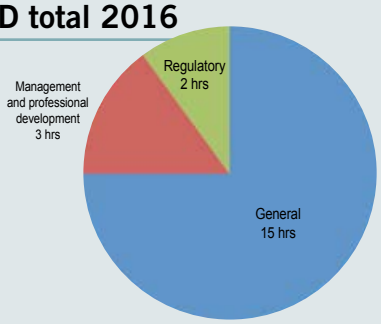
> **'Continuing professional development allows us to continue to hone our skills and keep them up to date in a constantly changing legal environment'**

The question then is: if we, as professionals, would plan to keep up with developments in our area as best practice, why do we need regulation at all?

Well, regulation encourages compliance. It would be uncontroversial to say that wearing seatbelts is good for our health, but compliance with those requirements has increased greatly since the introduction of penalty points. Regulation has led to a cultural shift where we know the seatbelt protects our safety and we wear it to protect us, but we also know that we don't want the penalty. Likewise, most professionals would acknowledge the value of staying up to date in their chosen area, but sometimes the time pressure of the urgent files on your desk right this minute can mean that big-picture, long-term planning can get sidelined.

Regulation encourages us to assign a specified period of time to keeping our

Standard CPD total 2016

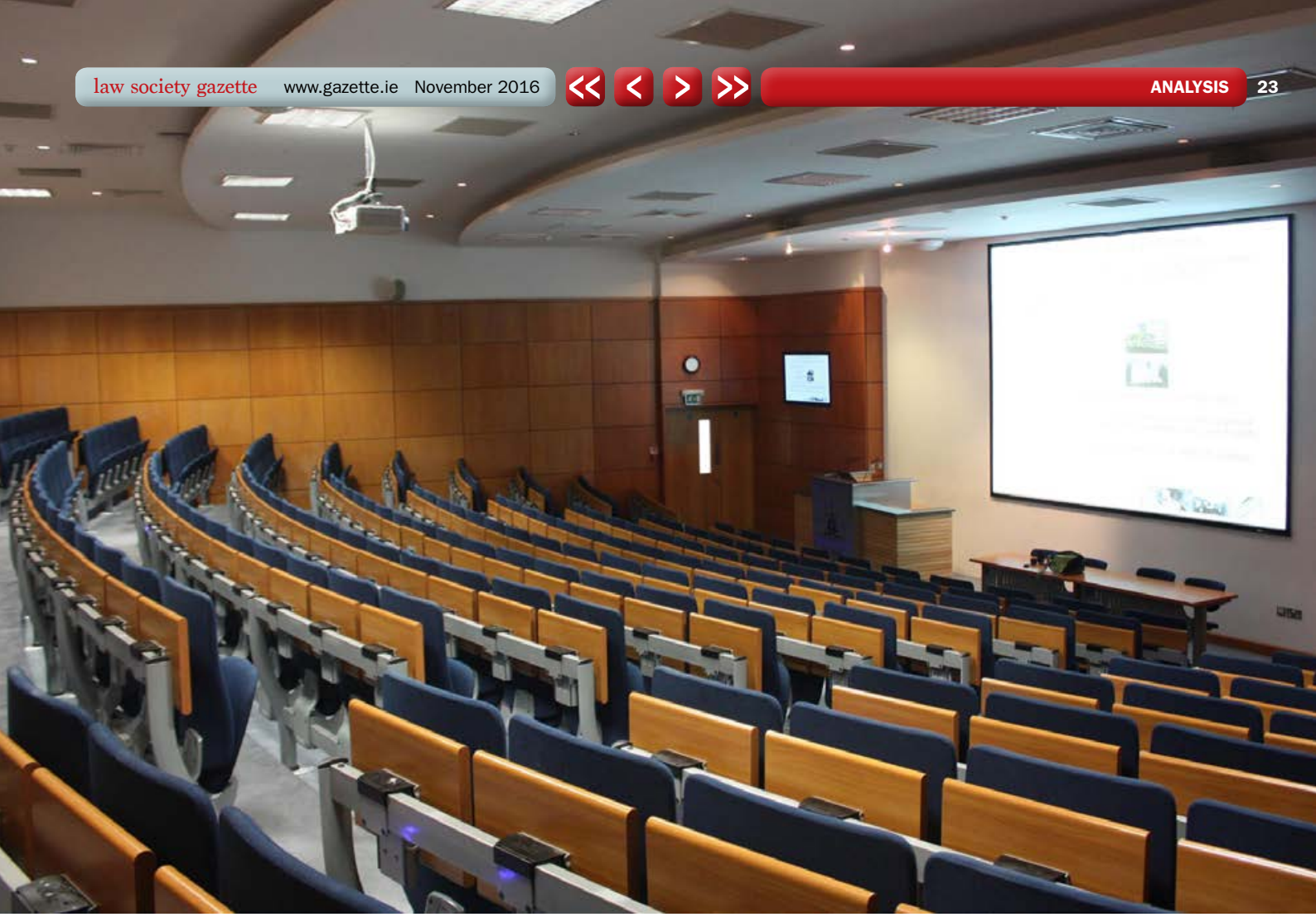


top tips

- Keep your CPD record card as you go along– it's always easier to refer to your record than to try and compile it, possibly a year later.
- Keep a tally of what type of CPD you have completed. You could have 50 hours of very useful general CPD, but you won't be fully compliant without the mandatory regulatory and management hours,
- Remember that up to 50% of your CPD requirement may be completed online,
- Join your local bar association. This is useful not just for CPD points, but also as a useful networking opportunity with colleagues.
- Remember to tick the box! Failure to certify that you have completed your CPD requirements on your practising certificate application form may lead to selection for audit.
- Make sure you get certificates of attendance from every seminar or training event you attend. No certificate, no CPD.

All certificates must have the following information:

- Headed notepaper,
- Your name,
- Date of training,
- Subject matter of training,
- Type of CPD claimed, and
- Number of hours of actual training (excluding breaks and/or registration times).



skills current – upgrading them, in our own minds, from a 'would be nice to do', to a definitive 'will do.'

Rational choice

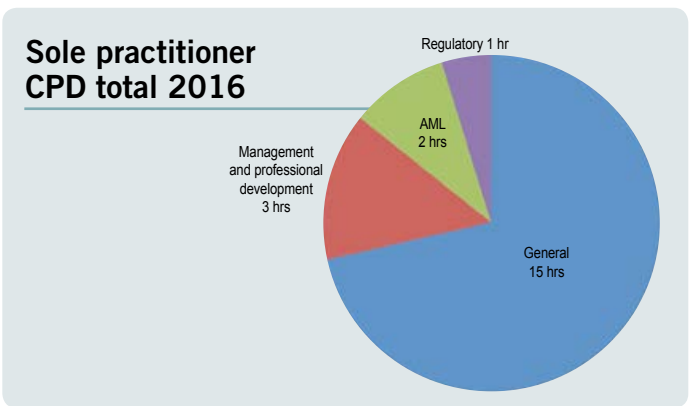
The areas that a solicitor may use for their CPD requirements are as varied as their areas of practice. The one common theme is that all solicitors must complete minimum requirements in regulatory matters and in management and professional development skills. These areas have been identified by the Law Society as areas of such importance to all members of the profession that it is essential that all practitioners stay up to date.

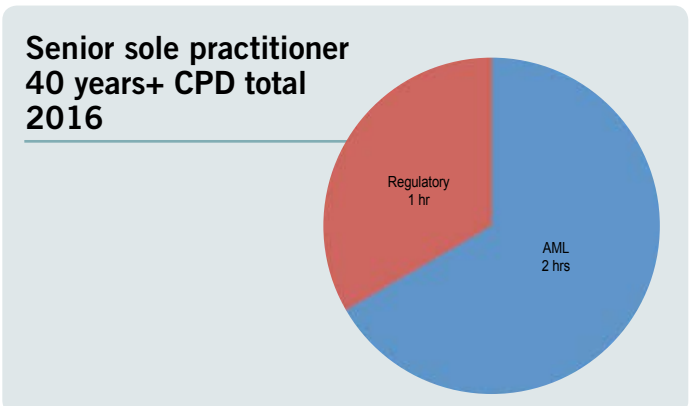
After that, practitioners are free to choose a wide variety of topics for their CPD requirements. Perhaps you've found that your practice has had more contact with non-native English speaking clients – have you thought that a language class could be useful? Not only would this allow you to better communicate with your clients, but signing up for an eight-week course of two-hour classes would fulfil your general CPD requirements, and also make holidays more interesting!

If you are a busy sole practitioner, your first thought regarding CPD may well be: "I don't have time for that". If so, then a seminar on work/life balance or time management could help you get more from your time.

CPD is essential, but it doesn't have to be onerous. Indeed, up to 50% of your CPD requirement can be completed online. The Law Society provides free online courses regularly as part of the MOOC programme, allowing you to access up-to-date high-quality training at a time that suits you. The growth and prestige of free online courses from institutions such as the Harvard and Yale law schools demonstrate the changing nature of education and information distribution.

And of course, if your first thought is that you don't know your MOOC from your Moodle, then there's a course for that too – and yes, you can get CPD points for it.





news in depth

NEW *GROCERY REGULATION* PUTS AFFECTED PLAYERS AT RISK

New regulations have been introduced for the marketing, sale and distribution of groceries and alcohol products. Resistance is futile, argues Duncan Grehan

Duncan Grehan is principal of Duncan Grehan & Partners Solicitors. He addressed this subject at the annual conference of the Global Advertising Lawyers' Alliance annual conference in Chicago in April

Since the 1950s, there has been a public policy tradition in Ireland of regulation, limitation, and restriction of contractual arrangements, particularly concerning the sale of grocery products. The 40 to 50 *Grocery Regulations* in force in the period from the 1950s to 1980s, made by ministerial order under the framework of the *Restrictive Practices Acts*, were largely directed at measures protective of Irish trade from external competition, but can be seen as a forerunner to the new era of free competition that, at an increasing pace, replaced the old protectionism after Ireland's entry in 1973 as a full member of the European Union (then the European Economic Community).

However, these old ways of regulating contractual practices have not been completely forgotten nor disregarded. If it ain't broke, why fix it?

> **Compliance is essential, as the *Grocery Regulation* introduces penal provisions in default**

New limits

Earlier this year, a far-reaching regulatory measure, restrictive of contractual arrangements in the grocery and alcohol market in Ireland, was quietly introduced. From 1 February 2016, Irish law places new limits on the commercial arrangements between wholesalers, retailers, and suppliers of grocery goods and alcohol products in the Irish marketplace whose worldwide turnover exceeds €50 million.

Conor Pope, consumer affairs correspondent for *The Irish Times*, wrote on 2 February 2016 (under the banner headline 'Protection for suppliers in new retail law') that: "Large grocery chains are now prohibited from charging suppliers for shelf space or forcing them to pay for promotions, as part of a major overhaul of retail rules that were signed into law yesterday."

So, the prohibition of certain contractual arrangements and commercial practices by ministerial order, as provided by statute, remains the preferred regulatory method in Ireland.

The limits placed by the *Grocery Regulation 2016* have international significance, particularly as many of the groceries and alcoholic beverages available in the Irish marketplace are imported rather than being produced here – and given Ireland's successful agricultural economic base and the huge world demand for Irish meat, dairy, whiskey and beer products, among others.

General terms

The *Grocery Regulation* (which has effect from 30 April 2016) requires all contracts between wholesalers, suppliers, and retailers to be signed and in writing by all parties and:

- Applies to any arrangement for sales or supply of food and alcoholic drink products in Ireland between parties whose worldwide turnover exceeds €50 million,
- Applies to food or drink intended for human consumption, including any additive ingredient or processing aid and all intoxicating liquor, but
- Excludes food and drink served or supplied by caterers, in a restaurant, or food take-out premises.

Mandatory terms

Imposed contract terms, which cannot be waived, are:

- *Written agreements* – the arrangements must be in writing, signed by all the parties, and in understandable language, and the parties must be given a pre-contract vetting opportunity.
- *Supply lines* – a retailer or wholesaler cannot compel a supplier to obtain goods or services from a third party from whom the retailer or wholesaler receives payment, except where the supplier's own supplier fails to meet reasonable quality standards or charges more than is charged by the supplier having an equivalent quality or quantity by the third party proposed by the retailer or wholesaler.

FOCAL POINT

unfair practices

The *Competition and Consumer Protection Act 2014* established the new Competition and Consumer Protection Commission (CCPC) and abolished the former Competition Authority and the National Consumer Agency.

On 1 February 2016 – the same day that the *Grocery Regulation* – came into force, the CCPC began its role as policeman and enforcer of the 27 (or so) unfair business-to-consumer commercial practices that had been blacklisted by EU Directive 2005/29/EC. These are now classed as criminal offences by the *Consumer Protection Act 2007*, which implements the directive into Irish law.

Also in February 2016, the CCPC published its consumer protection list, detailing 62 enforcement actions taken by it in 2015 against misleading commercial practices, often involving 'distance contracts' concluded via the internet, electronically, and in breach of the general requirement to provide truthful information in plain, intelligible language.

- *Sales forecast* – a retailer or wholesaler shall, on the supplier's request, provide a written forecast of the quality and quantity of goods to be required by the retailer or wholesaler, with a clear explanation for the basis on which it is prepared.
- *Shelf-display premium* – a retailer or wholesaler may not seek payment from a supplier in return for stocking, displaying or listing the supplier's grocery goods, unless the payment is based on an objective and reasonable estimate of the cost thereof.
- *Advertising premium* – a retailer or wholesaler may not compel a supplier to make payment for the advertising or display of grocery goods of the supplier in the retailer or wholesaler's premises.

Implied terms

These terms can be excluded by agreement but, if not, will otherwise be implied to have been agreed:

- *Variation, termination, renewal* – a retailer or wholesaler cannot vary, terminate, or renew a contract with a supplier unless the contract expressly provides for it. The contract must provide for a notice period before any change occurs, and notice has to be reasonable having regard to all of the circumstances of the contract.
- *Payment* – the retailer or wholesaler shall pay the supplier within 30 days of receipt of the supplier's invoice or delivery of the goods, whichever is later.
- *Promotions* – a retailer or wholesaler may not require a supplier to make any payment in respect of the promotion of the supplier's grocery goods in the retailer's or wholesaler's premises.
- *Marketing costs* – a retailer or wholesaler shall not seek payment from a supplier for marketing costs. These include costs in relation to visits by a retailer or wholesaler to the supplier, artwork, packaging design, marketing research, marketing in relation to the opening or refurbishment of a retail premises, or hospitality for staff and/or representatives.
- *Shelf space* – a retailer or wholesaler shall not require a supplier to make any payment for the retention, increased allocation, or better positioning of shelf space for the supplier's goods.
- *Wastage* – a retailer or wholesaler shall not seek payment from a supplier for wastage; that is, for grocery goods that become unfit for sale after their delivery.
- *Shrinkage* – a retailer shall not seek payment from a supplier for shrinkage; that is, losses arising as a result of theft, loss, or accounting error after the goods have been delivered to the retailer's premises.

Compliance and reporting

Retailers and wholesalers are now obliged to appoint a compliance officer to train staff in how to comply with these new laws and to liaise with the CCPC. They must submit annual compliance reports by the end of March of each year, using the CCPC template, and documents of record are required to be held for six years from the end of the financial year to which they relate.

Enforcement

Compliance is essential, as the *Grocery Regulation* introduces penal provisions in default. Breaches may be prosecuted by "anyone"; that is, by the CCPC, any competitor, or any aggrieved consumer. There is no *locus standi* requirement.

Penalties

- *Summary conviction, first offence* – a fine of €3,000 and/or imprisonment for a maximum of six months, or both.
- *Summary conviction, second or subsequent offence* – a maximum of €5,000 and/or imprisonment for a maximum of 12 months. If, after conviction, the offender continues to offend, then, for each day, he will be liable to fines of a maximum of €500.
- *Conviction on indictment* – a person on first conviction will be liable to a fine of a maximum of €60,000 and/or imprisonment for a maximum of 18 months; on any subsequent conviction of the same offence, to a fine not exceeding €100,000 or imprisonment of a term not exceeding 24 months, or both.

Private remedies

Anyone aggrieved by the failure of a retailer or wholesaler to comply with the new law may bring proceedings in the Circuit Court and claim reliefs, such as interlocutory orders, injunctions, damages, exemplary damages, and *Anton Piller* orders for the production of documents.

Considerable risk

The *Grocery Regulation 2016* places affected players in the Irish market, for locally and internationally sourced food products and alcohol beverages, at considerable risk unless arrangements are compliant.

The risk exposes parties to expensive consequences because of void, voidable, or invalid contractual arrangements, including criminal convictions, fines and imprisonment, injunctions and damages.

news in depth

THE HARP IN THE WARM HEART OF AFRICA

Irish lawyers representing Irish Rule of Law International have been working in Malawi since 2011 to address challenges in the criminal justice system there. Emma Weld-Moore and Orla Crowe explain

Emma Weld-Moore is Malawi programme manager with Irish Rule of Law International

Orla Crowe is a solicitor in Dublin firm Fahy Bambury

I started my placement as programme manager of Irish Rule of Law International's Access to Justice Programme in Malawi in June 2015, *writes Emma Weld-Moore.*

With limited knowledge of what to expect, I did my research, read IRLI's reports, and found out what I could about Malawi. With a population of around 17 million people (70% of whom live below the poverty line of just $1.90 a day), Malawi is ranked as one of the ten poorest countries in the world. It was a world away from my life in Dublin working as a solicitor with Ronan Daly Jermyn.

What struck me from the outset was the recognition and respect that IRLI holds within the criminal justice sector in Malawi. The programme lawyers understand the importance of partnership and relationship building, and this allows IRLI to work with institutions at a very deep level. With funding from Irish Aid, Human Dignity Foundation, and the generosity of members of the Irish legal profession, IRLI is working on the ground with some of the most vulnerable people in Malawi.

Serious issues

At the heart of IRLI's programme is a recognition of the serious issue of overcrowding in Malawi's prisons, which is symptomatic of the challenges faced by the wider criminal justice system. The prisons are at more than treble their capacity, with few sanitation or health facilities. Prisoners and remandees are held in conditions that are in violation of their fundamental human rights, and IRLI works in partnership with the Legal Aid Bureau in Lilongwe to provide legal aid to people who are being held in detention without any knowledge of their rights or the means to access these rights.

> **'We identified 101 children awaiting trial. About half were children in custody since 2013/2014, the youngest of whom had been in custody since 2014, when he was just ten'**

On a broader level, IRLI focuses on institutional capacity-building in the Office of the Director of Public Prosecutions, the Malawi Police Service, and the judiciary, to ensure that the programme has a meaningful impact on a longer term basis.

ill-defined lines

Coming from a commercial litigation background, I didn't know what to expect entering the sphere of criminal law in what is deemed by many international reports to be the poorest country in the world, *writes Orla Crowe.*

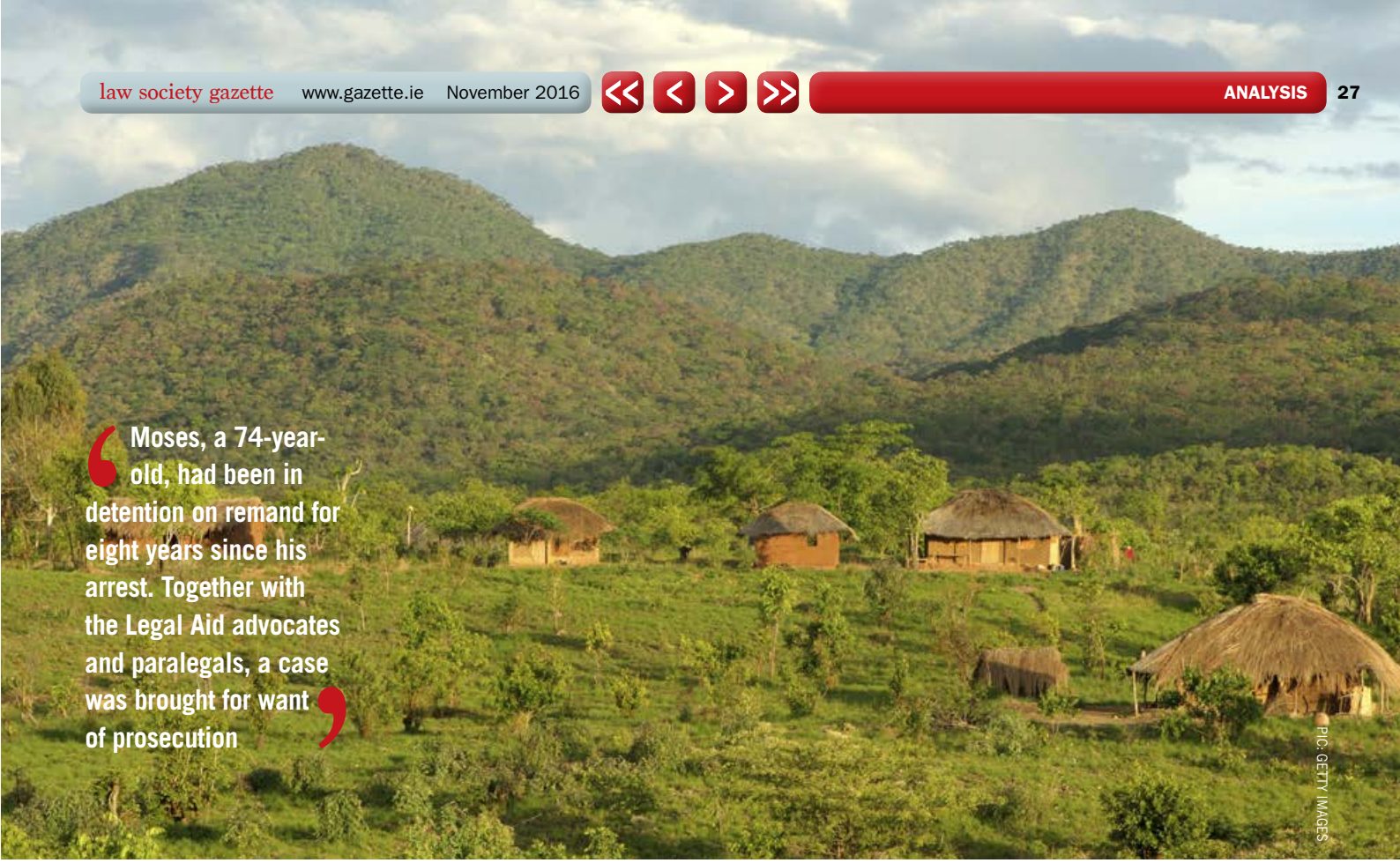
Perhaps one of the first matters to strike me about my placement with Malawi's DPP was that, unlike Ireland, the lines between prosecution and defence are not so easily defined. As a result of a significantly under-resourced Legal Aid Bureau, most accused are unrepresented and therefore, despite prosecuting on behalf of the State, one often has to advise accused persons on their basic fair procedure and fair trial rights.

During my 19 months in this position, I mainly focused on strengthening the skills of DPP paralegals and on targeted interventions with DPP advocates in homicide and sexual offence cases. One major project – in conjunction with Sarah McGuckin in the Legal Aid Bureau – was identifying cases in which children were allegedly 'responsible' for homicide, according to the wording in the *Child Care, Protection and Justice Act 2010*. Because of an extreme lack of funding for this sector, we identified 101 children awaiting trial. About half were children in custody since 2013/2014, the youngest of whom had been in custody since 2014, when he was just ten.

Through our advocacy efforts, we raised the issue at the highest level with the chief justice and DPP and began the work of processing these cases, which is being continued by IRLI's programme lawyers. Other worthwhile projects included drafting a DPP best practice handbook on dealing with homicide cases, bringing a test case for the introduction of DNA testing in defilement or incest cases, and introducing victim impact statements into homicide cases, where they had never been used before.

Undoubtedly, my role with IRLI in Malawi was the most meaningful work I have ever undertaken. However, the experience became so much more than just my work with IRLI. It is hard to describe the true nature of Malawians, other than to say that the country undeniably deserves the name of the 'Warm Heart of Africa'.

For anyone considering a change in their career path, or perhaps taking a sabbatical for a year, I cannot recommend IRLI enough as a unique opportunity to use your legal skills in a new, challenging, and rewarding way.



> Moses, a 74-year-old, had been in detention on remand for eight years since his arrest. Together with the Legal Aid advocates and paralegals, a case was brought for want of prosecution

PIC: GETTY IMAGES

When I arrived, IRLI's programme lawyer in the Legal Aid Bureau, Northern Irish barrister Sarah McGuckin, was working on the case of 74-year-old Moses, who had been in detention on remand for eight years since his arrest. Together with the Legal Aid advocates and paralegals, a case was brought for want of prosecution. Aside from the prolonged and, by then, illegal detention of this elderly man, the significance in bringing this case was that there was no reported decision of a similar case in Malawi. Following application to the High Court, the case was ultimately dismissed for want of prosecution. Sarah's skills and experience as a barrister were central in bringing the case to the High Court, and the Legal Aid Bureau now has the benefit of robust precedents that can be used in the future. Sarah and I had the pleasure of being present at Kasungu prison when Moses was released. It was a humbling experience to witness his joy.

Larger scale

As well as working on individual cases, IRLI also focuses on promoting human rights on a larger scale. In commemoration of International Human Rights Day on 10 December 2015, and with funding from the Irish Embassy, IRLI hosted events in the eight prisons in the central region of Malawi, including two children's reformatory centres. IRLI worked together with local NGO Paralegal Advisory Services Institute and invited representatives from the criminal justice sector – including High Court judges, magistrates, advocates from the DPP and Legal Aid Bureau – as well as police officers and social welfare officers – to attend the events in the prisons and to speak with the detainees. The main event was held in Maula Prison, the largest prison in Malawi.

Those who read the November 2015 *Gazette* would have seen the piece 'How to apply the law without having access to the law'. The article described the capacity-building initiatives that IRLI undertakes with magistrates, including holding training workshops. What is frightening are the very limited resources available to magistrates, particularly at rural level. IRLI regularly visits rural magistrates' courts, and, where possible, provides up-to-date legislation and case law. This is best achieved by transferring information from a USB onto a computer; however, most rural-based magistrates do not have computers, and those that do mostly have no access to the internet, be it due to no electricity or no available wi-fi. In 2015, the Law Society of Ireland donated 20 computers to the judiciary to assist with daily challenges such as these. Small initiatives like this have had a positive impact on improving the operation of many magistrates' courts.

FOCAL POINT

fundraising seminar on criminal law

Irish Rule of Law International is a joint charity of the Law Society of Ireland and the Bar of Ireland. It aims to strengthen the rule of law in developing countries through leveraging the skills of Irish and international volunteer legal professionals. You can read more about IRLI at www.irishruleoflaw.ie.

To raise much-needed funds for the Access to Justice Programme in Malawi, IRLI is organising its annual CPD seminar in criminal law.

This year's seminar will be held in the atrium of the Distillery Building on Saturday 26 November from 9-12.30pm. Eight substantive papers prepared by experts in particular areas will be presented. In previous years, the event was very successful, with over 130 people participating in 2015.

The recommended donation is €50, or €20 for trainee solicitors, pupil barristers or students. Attendees receive a booklet with all presented papers and three CPD points.

To register, please contact Vanina Trojan at vtrojan@irishruleoflaw.ie.

human rights watch

TIME FOR NEW PROCLAMATION?

'Human rights in health advocacy and domestic violence: time for a new Proclamation?' was the theme of the 14th Annual Human Rights Conference on 8 October 2016. Michelle Lynch reports

Michelle Lynch is policy development executive at the Law Society

This year's Annual Human Rights Conference explored human rights issues in relation to health advocacy and domestic violence against the backdrop of the human rights aspirations embodied within the *1916 Proclamation*.

The distinguished panel of speakers included Mr Justice Gerard Hogan, Margaret Murphy, Prof Deirdre Madden, Judge Rosemary Horgan (President of the District Court), Dr Louise Crowley, and Noeline Blackwell (chair, Dublin Rape Crisis Centre and member of the Human Rights Committee), who chaired the plenary sessions and presided over the Q&A sessions.

Pressing issues

Welcoming the speakers and diverse audience, Grainne Brophy (chairperson, Human Rights Committee) noted that the topics of conference resonated not just with the legal profession, but with society as a whole.

In his opening address, Mr Justice Gerard Hogan noted how none of the drafters of the Proclamation had held elected office. As a result, it was unclear what type of state they would have created had they survived the Rising, though he suggested that it might have been a more equal one.

The Free State Constitution of 1922 endeavoured to uphold the highest standards of civil and religious liberties, he said, and it "pillaged" from the highly influential and admired constitution of the Weimar Republic. Mr Justice Hogan added that it was a time that recognised a high standard of protection for individual rights.

The 1937 Constitution also heavily drew on the Weimar Constitution, he said, and was, in fact, a rather innovative document. However, he observed that this innovation and excellence was not recognised, and a sort of "legal shoneenism" existed, which led to the belief that we couldn't be as good as the continental Europeans. The 1937 Constitution also sought to give full protection to civil and political liberties.

> **'Complaints made by members of the public were less likely to lead to investigations than complaints submitted by medical professionals'**

Mr Justice Hogan reflected on legal history since 1922 and remarked that the Irish judiciary could congratulate itself in terms of the standard of procedural justice – but that the record in terms of fundamental rights had been more mixed. He referred to the significant judgment of *McGee v Attorney General*, where the Supreme Court had decided that there was a constitutional right to marital privacy in the context of the importation of contraceptives. Since the 1970s, however, the record had not been so positive. Mr Justice Hogan noted that we could do better in the next 100 years, but that society as a whole had to be willing. Only then could Ireland live up to the objective of being an independent, self-governing nation aspiring to the highest standards.

Health advocacy

Margaret Murphy opened the first plenary session: the external lead advisor for the WHO's Patients for Patient Safety advocacy group gave a moving and personal account of how she came to be a patient safety advocate. Ms Murphy, who lost her son following a series of medical errors, emphasised the need for transparency and accountability, noting that it was a "legitimate expectation that transparency and accountability be a given in all encounters and all aspects of healthcare". However, she observed that, all too often, these are "sacrificed on the altar of corporate damage limitation".

She urged that errors should be an opportunity for learning and noted that, all too often, people like herself and her husband had to resort to litigation to receive the answers they required following their son's death. While they won a financial award (which they donated to charity) and received a public apology, she described the process as "a David and Goliath experience". For her, the burning question was: 'Can a tragic outcome be a catalyst for change in a reformed health service?' Her presentation received a standing ovation.

Deirdre Madden (UCC) provided an account of the experience of complainants in Ireland. She presented a qualitative review into complaints made to the Irish Medical Council. What she found was

Prof Deirdre Madden, Mr Justice Gerard Hogan, Margaret Murphy, Noeline Blackwell, Judge Rosemary Horgan and Dr Louise Crowley

ALL PICS: CIAN REDMOND PHOTOGRAPHY

At the Annual Human Rights Conference on 8 October 2016 were *(l to r)*: Shane McCarthy (vice-chair, Human Rights Committee), Michelle Lynch (secretary, Human Rights Committee), Rachael Hession (Law Society Professional Training), Noeline Blackwell (conference chair), Judge Rosemary Horgan (President of the District Court), Stuart Gilhooly (senior vice-president, Law Society), Aine Flynn (Human Rights Committee), Prof Deirdre Madden, Dr Louise Crowley, Margaret Murphy and Grainne Brophy (chair, Human Rights Committee)

Mr Justice Gerard Hogan delivers the opening address

that complaints made by members of the public were less likely to lead to investigations than complaints submitted by medical professionals or through solicitors: in 2011/ 2012, 86% of complaints to the Medical Council came from the public, but these comprised only 7% of the complaints referred to an inquiry.

The language used in a complaint could influence whether it led to an inquiry, and she noted that downgrading complaints due to the language used was "a form of epistemic injustice". She observed that "patients are valuable sources of data for multiple reasons" and that the role of emotion – often discouraged from being included in medical decisions – could, in fact, have a profound impact on health outcomes, as well as enhancing patient care and experiences.

Domestic violence

Judge Rosemary Horgan opened the second plenary session. She gave an impressive overview of the legal framework on domestic violence in Ireland. Notably, she observed that there was a data deficit in the area, but that this was set to change this year in light of findings in a 2014 report of the Oireachtas Committee on Justice, Defence and Equality in relation to domestic and sexual violence.

She emphasised that domestic violence did not always fit neatly into a situation of physical abuse, and often coercive control could develop into further intimidation and control. She highlighted how social media was not included under the definition of harassment and that this posed considerable difficulties.

She remarked that many juveniles came from homes where domestic violence took place, and that this cycle was often perpetuated through generations. She examined the challenges that lay litigants – who were the victims of domestic violence – faced in navigating the court system. She emphasised the need to ensure the safety and privacy of victims, and to acknowledge the independence and integrity of all involved.

Historical evolution

Dr Louise Crowley went on to provide an overview of the evolution of domestic violence protection in Ireland, including legislative developments and available remedies. She shared alarming statistics from Women's Aid on the prevalence of domestic violence in Ireland, including that 20% of women have suffered partner abuse. Since 1996, she added, a total of 212 women in Ireland had been murdered, 63% of them in their own homes. In the resolved cases, 87 women (55%) had been murdered by a partner or ex-partner, while 14 children had been murdered alongside their mothers (Women's Aid Female Homicide Media Watch, August 2016).

She considered international influences on current national legislative responses, commending the progress made to date, but noting that the governing legislation had failed to recognise the role of law in the provision of services for perpetrators.

She referred to various intervention programmes, and specifically to 'perpetrator programmes', which she herself had researched. These were relatively limited in Ireland due to funding issues, and much more was needed to try to address domestic violence issues at their root cause.

Dr Crowley remarked that, in failing to adequately intervene with the perpetrators, victims were also being failed. In terms of future reforms, she referred to the *Second National Strategy on Domestic, Sexual and Gender-based Violence 2016-2021*, which affirms that societal attitudes have to change, while supports available to victims and survivors need to be improved and perpetrators held to account for their actions.

The conference papers are available on the Human Rights Committee page, under the 'Resources' tab.

COME FLY *with me*

Marie O'Brien is a partner in A&L Goodbody with over 11 years' experience in advising on aircraft finance matters

Ireland holds a dominant position in the world of aircraft financing and leasing, consolidated over a 40-year period since the establishment of Guinness Peat Aviation in Shannon. Marie O'Brien fastens her seat belt

A winning formula of history, experience, innovation and ambition has created an environment where news stories such as 'Avolon to buy CIT's aircraft leasing business for $10bn' (*The Irish Times*) or 'RBS sells aviation unit to Sumitomo Mitsui for $7.3 billion' (*Bloomberg*) or 'AerCap finishes $7.6 billion ILFC deal' (*Bloomberg*) are frequent and expected.

Most of the large aircraft leasing companies – including GECAS, AerCap, AWAS, Avolon, SMBC, ICBC Financial Leasing, Aircastle, and Macquarie Airfinance – are either headquartered or have operations in Ireland. The leasing industry has grown to such an extent that Ireland now holds over 50% of the global market share of leased aircraft.

The global industry is huge, which makes Ireland's dominance as a jurisdiction for investment and leasing even more impressive. According to Boeing's *Current Aircraft Finance Market Outlook 2016*, airlines and lessors took delivery of new aircraft worth approximately $122 billion last year. That figure is expected to rise to $127 billion for 2016 and will increase steadily to $172 billion by 2020. Airbus, in its *Global Market Forecast 2016-2035*, anticipates that air traffic will grow at 4.5% annually, requiring some 33,000 new passenger and dedicated freighter aircraft at a value of US$5.2 trillion over the next 20 years. Many regions are predicting growing demand for air travel – for example, Brazil, China, India and Africa – which in turn drives the need for more aircraft.

When Irish eyes are smiling

For anyone familiar with the industry, the story of how this all began in Ireland through Tony Ryan and Guinness Peat Aviation is well known – however, it never loses its impact. The aircraft leasing model, largely developed and promoted by Tony Ryan,

at a glance

- Most of the large aircraft leasing companies are headquartered or have established operations in Ireland, which holds over 50% of the global market share of leased aircraft
- The development of the leasing model meant that companies established themselves as leasing companies, which acquired the aircraft and leased them to airlines around the world
- Ireland was one of the first states to ratify the *Cape Town Convention*, and the additional protection that the convention affords to financiers is another factor that drives transactions to be structured through Ireland

PIC: PAUL DOYLE @ELEVATIONAIR/GAZETTE STUDIO

‘The International Civil Aviation Organisation ranks the Irish Aviation Authority among the best aviation authorities in the world in the safety oversight of civil aviation’

We’ve come a long way – the Aer Lingus De Havilland DH84 Dragon, EI-ABI ‘Iolar’. This is a restored version of the same aircraft type that operated the airline’s first service from Dublin (Baldonnel) to Bristol on 27 May 1936

PIC: BOMBARDIER/LEARJET/GAZETTE STUDIO

'I'm in the hi-fidelity first-class travelling set – I think I need a Learjet'

opened up the aircraft industry to allow airlines embrace more flexibility around their fleet planning and acquire newer aircraft. Before this, airlines owned all their aircraft, which made it very difficult for them to respond efficiently to changes in demand and maintain a modern fleet of aircraft.

The development of the leasing model meant that companies established themselves as leasing companies, which acquired the aircraft and leased them to airlines around the world. Ireland's extensive double-tax treaty network meant that airlines globally preferred to lease aircraft from an Irish lessor. Ireland has always embraced enterprise and foreign investment, and factors such as Ireland's stable and transparent tax regime and business-friendly environment have played a key role in attracting investors to base their aircraft-leasing operations here. Unrivalled experience and an ability to respond quickly to developments in the industry have meant that Ireland has continued to build on the original platform to become the default location when establishing a leasing company.

My kind of town

Under the *Chicago Convention on Civil Aviation 1944*, every aircraft in operation must be registered with a civil aviation authority, and the Irish Aviation Authority (IAA) is highly regarded as an authority for the registration of aircraft. The International Civil Aviation Organisation ranks the IAA among the best aviation authorities in the world in the safety oversight of civil aviation. Many aircraft operating internationally are registered with the IAA, so don't be surprised to see an 'EI' mark on aircraft in a remote airport.

The *Convention on International Interests in Mobile Equipment* (the *Cape Town Convention*) and its associated *Aircraft Equipment Protocol* were concluded in Cape Town in November 2001 and came into effect in 2006. The *Cape Town Convention* is a treaty designed to facilitate asset-based financing and leasing of aviation equipment, expand financing opportunities, and reduce costs – thereby providing substantial economic benefits. It does so by reducing a creditor's risk and by enhancing legal predictability in these transactions, including in the case of a debtor's insolvency or other default.

National laws, with varying degrees of protection for such asset-based financing, create uncertainty for lenders and increase the cost of such transactions. The lack of a uniform global approach was the motivation behind creating a treaty that would help harmonise the laws applicable to such financings. Ireland was one of the first states to ratify the *Cape Town Convention*, and the additional protection afforded to financiers is another factor driving transactions to be structured through Ireland. In addition, the registrar of the international registry established pursuant to the *Cape Town Convention* is an Irish company, Aviareto Ltd. Approximately 65 states have ratified the convention, which means that it affects almost all aircraft financing and leasing transactions.

Around the world

The industry is constantly changing and evolving. The ability to advise on new structures and offer original thinking when responding to new challenges is critical. Irish legal and tax advisors do this with confidence. A key reason for Ireland's success is the availability of highly skilled and experienced people. For Ireland's continued success in the aviation sector, it is vital that this pool of talent is maintained and refreshed. A number of years ago, there was little or no specialised training in this field for lawyers. The Law Society's courses on aviation finance and leasing topics are a welcome development and have contributed to attracting and upskilling new talent.

Although lease and finance documents are usually governed by English or New York law, our role as Irish lawyers is central to the transaction. It includes, for example, advising on:

- Structuring and establishing an aircraft leasing platform in Ireland,
- The Irish law aspects of providing finance to an Irish borrower, and
- *Cape Town Convention* counsel.

Many companies establish in Ireland through joint ventures and, as mentioned above, an increasing number of large mergers and acquisitions are seen in this area. Being at the epicentre of this global industry gives Irish lawyers a very interesting perspective and insight on global developments. With such international reach, most transactions involve collaboration with lawyers from different jurisdictions.

The industry is renowned for being cyclical, with regular highs and lows. Although it is somewhat protected from a downturn in one region by growth in another, global shocks such as 11 September 2001 or an oil crisis have an impact on the industry. The asset class is high value and, therefore, it requires a large amount of capital to ensure that aircraft are financed and delivered.

During the financial crisis, capital dried up and had an impact on the industry. However, this forced diversification of its capital base, thereby bringing it back to a healthy position.

Many ask whether the Brexit vote will have an impact on the market. While the decision may prove unfavourable for some sectors, the fact that the aviation industry is so well established in Ireland means that it is somewhat protected from the types of decisions being considered in other industries. Of course, if Brexit causes a downturn in the economy generally, that will not be helpful. One area that may see some interesting developments is the potential need to restructure British-owned airlines to meet the criteria of being majority EU-owned in order to be described as European airlines.

Fly me to the moon

Current trends in the industry bode well for Ireland. For instance, the portion of the global aircraft fleet that is leased is expected to rise to over 40% in the next five years. Given that over 50% of leased aircraft currently flow through Ireland, this creates an obvious opportunity.

The overall demand for aircraft continues to increase and, since Ireland is a favoured location for financing, this should translate to a corresponding increase in aircraft financed through Ireland. As established leasing companies mature in their business models, we are likely to see more eye-catching headlines around acquisitions and initial public offerings. With regard to new entrants, there continues to be a very strong flow of international investors from a number of jurisdictions that see Ireland as key to the development of a new leasing platform.

The types of aircraft investors have expanded to include private equity funds and pension and insurance institutions, and significant growth in air travel is being driven by increased demand in certain jurisdictions, including China and India. Large Chinese banks and financial institutions find Ireland's offering for establishing aircraft-leasing platforms particularly attractive, and so the trend continues. The success of early movers, such as ICBC Financial Leasing, has helped pave the way for other Chinese banks to establish in Ireland. The tax benefits, the availability of expertise, and the business-friendly environment combine to help win these investments over other jurisdictions.

A new pool of talent will help the industry navigate through its next phase of development, which will require it to embrace new technology, drive innovation in structures, and respond quickly to economic opportunities and challenges. There is great scope for further growth of the industry, and Ireland is well positioned to continue to lead and dominate in this area.

look it up

Legislation:

- *Chicago Convention on Civil Aviation 1944*
- *Convention on International Interests in Mobile Equipment* (the *Cape Town Convention*)

Literature:

- Airbus *Global Market Forecast 2016-2035*
- Boeing *Current Aircraft Finance Market Outlook 2016*

Best laid PLANS

The *Assisted Decision-Making (Capacity) Act 2015* will place advance healthcare directives on a statutory footing and, once commenced, will legislate for their validity and effect. Marie Kinsella and Nicola Harrison carve it in stone

Marie Kinsella is a partner in ByrneWallace and a member of the Law Society's Mental Health and Capacity Task Force

Nicola Harrison is an associate in ByrneWallace

An advance healthcare directive (AHD) is an advance instruction by a person about how he/she wishes to be treated if certain circumstances arise. It is a mechanism whereby people can voice their wishes around healthcare decisions when they have capacity to do so and for those wishes to take effect when they no longer have capacity.

The validity of AHDs has not been explicitly tested by the Irish courts. However, there have been references made in a number of cases dealing with the issue of the refusal of medical treatment that point to the likelihood that an AHD will be legally binding provided certain conditions are met. These conditions include the requirements that:

- The patient was mentally competent at the time the directive was made, and
- The directive applies to the particular set of circumstances arising.

Case law

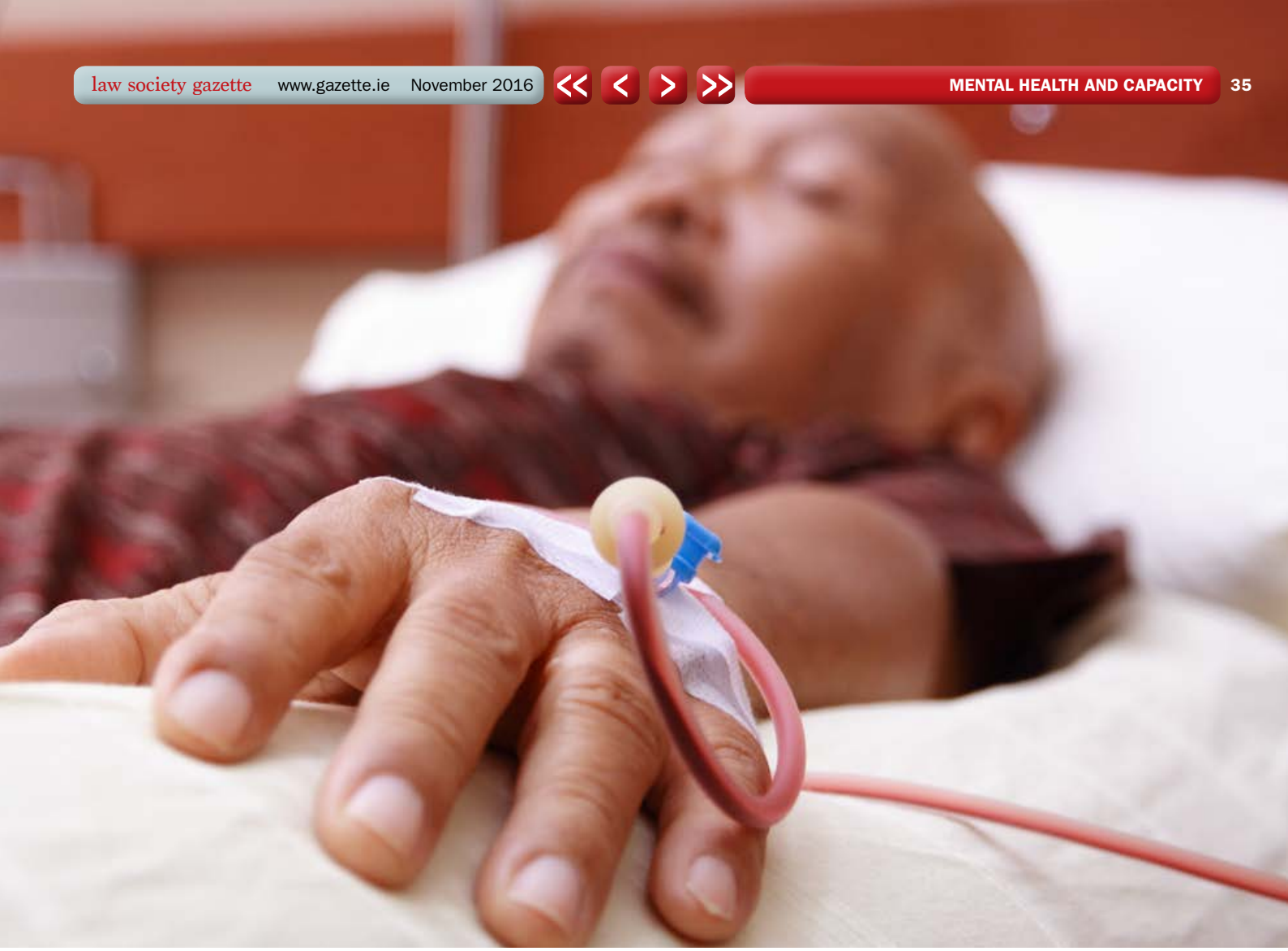
In *Re a Ward of Court* (1996), the Supreme Court considered whether life-sustaining treatment could be withdrawn from a woman in a persistent vegetative state who had sustained profound brain damage following a minor operation at the age of 22. The High Court held that withdrawal of treatment in these circumstances was permissible, and this decision was ultimately upheld by the Supreme Court.

While the main issue for determination in that case was the patient's right to die, the court did comment that a person's right to forego medical treatment or direct that it be withdrawn would be valid provided that the ward was mentally competent and the directive related to her current situation, even if the withdrawal of treatment would result in her death.

A more recent case is that of *Governor of X Prison v PMcD* (2015). This involved a prisoner who began a hunger strike for reasons relating to the conditions of his detention. He made an AHD stating that, if he did end up in hospital, he did not wish to be treated. The prison made an application for orders to validate both his refusal of food and their failure to force-feed

at a glance

- Under the *Assisted Decision-Making (Capacity) Act*, once all the legal requirements are met and an advance healthcare directive is valid, a healthcare professional must comply with it, even if they do not agree with the patient's decision
- Where there is any doubt as to the validity or applicability of an AHD, the healthcare professional must try to resolve this by consulting with the designated healthcare representative (if there is one) or, if there is none, with the patient's family and friends
- Solicitors should be aware that any directions with regard to treatment choices contained in an AHD will take precedence over any such decisions contained in an EPA



him, and the court held that his directive was valid, on the basis that he had capacity at the time it was made.

Professional guidance

The Medical Council's *Guide to Professional Conduct and Ethics for Registered Medical Practitioners* states that clinicians should take reasonable steps to find out if a patient who lacks capacity has made an advance healthcare plan or directive. It also states that an AHD should be followed provided that:

- It was an informed choice,
- It covers the situation that has now arisen, and
- There is nothing to indicate that a patient has changed his or her mind.

In a similar vein, the HSE's *National Consent Policy* provides that a person's advance refusal of treatment should be respected if (a) the decision was an informed choice, (b) it specifically covers the situation that has arisen, and (c) there is no evidence that the service user has changed his or her mind since the advance plan was made.

In terms of international human rights legislation, there have been a number of conventions and directives that have paved the way for legislation in Ireland around the issue of AHD.

In 2006, The UN *Convention on the Rights of Persons with Disabilities* called for states to facilitate people with disabilities to exercise their rights to make choices and express preferences in relation to their care.

In 2009, the Council of Europe issued a recommendation on the *Principles Concerning Continuing Powers of Attorney and Advance Directives for Incapacity*. This provides that states should promote self-determination for capable adults in the event of their future incapacity, by means of continuing powers of attorney and advance directives.

In 2014, the Council of Europe issued a recommendation on the *Promotion of Human Rights of Older Persons*, which states that "member states should provide for legislation that allows older persons to regulate their affairs in the event that they are unable to express their instructions at a later stage".

It is in the context of such obligations that the *Assisted Decision-Making (Capacity) Act 2015* has been enacted. However, it is not yet commenced, so the current common law position still applies.

Part 8 of the act specifically deals with the AHD, which is defined in section 82, in relation to a person who has capacity, as "an advance expression made by the person … of his or her will and preferences concerning treatment decisions that may arise in respect of him or her if he or she subsequently lacks capacity". The AHD must be made in the prescribed form as set out in section 84 of the act.

Designated healthcare representative

While a person can make an AHD without appointing anyone to act on their behalf, one of the features of part 8 is that it provides (at section 87) for persons to appoint a designated healthcare representative to act on their behalf in making treatment decisions or in interpreting the terms of their AHD. Such a representative may have the power to:

- Advise and interpret the directive maker's will and preferences, and or
- Consent to or refuse treatment, up to and including refusal of life-sustaining

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treatment, based on the known will and preferences of the directive maker.

The act distinguishes between treatment refusals and treatment requests. In terms of treatment refusals, the act provides (at section 84) that these *shall* be binding, provided the following conditions are met:

- At the time in question, the directive maker lacks capacity to consent to the treatment,
- The treatment being refused is clearly identified in the directive, and
- The circumstances in which the refusal applies are clearly identified.

In terms of treatment requests, however, the 2015 act states that such requests are not legally binding but they *shall* be taken into consideration during any decision-making relating to treatment, provided the specific treatment is relevant to the patient's condition.

When is an AHD not valid?

At section 85, the act sets out the specific scenarios when AHDs will not be valid, which include where:

- The directive was not made voluntarily, or
- The directive maker has acted in a manner that is inconsistent with the terms of the directive while he or she had capacity.

In addition, a directive will not be applicable where:

- The directive maker still has capacity at the time in question, or
- The treatment or the circumstances are not materially the same as that set out in the directive.

As it may be difficult for a healthcare professional to establish that the treatment is 'materially the same' – particularly if there is any uncertainty or ambiguity in the wording of the directive – it is important for the directive maker to ensure that the directive is carefully worded and kept under regular review. However, section 85(5) of the act specifies the steps to be taken where there is any ambiguity in the wording of a directive.

Section 85 also specifies two important scenarios where a directive will not be applicable. First, it provides that a directive will not apply to life-sustaining treatment unless it is specifically provided therein that the directive maker understands the risk to his or her life. Secondly, it provides that a directive will not apply to basic care, which includes warmth, shelter, oral nutrition, oral hydration, and hygiene, but does not include artificial nutrition and hydration.

Section 85 of the act also provides that, where there is any doubt as to the validity or applicability of the directive, the healthcare professional must try to resolve this by consulting with the designated healthcare representative if there is one and, if there is none, with the patient's family and friends.

In addition, they must seek an opinion from a second healthcare professional and, if there is still doubt, the act states that the healthcare professional must resolve the ambiguity in favour of the preservation of life.

The act also provides that, if a dispute arises as to the validity or applicability of a directive, an application can be made to the Circuit Court by any interested party for a declaration as to whether the directive is valid or applicable. Where the application in relation to a directive pertains to life-sustaining treatment, then the application must be made to the High Court (section 89).

Compliance

Under the 2015 act, once all of the legal requirements are met and the directive is valid and applicable, then a healthcare professional must comply with it, even if they do not agree with the patient's decision.

However, the act provides a 'safety net' for healthcare professionals who fail to comply with a directive, provided they had reasonable grounds to believe that it was not valid or applicable. In such circumstances, no civil or criminal liability will apply.

In terms of giving effect to part 8, the act provides for codes of practice to be prepared to support the understanding and implementation of its provisions. In addition, it makes provision for regulations to be made providing for the notification of AHD to the director of the Decision Support Service and the setting up of a national register of AHDs.

Solicitors should note that it is not a requirement for a person making an AHD to consult a solicitor. However, clients will expect solicitors to advise them about the distinction between making an AHD and providing for healthcare decisions that (on the commencement of the 2015 act) may now be contained in an enduring power of attorney (EPA).

Solicitors should be aware that any directions with regard to treatment choices contained in an AHD will take precedence over any such decisions contained in an EPA, regardless as to whether the AHD was made before or after the making of the EPA. Also, any direction with regard to the refusal of life-sustaining treatment must be contained in an AHD, as such decisions cannot be included within the scope of 'personal welfare' decisions in an EPA.

Given that the purpose of AHDs is to provide healthcare professionals with important information about the wishes of the patient and promote patient autonomy, the new legislative framework is a welcome development.

FOCAL POINT

commencement date of section 91(2)

The *Assisted Decision-Making (Capacity) Act 2015 (Commencement of Certain Provisions) (No 2) Order 2016* was signed by the Minister for Health on 13 October 2016.

That order provides for the commencement on 17 October 2016 of section 91(2) of the 2015 act, namely the establishment by the Minister for Health of a multidisciplinary working group to make recommendations to the director of the Decision Support Service in relation to codes of practice pertaining to the advance healthcare directive provisions of the 2015 act.

look it up

Cases:

- *Governor of X Prison v PMcD* [2015] IEHC 259
- *Re a Ward of Court* [1996] 2IR

Legislation:

- *Assisted Decision-Making (Capacity) Act 2015*
- *Convention on the Rights of Persons with Disabilities* (UN, 2006)

Literature:

- Council of Europe (2009), *Principles Concerning Continuing Powers of Attorney and Advance Directives for Incapacity*
- Council of Europe (2014), *Promotion of Human Rights of Older Persons*
- Health Service Executive, *National Consent Policy*
- Irish Medical Council (2016), *Guide to Professional Conduct and Ethics for Registered Medical Practitioners*

NEW *and improved!*

Sean Murphy is director of legal training and development at the Competition and Consumer Protection Commission

Don't be misled by the law on misleading and comparative advertising. Sean Murphy looks at the interaction between the *Consumer Protection Act* and the *EC (Misleading and Comparative Marketing Communications) Regulations*

Advertising is one of the most effective ways that a trader can bring a product to a consumer's or another trader's attention, and it is of benefit to both traders and consumers.

From a trader's perspective, it can increase the awareness of a new product, thereby allowing the trader to compete with a more established product. Consequently, it facilitates the trader entering new markets. For established products, advertising assists in maintaining the product's place in the market.

From the consumer's perspective, advertising alerts consumers to an increased choice of product and, crucially, provides information relating to that product. Advertising is therefore good for competition. When advertising is complete and accurate, it is good for consumer protection, enabling consumers to make informed decisions.

Given the benefits of advertising to both traders and consumers, it is important that it not be abused. Traders that adopt honest advertising practices must be protected from competitors who engage in misleading advertising practices and who subsequently benefit from this unfair competition.

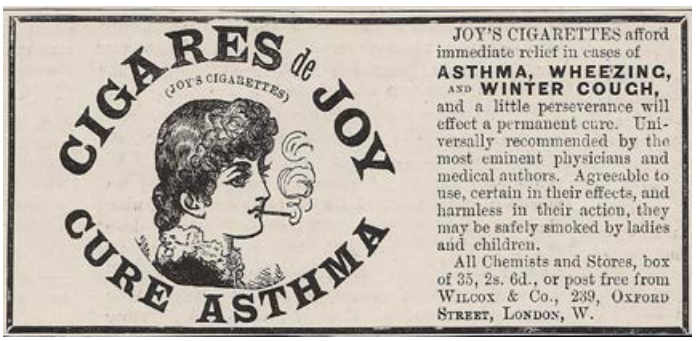
Traders to whom particular marketing communications are addressed and consumers, as the end users of the advertised product, will also require such protection. The primary areas of concern in this regard are misleading advertisements and those comparative advertisements that make unfair, exaggerated claims about the trader's product when compared with a competitor's product.

Simply the best

In Ireland, we have followed European initiatives that have sought to control such instances of misleading and comparative advertising. There have been a number of such legislative developments over the years, which have a created a complex trail for those seeking to access and understand the most current state of play. What law applies and to whom does it apply? (**See panel, next page.**)

at a glance

- The implementation of the *Unfair Commercial Practices Directive* and the *Misleading and Comparative Advertising Directive* has led to a distinction between misleading business-to-consumer advertising and misleading business-to-business advertising
- The existence of two, not dissimilar instruments, catering for different commercial relationships has caused some confusion, as evidenced in two separate High Court proceedings
- The MCA limits protection to traders. It follows that seeking relief against misleading advertising claims aimed at consumers must be taken under the UCPD



> The UCPD is not intended to address advertising that misleads traders. Addressing misleading advertising claims that are aimed at consumers is already provided for under sections 43-46 of the *Consumer Protection Act*

REFERENCE POINT

probably the best directive in the world

In seeking to understand the origin of the various provisions that deal with misleading and comparative advertising, a good place to start is Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the member states concerning misleading advertising. This directive set out to harmonise national measures concerning misleading advertising. This was given effect in Ireland by the *European Communities (Misleading Advertising) Regulations* (SI 134 of 1988).

Directive 84/450/EEC was amended by Directive 97/55 to include comparative advertising and by the *Unfair Commercial Practices Directive* (UCPD) (Directive 2005/29/EC) to limit its scope to misleading business-to-business advertising. Directives 84/450 and 97/55 were subsequently repealed and codified by the *Misleading and Comparative Advertising Directive* (MCA) (Council Directive 2006/114/EC).

The MCA is given effect in Ireland by SI 774 of 2007 (it also revoked SI 134/1988). Currently, both the UCPD (given effect here by the *Consumer Protection Act 2007*) and SI 774 of 2007 are the primary legislative instruments addressing misleading and comparative advertising.

In Ireland, the implementation of the *Unfair Commercial Practices Directive* (UPCD) and the *Misleading and Comparative Advertising Directive* (MCA) has led to a distinction between misleading business-to-consumer (B2C) advertising and misleading business-to-business (B2B) advertising. The existence of two, not dissimilar instruments, catering for different commercial relationships has caused some confusion, as evidenced in two separate High Court proceedings. In *Tesco Ireland Limited v Dunnes Stores*, the court made the following observation: "The purpose of the 2007 regulations was to transpose Directive 2006/114 EC into Irish law. The substantive provision of the 2007 regulations on which the plaintiff relies is regulation 3, which provides that a trader shall not engage in misleading marketing communication and goes on to provide that a marketing communication is misleading if:

a) In any way (including its presentation), it deceives or is likely to deceive in relation to any matter set out in paragraph (4) the trader [sic] to whom it is addressed or whom it reaches, and
b) (i) By reason of its deceptive nature it is

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likely to affect the trader's [sic] economic behaviour, or

(ii) For any reasons specified in this paragraph, it is injured or is likely to injure a competitor.

It was suggested by counsel for the plaintiff that there may be an error in paragraphs (a) and (b) and that the reference to 'trader' should be a reference to 'consumer'. That suggestion would appear to be correct."

With respect, the suggestion by counsel was incorrect. Matters concerning misleading B2B advertising are addressed exclusively through SI 774 of 2007. The European Commission, in its own review of the operation of the MCA, declares as follows: "The *Misleading and Comparative Advertising Directive* is a horizontal instrument that applies to all advertising *between businesses*" [emphasis added].

Article 1 of the MCA also provides: "The purpose of this directive is to *protect traders* against misleading advertising and the unfair consequences thereof and to lay down the conditions under which comparative advertising is permitted" [emphasis added].

Regulation 3, which the judge refers to above, is only concerned with those marketing communications that are addressed to traders.

> In Ireland, the implementation of the UPCD and the MCA has led to a distinction between misleading B2C and B2B advertising

Better than all the rest

The issue arose again in *Aldi Stores (Ireland) Limited and Aldi GMBH & Co KG v Dunnes Stores*, where the following observations were made: "Under article 2(b) of the directive, misleading advertising is defined as any advertising which is likely to deceive 'the persons to whom it is addressed or whom it reaches'.

"Regulation 3(2) of the implementing regulations provides: 'that a marketing communication is misleading if it deceives or is likely to deceive … the trader to whom it addresses or whom it reaches'.

"Thus the phrase in the directive 'the persons to whom it is addressed' is replaced in the Irish regulations as 'the trader to whom it is addressed'.

"A 'trader' is defined in the Irish regulations at regulation 2(1) as meaning a person 'who is acting for purposes relating to the person's trade, business or profession or a person acting on behalf of such a person'.

"The defendant seems to have accepted that the reference to 'the trader' in the 2007 regulations is incorrect. I was also referred to a decision of Laffoy J in an interlocutory decision in *Tesco Ireland Ltd v Dunnes Stores* [2009 IEHC 569] when the learned judge considered that the reference to trader should [be] a reference to 'consumer'.

"However, the actual wording of the directive is whether the advertising is likely to deceive 'the persons to whom it is addressed or whom it reaches'. This could include a consumer, but it is drafted more broadly in the directive.

"It is clear therefore that there is an infelicity in the drafting, but it is not central to the issues which I have to decide upon."

As this article contends, regulation 3 is not intended to refer to consumers. Similarly, the UCPD is not intended to address advertising that misleads traders. Addressing misleading advertising claims that are aimed at consumers is already provided for under sections 43-46 of the *Consumer Protection Act* (the UCPD). Recital 6 of the UCPD provides: "Nor does this directive cover or affect the provisions of Directive 84/450/EEC on advertising which misleads business but which is not misleading for consumers and on comparative advertising."

The MCA simply limits this protection to traders. It follows, therefore, that seeking relief against misleading advertising claims aimed at consumers cannot be addressed through the MCA and must therefore be taken under the UCPD.

The provisions relating to comparative advertising are slightly different, and this could cause some confusion when considering whether the MCA is exclusively concerned with B2B or whether any of its provisions has a B2C application. The MCA has a B2C application, but only as it relates to comparative advertising – not misleading advertising.

And not in the safari way...

Better than anyone

The dual nature of the MCA has been more recently recognised by the CJEU as follows: "In the present case, it must first be observed that, pursuant to article 1 of Directive 2006/114, that directive has a dual objective, which consists in protecting traders against misleading advertising and the unfair consequences thereof, on the one hand, and in laying down the conditions under which comparative advertising is permitted, on the other."

The comparative advertising provisions cover both business and consumers.

Comparative advertising is addressed through a general prohibition contained in article 4 of the MCA. A close reading of this article shows that both the B2B standard of the *MCA Directive* or the B2C standard of the UCPD must be satisfied depending on the group to which the comparison was addressed. If we accept this, then reliefs can be sought under either the MCA or UCPD, depending on the group addressed.

Once the appropriate legislative instrument has been identified, your attention is drawn to the content within for guidance as to the reliefs that may be sought.

look it up

Cases:

- *Aldi Stores (Ireland) Limited and Aldi GMBH & Co KG v Dunnes Stores* [2015] IEHC 495
- *Tesco Ireland Limited v Dunnes Stores* [2009] IEHC 569

Legislation:

- *Consumer Protection Act 2007*
- Council Directive 2006/114/EC (*Misleading and Comparative Advertising Directive*)
- Council Directive 84/450/EEC
- Directive 2005/29/EC (*Unfair Commercial Practices Directive*)
- Directive 97/55/EC
- *European Communities (Misleading Advertising) Regulations 1988*
- *European Communities (Misleading and Comparative Marketing Communications) Regulations 2007* (SI 774 of 2007)

Sixteen TONS

The Irish courts may not be fully applying key rights that flow from EU consumer protection law and the *Charter of Fundamental Rights* in debt-related repossession proceedings, suggests a group of practitioners

Many of us see heartache and distress as the courts deal with debt-related proceedings and our clients, or the many unrepresented defendants, struggle with the enormity of losing their home, often with no viable alternative place to live.

It is clear that the courts see their role in possession proceedings as forming an essential part of property and contract law, which buttress (failed) housing and credit markets and securitisation of loans.

While there are some statutory developments in relation to insolvency and bankruptcy, no 'new equity' in the law of property has been created in the mobilisation of the Irish legal system dealing with the contemporary financial and debt crisis. While significant challenges were made to the 'summary' process of repossessions of homes, following the lacuna in the law created by the *Land and Conveyancing Law Reform Act 2009*, the new mortgage category of the consumer 'housing loan' has not generated links to wider consumer law. Attempts to define the status and enforceability of the Central Bank's *Code of Conduct on Mortgage Arrears* within property law were dismissed, except for its short moratorium period, in *Irish Life and Permanent v Dunne* (2015), and the legal position remains extant.

Furthermore, the most recent examples in the substantial corpus of consumer or human rights law have not been assimilated into individualised debt-related proceedings, increasingly involving globalised lending corporations and issues often reaching beyond individual contracts.

So what of the individual homeowner and their family – do they have any rights to be protected before a possession or execution order is granted? It is our view that the Irish courts may not be fully applying key rights that flow from EU consumer protection law and the *Charter of Fundamental Rights*.

Muscle and blood

The *Unfair Contract Terms in Consumer Contracts Directive* (UCTD) applies to loan or mortgage contracts, and article 3 can be relevant:

at a glance

- It is clear that the Irish courts see their role in possession proceedings as forming an essential part of property and contract law, which buttress (failed) housing and credit markets and securitisation of loans
- The most recent examples in the substantial corpus of consumer or human rights law have not been assimilated into individualised debt-related proceedings
- The CJEU is developing new human rights norms within EU consumer protection law, and these are becoming relevant for debt recovery, particularly involving home repossession procedures

> There are a number of terms that might appear in loan or mortgage agreements that could be 'unfair' under the UCTD

"1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. 2) A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract."

In the *Aziz* case referred by a Spanish court, the Court of Justice of the European Union (CJEU) established that Spanish mortgage law and associated curial procedures violated the UCTD. The procedural rules on foreclosures made it impossible or excessively difficult for consumers to enjoy the protection of the UCTD. The CJEU also held that any "judgment would enable that consumer

to obtain only subsequent protection of a purely compensatory nature, which would be incomplete and insufficient and would not constitute either an adequate or effective means of preventing the continued use of that term, contrary to article 7(1) of Directive 93/13."

The CJEU held that this "applies all the more strongly where, as in the main proceedings, the mortgaged property is the family home of the consumer whose rights have been infringed, since that means of consumer protection is limited to payment of damages and interest and does not make it possible to prevent the definitive and irreversible loss of that dwelling."

The *Treaty on European Union* puts responsibility for providing remedies sufficient to ensure effective legal protection in the fields covered by European Union law on member states through the status of their courts. Of vital importance in *Aziz* was the reaffirmation by the CJEU of the obligation of the national court to examine, of its own motion, all credit contracts for compliance with the UCTD: "The national court is bound, in accordance with the case law of the court, to examine of its own motion all the contractual terms falling with the scope of the directive to ascertain whether they are unfair, even in the absence of an express application to that effect, where it has available to it the legal and factual elements necessary for that task."

The company store

There are a number of terms that might appear in loan or mortgage agreements that could be 'unfair' under the UCTD (which provides an indicative and non-exhaustive list):

- An acceleration clause (a term in a standard contract that requires the consumer to pay the entire amount owed immediately upon missing a payment), or
- A particularly high default interest clause,
- A unilateral quantification of debt clause,
- Another standard term that is contrary to the requirement of good faith causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

While the charter does not provide a set of stand-alone rights, it is engaged when a national court is considering an EU law issue, such as the application of the UCTD to a consumer contractual term.

In that context, charter rights – such as article 7 on the right to respect for private and family life, home and communications; article 24 on the rights of the child; article 38 on ensuring a high level of consumer protection; and article 47 on the right to an effective remedy and fair trial – might be relevant, as binding EU law.

Thus, in *Kušionová* (2014), the CJEU examined the enforcement of the security for credit in the form of a charge on a family home in the context of the UCTD. The CJEU noted that the system of protection introduced by UCTD is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his/her bargaining power and his/her level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms.

The significance of the enforcement of the security on the family home was considered: "With regard to the proportionality of the penalty, it is necessary to give particular attention to the fact that the property at which the procedure for the extrajudicial enforcement of the charge at issue in the main proceedings is directed is the immovable property forming the consumer's family home. The loss of a family home is not only such as to seriously undermine consumer rights … but it also places the family of the consumer concerned in a particularly vulnerable position … Under EU law, the right to accommodation is a fundamental right guaranteed under article 7 of the charter that the referring court must take into consideration when implementing Directive 93/13."

New human rights norms

The CJEU is developing new human rights norms within EU consumer protection law, and these are becoming relevant for debt recovery, particularly involving home repossession procedures. The precise assistance of the UCTD and the charter to distressed borrowers will depend on individual case circumstances. But the application of EU law rights to consumer credit cases can improve the position of clients and may lead to a progressive body of case law in this area.

Authors: Madeleine Thornton is a solicitor; Julie Sadlier is a solicitor who specialises is mortgage arrears, repossession law and insolvency; Padraic Kenna lectures in law at NUI Galway; Gary Fitzgerald is a barrister and director of the Irish Centre for European Law; and Marguerite Angelari is senior lawyer with Open Society Foundations.

REFERENCE POINT

what do you get?

In order to raise awareness of and facilitate discussion on this contemporary area of human rights law, a number of seminars are planned in autumn 2016 and spring 2017 in Dublin, Galway, Cork, Cavan and Kilkenny. These are being organised by the Open Society Justice Initiative in association with the School of Law at NUI Galway and the Irish Centre for European Law.

The seminars will be of interest to legal practitioners working in debt-related areas. Full details and registration on www.icel.ie/UCTD.

look it up

Cases:

- Case C- 415/11, *Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* (2013)
- Case C-34/13, *Kušionová v SMART Capital as* (2014)
- *Irish Life and Permanent PLC v Dunne and Irish Life and Permanent PLC v Dunphy* [2015] IESC 46

Legislation:

- *Land and Conveyancing Law Reform Act 2009*
- *Charter of Fundamental Rights of the European Union*
- *Unfair Contract Terms in Consumer Contracts Directive* (Directive 93/13)
- *European Communities (Unfair Terms in Consumer Contracts) Regulations 1995* (SI 27/1995) (as amended by the *European Communities (Unfair Terms in Consumer Contracts)(Amendment) Regulations 2013* and the *European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2014*)

Literature:

- Central Bank of Ireland (2013), *Code of Conduct on Mortgage Arrears*
- Kingston, Suzanne, and Liam Thornton (2015), *A Report on the Application of the European Convention on Human Rights Act 2003 and the European Charter of Fundamental Rights: Evaluation and Review* (Law Society of Ireland/Dublin Solicitors' Bar Association)

THE LAST Collins

Keith Walsh is principal of Keith Walsh Solicitors

Anthony Collins, former managing partner of Eugene F Collins, talks to Keith Walsh about his old firm and how life has changed in the solicitors' profession since the heady days of the 1960s

The dining room in the members' restaurant of the Royal Dublin Society is busy for a Wednesday, and it seems an entirely appropriate place to meet a pillar of the legal establishment for lunch. Appearing much younger than his date of birth would suggest, and wearing his trademark smile, Anthony Collins is in good form.

We start by discussing his last day at Eugene F Collins on 1 April 2015. It marked the first day in 122 years that there was no longer a Collins at the firm, which was established by Anthony's grandfather, Eugene. His son Desmond (Anthony's father) succeeded him, and Anthony subsequently became an apprentice to his dad, succeeding him.

Desmond was a very keen single-figure golfer and Anthony recalls the story of his grandfather deciding to take up the game, given his son's prowess in the sport. He visited some auction rooms on the quays and arrived back at the office after court one day with a set of second-hand clubs. When he proudly showed his 'bargain' to one of the clients, they remarked, "I didn't know you were left-handed." He wasn't.

Anthony is a fourth-generation solicitor in the Collins family – Eugene's father Michael Joseph qualified as a solicitor in Cork in 1849 and established a successful practice there. Michael successfully defended a number of the Fenians, who were prosecuted following the uprising in 1867, and charged no fee. By way of thanks, they clubbed together and bought the chair used by the special judge. Anthony has the chair to this day. Sadly, Michael died at the age of 42 in 1870.

Eugene took the mantle, beginning his legal studies in Cork. His mother subsequently sent him to Dublin in the strange belief that his studies were less likely to be interrupted by an active social life in the capital compared with his native Cork.

Beginnings and growth

The practice started out in Eustace Street in 1893 before moving, via Fitzwilliam Square, to its current offices in Burlington Road. The firm advised Padraig Pearse in relation to miscellaneous matters.

Several decades later and, as a youngster, the young Anthony Collins was more interested in commerce than law, opting to study business at Trinity College Dublin. His dad Desmond, seizing his opportunity, requested that he come into the office "for a little while" – he stayed for more than 50 years, eventually receiving his parchment in 1964 from Desmond, who was then serving as President of the Law Society. By the 1960s, the business was very well established,

at a glance

- Anthony Collins, his father, and grandfather represented three generations of Collins at Eugene F Collins, the firm founded by his grandfather. His great grandfather, also a solicitor, acted for the Fenians in Cork after their failed uprising in 1867
- 1 April 2015 marked the first day in 122 years when there was no longer a Collins in the firm
- The three generations were all members of the Strollers, a singing and social club of which Anthony was president, and is still a member
- Now in his '70s, Anthony continues to work as a company director and consultant and has an office in Clare Street

PIC: CIAN REDMOND PHOTOGRAPHY

> As a youngster, Anthony was more interested in commerce than law and studied business at Trinity College. His dad asked him to come into the office "for a little while" – he stayed for 50 years

Anthony, sitting in the judge's chair presented to his great-grandfather Michael by a group of Fenians whom he successfully defended following their participation in the 1867 rising in Cork. A portrait of Eugene F Collins hangs behind him

LAW SOCIETY PROFESSIONAL TRAINING

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LAW SOCIETY OF IRELAND

Law Society Skillnet CPD Clusters

DATE	EVENT	FEE	CPD HOURS
11 Nov	Practice and Regulation Symposium 2016 – in partnership with the Small Practice Network and the Dublin Solicitors' Bar Association - Mansion House, Dublin	€105 - Hot lunch and networking drinks reception included in price	3 Regulatory Matters & 4 M & PD Skills (including accounting and anti-money laundering compliance) (by Group Study)
18 Nov	Practitioner Update 2016 – The Kingsley Hotel, Cork in partnership with the Southern Law Association and West Cork Bar Association	€105 - Hot lunch and networking drinks reception included in price	1 Regulatory Matters (including 0.5 accounting and anti-money laundering compliance), 4 General & 1 M & PD Skills (by Group Study)
25 Nov	General Practice Update 2016 – Hotel Kilkenny, Kilkenny in partnership with Carlow Bar Association, Kilkenny Bar Association, Wexford Bar Association and Waterford Law Society	€105 - Hot lunch and networking drinks reception included in price	1 Regulatory Matters, 4 General & 1 M & PD Skills (including accounting and anti-money laundering compliance) (by Group Study)

DATE	EVENT	DISCOUNTED FEE*	FULL FEE	CPD HOURS
10 Nov	Leadership and the in-house lawyer The In-house and Public Sector Committee Annual Conference	€150	€176	2.5 M & P D Skills plus 2.5 General (by Group Study)
18 Nov	Business Law 2017 in collaboration with the Business Law Committee	€150	€176	5.5 General plus 1 Regulatory Matters (including accounting and anti-money laundering compliance) (by Group Study)
24 Nov	Networking Skills – How to get clients and keep them	€120	€150	3.5 M & P D Skills (by Group Study)
25 Nov	Annual Family & Child Law Conference 2016 in collaboration with the Family & Child Law Committee	€150	€176	5 General (by Group Study)

Property Transactions Master Class

Course fee includes: iPad Mini, interactive eBook on Commercial & Complex Property Transactions plus 2 Law Society/OUP manuals; Conveyancing 8th edition (to be published Autumn 2016) and Landlord & Tenant Law 6th edition
CPD Hours per Module: 10 Hours including 2 M & PD Skills
Fee: €600/€500*
Please note: Access to an iPad is essential for participation in this programme

Dates:
11 & 12 November 2016 – Module 1: The Fundamentals of Property Transactions20 & 21 January 2017 – Module 2: Complex Property Transactions3 & 4 February 2017 – Module 3: Commercial Property Transactions
Attend 1, 2 or all 3 Modules
There is a reduced fee of €1,500/€1,400* for attending all three modules

The Fundamentals of Technology & Intellectual Property Law

Course fee includes: iPad Mini & Interactive eBook on Technology & IP Law
CPD Hours Per Module: 10 Hours including 3 M & PD Skills
Fee: €1,100/€1,000*
Please note: Access to an iPad is essential for participation in this programme

Dates:
25 & 26 November 2016 – Module 1: Intellectual Property Law
20 & 21 January 2017 – Module 2: Technology Law
Attendance on both modules is required

For full details on all of these events visit webpage www.lawsociety.ie/Lspt
or contact a member of the Law Society Professional Training team on

P: 01 881 5727 E: Lspt@lawsociety.ie F: 01 672 4890

**Applicable to Law Society Skillnet members*

was acting for three public companies, and was the main external legal advisor for RTÉ. Anthony remembers acting for the broadcaster in a libel action by a garda against Bernadette Devlin. RTÉ's involvement came about due to remarks made about the garda on the *Late Late Show*.

The firm was also involved in the Shanahan Stamp Auctions liquidation, as well as the tribunal of inquiry into a 7 *Days* television programme, which sat for over 50 days investigating the authenticity of a 26-minute broadcast on illegal money lending.

Eugene passed away in 1947, and Desmond worked in the practice until the 1970s. He was such a well-regarded expert in bankruptcy and insolvency matters that solicitors from all over the country sent their work to him, given that it was such a specialist area at the time. Judge Kenny of the High Court, who was then the bankruptcy judge, acknowledged his expertise in court on many occasions.

There was significant expansion in business in the 1960s and '70s, with the firm concentrating more and more on commercial, property and litigation work. Anthony, like his father and grandfather before him, focused at that time on liquidation and receiverships and was also very involved in promoting the firm.

He recalls the recession in the 1980s as being nowhere near as bad as the recent crash. In that decade, the firm focused on commercial and corporate work and on building private client relationships. In the 1990s, Anthony continued to do corporate work, but also took up several directorships, including one with the Grafton Group where he became deputy chairman. He served also as a director of The *Leinster Leader*, which the law firm had acted for since the 1920s, right up to its sale in 2005.

Anthony receives his parchment in 1964 from his dad Desmond, who served as President of the Law Society that year

Anthony was the lead partner acting for Pernod-Ricard in its takeover of Irish Distillers in the late 1980s. During that decade, he also served as President of the Law Society from 1984-'85.

In the early 1970s, it became apparent to Anthony that, in order for the firm to grow and expand, it would need to take in new partners. This it did through the 1970s and '80s, particularly following his stint as Law Society president. The 'secret' to the expansion of Eugene F Collins was due to several factors, including:

- Having competent lawyers with the right skills and attitude,
- The positive attitude of the partners to marketing the firm, gaining new clients and looking after existing ones – client care was a priority and resulted in further recommendations,
- A focus on Irish accountants and foreign lawyers, particularly in relation to commercial work, and
- Referrals from other law firms with which Eugene F Collins had good relations, particularly in conflict-of-interest situations.

Movie stars

In the 1970s, London tax advisors were encouraging musicians and actors to relocate to Ireland to avail of tax-relief schemes. The firm's contacts with London lawyers led to one of Anthony's more interesting roles at the time – finding suitable country houses for those stars who wished to buy in Ireland.

He acted for Richard Condon (author of *The Manchurian Candidate*) and, more famously, for Robert Shaw, one of the stars of the Stephen Spielberg 1976 blockbuster, *Jaws*. Anthony appeared in a recent documentary on Shaw's life and connections with Touramakeady, Co Mayo, where the star lived and died.

Anthony recalls: "I remember Robert as an exceptionally competitive man. But when people accused him of this – as they often did – he replied that everyone was competitive but that he was just more honest about his passionate wish to win than others." Shaw was best known in Ireland in his pre-*Jaws* days for playing General Custer (*Custer of the West*) and was often greeted walking down Grafton Street or around Dublin with the words "Hello, Custer!", which Anthony says never bothered him.

Plus ça change

Into his '70s, Anthony is still very involved with his various directorships and some consultancies, and has an office in Clare Street. I show him his 'President's message' from a 1985 *Gazette*, in which he highlighted themes still very relevant today:

- The importance of maintaining the independence of the solicitors' profession,
- The importance of being sensitive when dealing with personal clients and communicating with them,
- That solicitors should always encourage the important traits of integrity and courtesy between colleagues.

Integrity, sensitivity, courtesy and discretion are obviously the watchwords of Anthony Collins' business and private life. He is also great company. Anthony may be the last in the line of the three great Collinses, but he has served his forebears and his entire profession with distinction.

We wish him well in his many years of semi-retirement with his wife Mary Collins, herself recently retired from the District Court bench.

FOCAL POINT

borstal boys

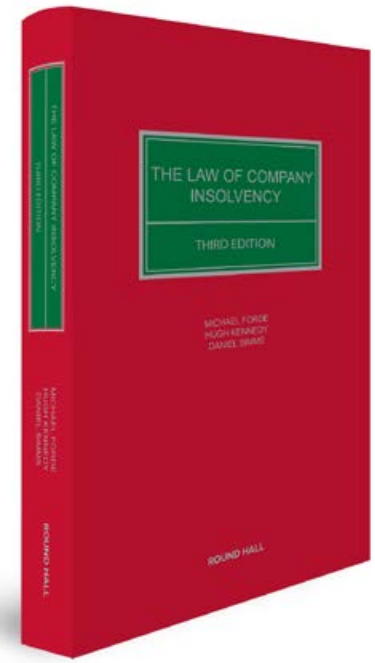
Anthony brings to the interview Ulick O'Connor's book on Brendan Behan to illustrate one of the lighter moments of his apprenticeship. He was doing a few bits of work around the courts and ended up in the District Criminal Courts in the Bridewell. Brendan Behan, then a major celebrity, had been accused of assault for lunging at a manager in the well-known shop, Smith's of the Green, and was brought before the court.

Behan was due in New York for an opening night and it was obvious to young Anthony that the entire court was conspiring to ensure that he was not convicted. The sergeant giving evidence testified to his good character when he met him "in happier circumstances". When asked about those 'circumstances', the sergeant replied: "He was making a contribution to the Garda Benevolent Society."

The theatre impresario Joan Littlewood came from London to testify on his behalf. The excuse given for his behaviour was that he had been 'on the dry' for three months and RTÉ had rejected a short play he had submitted, which had upset "his delicate artistic temperament". He escaped conviction and was soon on his way to New York.

The Law of Company Insolvency (third edition)

Michael Forde, Hugh Kennedy and Daniel Simms. Round Hall (2015), www.roundhall.ie. ISBN: 978-0-4140-369-87. Price: €295 (incl VAT).



A third edition of *The Law of Company Insolvency* was necessitated by the enactment of the *Companies Act 2014*, which replaced the *Companies Act 1963* (as well as a number of other pieces of legislation). Furthermore, bearing in mind the economic problems that have beset Ireland in recent years, the publication of this new, up-to-date edition is timely, and the book successfully provides a practical and useful guide on all aspects of this area. It is comprehensive, current, practical and relevant for any individual advising in the ever-developing area of company insolvency.

A detailed and comprehensive analysis is provided in relation to a number of areas of company insolvency in the book, including receiverships, examinerships, liquidations and the position of secured creditors. It examines the rights and liabilities of the parties involved in the winding-up process – company directors, shareholders, and secured and unsecured creditors – and also addresses the issue of fraudulent and reckless trading, as well as the impact of insolvency on employment. This edition also includes a chapter on the principal aspects of corporate secured credit (debentures and securities), including an overview of asset-based security and trusts as a quasi-security device.

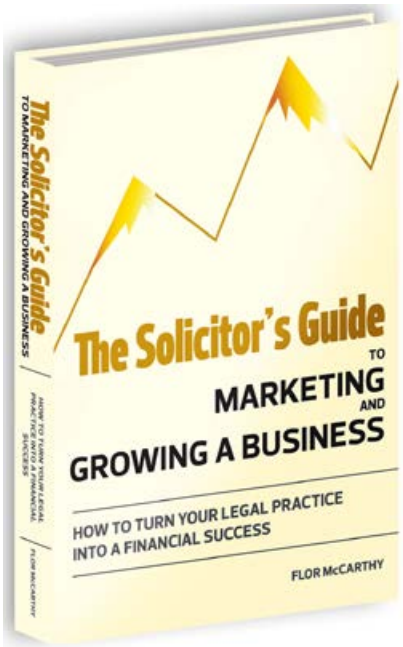
For ease of use and as an avenue for further research, the book provides extensive footnotes – an invaluable resource in itself – plus a detailed index. There are massive tables of cases and legislation and five appendices, and the book helpfully reproduces useful extracts from the *Companies Act 2014*, the *Land and Conveyancing Law Reform Act 2009* and the *Bankruptcy Act 1988*. Furthermore, the book contains succinct summaries of the relevant case law for each applicable area and, importantly, it includes an analysis of various recent decisions of the High Court, as well as the British courts.

The Law of Company Insolvency is therefore an accessible and authoritative source of guidance for anyone practising in this complex area. The law relating to company insolvency has grown and developed at an unprecedented rate in recent years, with many new developments. This book is an indispensable tool for all insolvency practitioners, of all levels of experience. The law is stated as at November 2015.

Caroline Hayes is a solicitor in A&L Goodbody's restructuring and insolvency team.

The Solicitor's Guide to Marketing and Growing a Business

Flor McCarthy. Practice Success (2015), www.thesolicitorsguide.com. ISBN: 978-0-9927-982-15. Price: €32.94 (includes €7.97 p&p).



When I started in practice in the 1980s, the only – and indeed, usual – form of advertising for solicitors was a nameplate outside the office and a box advertisement in the local newspaper announcing one's commencement in practice. How times have changed.

In this book, which the author directs specifically at small to medium-sized practices, the clear emphasis is on the solicitors' practice as a business operating in a world that is changing at an ever-increasing pace. The book itself is well set out and deals with the basics of marketing and advertising, including asking the basic question as to whether one should advertise at all. I think any practitioner would find the information in relation to websites and online advertising to be particularly helpful.

The book having provided general information in relation to marketing one's practice, I found that one of the most interesting parts of the book was the chapter entitled 'Managing distractions'. I found this chapter to be of immense help in managing my time and work more effectively. After all, there is absolutely no point in driving a huge amount of business into your practice if you, yourself, cannot handle it.

In short, this book is an extremely helpful introduction to marketing one's legal practice. Mr McCarthy's knowledge of the Irish market is a huge advantage, and I would certainly recommend it, not only to any practitioner who is dipping their toe into the shark-infested waters of small business marketing, but also to those, such as myself, who have long since been converted to the need to advertise and market our professional practice.

Sean O'Brien is a principal at O'Brien Ronayne Solicitors, Tallaght, Dublin 24.

RICHARD O'REGAN
1958 – 2016

The passing of Richard O'Regan on 7 September 2016 was a shock to all who knew him, and it was greeted with deep sadness by family members, friends, colleagues, and former classmates at Blackhall Place.

Having retired as a garda inspector after 30 years' service to the State, Richard was uniquely placed to combine his previous experience with his new role as a solicitor. He was always on hand to help and guide his fellow classmates when a trainee at Blackhall. Post-qualification, his colleagues and clients knew that Richard always had their best interests at heart, and highly valued his trust and knowledge.

His motivation to qualify as a solicitor later in life meant that he, like his fellow mature students, had to adapt to new teaching methods and blended-learning systems – dispensing with notepads in favour of iPads. His younger colleagues saw him as a friend and confidante on whom they could rely – someone who always kept a close eye on them in an understated and caring manner.

Richard was admired and respected for his dedication to his family – wife Delia, children Maria, Padraic, Micheál and Elaine, and grandad to baby Amelia. Originally from Rathmore, Co Kerry, he and his family settled in Blarney, Co Cork.

He was never happier than when travelling home by train, which also enabled him to prepare for tutorials and revise for exams. Everything was taken with good humour, with the objective to qualify – but his family was his bedrock. It is rare to meet a person who has a positive impact on everyone they meet and who is regarded by all, without exception, as sincere, decent and, above all, a true gentleman. Richard always made time to speak with everyone, was interested in others, inquisitive and engaging. He had broad tastes that included classic cars, Irish music, politics and economics, while his extensive library fed his desire for knowledge and his interest in others.

All of those who had the good fortune and pleasure to meet him, whether in his tutorial group, lectures, or in the canteen over lunch or a cup of tea, spent time with a friend and colleague who put them at ease and gained their trust simply by being himself.

Richard qualified as a solicitor and entered the Roll on 4 April 2016. The legal profession, his colleagues and friends in the Law Society, and in Vincent Toher and Company Solicitors (Washington Street, Cork), have lost a dear friend and colleague who had already contributed immensely to his chosen profession. He has left a legacy for all, based on his core values of honesty, decency and trust.

Our thoughts and prayers are with Delia, Maria, Padraic, Micheál, Elaine and granddaughter Amelia, son-in-law Eoin, Padraic's fiancée Lorna, brothers-in-law, sisters-in-law, extended family, and his wide circle of friends and colleagues.

Ar dheis Dé go raibh a anam dílis.

TC

council report

30 September 2016

Motion: PII regulations

"That this Council approves the Solicitors Acts 1954 to 2011 (Professional Indemnity Insurance) Regulations 2016."

Proposed: Michael Quinlan
Seconded: Richard Hammond

Michael Quinlan explained that the proposed regulations would introduce three levels of cover in the Run-off Fund from 1 December 2017, in respect of (a) firms that were designated as compliant firms by the SPF manager, (b) firms that were designated as non-compliant firms by the SPF manager, and (c) Assigned Risks Pool firms. The SPF manager could change the designation of a compliant firm to a non-compliant firm and vice versa. To ensure fair procedures, an appeals mechanism had been built into the regulations so that the run-off firm could appeal the decision to the SPF management committee.

Richard Hammond noted that the purpose of the regulations was to introduce constructive flexibility for the Run-off Fund and to incentivise compliance. The regulations also catered for both orderly and disorderly closures of firms.

The Council approved the *Solicitors Acts 1954 to 2011 (Professional Indemnity Insurance) Regulations 2016*.

Motion: AML regulations

"That this Council approves the Solicitors (Money Laundering and Terrorist Financing) Regulations 2016."

Proposed: Christopher Callan
Seconded: Martin Crotty

Christopher Callan noted that, under the *Criminal Justice (Money Laundering and Terrorist Financing) Acts*, solicitors had statutory obligations to prevent and detect the commission of money laundering and terrorist financing. In addition, the Law Society was statutorily obliged to monitor solicitors' compliance with their obligations under the AML legislation.

While the proposed regulations did not impose any new obligations on solicitors with regard to their statutory AML obligations, nor confer any new powers on the Law Society, they would bring all relevant legislation into one document specific to solicitors, enhance the understanding by solicitors of their statutory AML obligations, and provide the Law Society with a firm regulatory framework to permit it to monitor solicitors' compliance with their AML obligations.

The Council discussed the increasingly onerous obligations being placed on the profession through AML legislation emanating from the EU, and it was noted that further changes were in prospect following transposition of the *Fourth AML Directive*, to which amendments had already been proposed by the EU Commission. It was noted that training and awareness-raising for solicitors was of increasing importance and, while there was a vast resource of AML-related information on the Society's website, the regulations would assist further in making the regime intelligible for the Society's members and bringing some cohesion and clarification to a complex issue.

The Council approved the *Solicitors (Money-Laundering and Terrorist Financing) Regulations 2016*, as circulated.

Legal Services Regulation Act

Paul Keane noted that a statutory instrument had been signed by the Minister for Justice commencing parts 1 and 2 of the act with effect from 1 October 2016. In addition, the board of the authority had been appointed, and its first meeting was scheduled for 23 October 2016. However, there remained a significant amount of work before the authority would be up and running. The board had to appoint a chief executive officer, identify premises, appoint staff, and become properly established. The disciplinary apparatus would also need to be sequenced, in order that there was no gap between one system and another.

In terms of work being undertaken by the Law Society, he commended the LSRA webpage to the Council, which was becoming a richer resource as time passed. Sub-groups on legal costs and LLPs were working on documentation that was both in compliance with the legislation and appropriate to the client market, and there was an agreed strategy on education and training for the profession.

FATF evaluation of Ireland

Deputy director general Mary Keane briefed the Council on the forthcoming FATF evaluation of Ireland, which would take place from 7-18 November 2016. The FATF assessors would want to meet with representatives of government departments, law enforcement agencies, financial institutions and designated bodies. They would want to meet with the Law Society and also, separately, with at least one solicitors' firm. The purpose of the meetings would be to monitor and report on the effectiveness of the systems in place to prevent money laundering and to counter terrorist financing. The FATF report into Ireland would be published and discussed at a FATF summit in June 2017.

Motor insurance costs

The Council discussed the media and political focus in recent months on motor insurance costs and the efforts by the insurance industry to shift blame for increasing premiums onto lawyers and the legal system. The Oireachtas committee hearings, at which the Society had been represented by senior vice-president Stuart Gilhooly and the director general, were considered, and it was noted that the Competition and Consumer Protection Commission had commenced an investigation into the insurance industry and some of its pronouncements.

In addition, a ministerial working group chaired by Minister Eoghan Murphy was meeting with all relevant parties and was under intense political pressure to do something about the fact that insurance premiums had increased by up to 38%. A new *Book of Quantum* was also due for publication shortly. The Council agreed that it was hoped that the innocent victims of negligence would not become collateral damage in efforts to address the premium increases that were being driven by the insurers' bottom line.

practice notes

CONVEYANCING COMMITTEE

Stamping deed of assurance of derelict/uninhabitable property

A derelict uninhabitable property falls outside the charge to LPT and thus, in most cases, will not have an LPT property ID number, which is required in order to stamp the deed of assurance of such a property at the residential rate of stamp duty.

The Conveyancing Committee wishes to draw the attention of practitioners to the new Revenue procedure for obtaining a property ID number in such cases. The procedure is reproduced here and can also be found in the FAQs on stamp duty on the Revenue website (www.revenue.ie/en/tax/stamp-duty/faqs/filing-stamp-duty-returns.html).

Practitioners should note that the Revenue requirements for an uninhabitable property for LPT purposes are that it is not suitable for use as a dwelling, but that the stamp duty definition is different. A Revenue guide on the distinction, 'Interaction of LPT (Local Property Tax) and stamp duty,' is available in the stamp duty FAQ section of www.revenue.ie/en/tax/stamp-duty/faqs/interaction-stamp-duty-lpt.html.

I AM FILING A STAMP DUTY RETURN ONLINE FOR A DERELICT/UNINHABITABLE HOUSE. WHAT DO I DO IF I HAVE NO (LOCAL PROPERTY TAX) LPT PROPERTY ID NUMBER?

A derelict house falls within the definition of 'residential property' for stamp duty purposes. In order to file the stamp duty return online, the following steps need to be taken.

Step 1: As it is the responsibility of the vendor to provide the purchaser with an LPT property ID, the vendor should contact the LPT Branch in Revenue by telephoning 1890 200 255 (or +353 1 702 3049 if calling from abroad), which is open from 9.00 to 17.00 (Monday to Friday), or emailing lpt@revenue.ie, explain the situation (that is, sale of a derelict house and an LPT property ID number is needed in order to file the stamp duty return online), and request them to create an LPT (Local Property Tax) property ID number for the vendor. LPT Branch will need the vendor's tax reference number and the address of the property being sold and may request supporting documentation to confirm the status of the property.

Step 2: Once the vendor has provided you with the LPT property ID, you should file the stamp duty return online through ROS, inserting the LPT property ID number in the appropriate screen.

The above procedures should also be followed in the case of houses that are not suitable for use as a dwelling ('uninhabitable houses').

More information on LPT is available on www.revenue.ie.

PII COMMITTEE

Professional indemnity insurance renewal

The mandatory professional indemnity insurance (PII) renewal date for all firms is 1 December 2016. This date is not negotiable. All cover under the current indemnity period will expire on 30 November 2016.

Confirmation of cover

All firms must ensure that confirmation of their PII cover is provided to the Society within three working days of 1 December 2016, including those firms with variable renewal dates. Therefore, confirmation of cover in the designated form must be provided to the Society on or before close of business on Tuesday 6 December 2016.

Confirmation of cover should be provided by your broker through the Society's online PII confirmation system. Such confirmation must include your policy number, and confirmation of cover cannot be provided until the policy is actually in place. As your firm has a statutory obligation to ensure such confirmation of cover is provided to the Society on or before Tuesday 6 December 2016, you are responsible for ensuring that your broker provides the Society with confirmation of cover by that date. You should also ensure that your broker has familiarised themselves with the online confirmation system and has the necessary information to confirm cover online (such as their login and password) in advance of 6 December 2016.

It is noted that some firms who have confirmed PII cover to the Society during 2016 have a coverage period that extends past 30 November 2016. Such firms are still required to reconfirm cover for 2016/2017 with the Society by 6 December 2016. Please note that your firm will not be reflected as having PII in place on the Society's 'Find a firm' online search facility until such time as the Society has received the required online confirmation of cover.

Guide to renewal

The guide to renewal for the 2016/2017 indemnity period will be published on the Society's website on 1 November 2016 to assist the profession with renewal. The guide includes information such as tips for renewal, important points to note, and a guide to insurers and brokers. This guide will be updated frequently with new information received by the Society, in particular with regard to what insurers will be in the market in the next indemnity period.

Renewal resources

Renewal resources for the 2016/2017 indemnity period are available to download from the Society website at www.lawsociety.ie/PII and include the common proposal form, PII regulations and minimum terms and conditions, the *Participating Insurers Agreement*, and relevant PII practice notes. The information available is frequently updated as more documentation becomes available.

Disclosure of financial rating

Financial ratings are obtained by insurers following assessment of their financial strength through an independent process by a rating agency. While a financial rating is an indication of the financial strength of an insurer, it does not guarantee an insurer's financial solvency.

The Society changed the title of 'qualified insurer' to 'participating insurer' for the 2013/2014 indemnity period, and has kept this change in place for the 2016/2017 indemnity period, to more accurately reflect and emphasise the Society's limited role regarding insurers in the solicitors' PII market and to dispel the mistaken impression of approval or financial strength that may have been incorrectly inferred from the title 'qualified insurers'.

Participating insurers are required to disclose their financial rating, or absence thereof, to firms when issuing quotations. This requirement was introduced in the 2011/2012 indemnity period and remains in place for the 2016/2017 indemnity period in order to:

- Allow firms to make a more fully informed decision on their choice of insurer,
- Ensure full transparency for the

profession in relation to participating insurers meeting, or not meeting, generally accepted standards of financial strength, and
- Do so in a way that will not restrict firms' choice of insurer.

It should be noted that all participating insurers in the market are permitted to write insurance in this jurisdiction under the supervision of the Central Bank. The Society is not responsible for policing the financial stability of any insurer. The Society does not vet, approve, or regulate insurers.

More in-depth information on financial rating of insurers can be found on the Society's website at www.lawsociety.ie/PII and in the guide to renewal.

Notification of claims

All claims made against solicitors' firms and circumstances that may give rise to such a claim should be notified to the firm's insurer as soon as possible. In particular, **claims made between 1 December 2015 and 30 November 2016 (both dates inclusive) should be notified by the firm to their insurer by 30 November 2016**.

It is proper practice for firms to notify insurers of claims or circumstances during the year as they arise, not at the end of the indemnity period. Notifying all claims and circumstances at the end of the indemnity period is referred to as 'laundry listing' by insurers and is not looked on favourably. Firms should also ensure that their claims and circumstances notifications meet the notification requirements set out in the insurance policy terms and conditions.

The minimum terms and conditions for PII were amended in the 2011 PII regulations, and this change is retained in the minimum terms and conditions for 2016/2017, to permit firms to report claims or circumstances of which they are aware prior to expiry of cover to their insurer within three working days immediately following the end of the coverage period. Therefore, a three-working-day grace period from 30 November 2016 is in place with regard to notification of claims and circumstances to your insurer.

Quotes

Insurers are required to leave quotes to firms open for a period of not less than ten working days. This requirement was introduced in the 2012/2013 indemnity period and remains in place for the 2016/2017 indemnity period.

Amendments for 2016/2017

Amendments have been made to the Run-off Fund under the new regulations, which will come into effect on 1 December 2017, to increase the level of compliance of firms in the Run-off Fund with the Special Purpose Fund Manager with regard to claims and membership of the Run-off Fund.

Under these new provisions, three levels of run-off cover have been introduced, with effect from 1 December 2017, depending on the compliance of run-off firms:
- Compliant run-off firms will have cover in the Run-off Fund with the same minimum terms and conditions as those that exist in the market,
- Non-compliant run-off firms will have reduced cover in the Run-off Fund with the same minimum terms and conditions as those that exist in the market, with the exception that there will be no cover for claims by financial institutions,
- ARP run-off firms will continue to have cover in the Run-off Fund at the same level that exist in the ARP, with aggregate cover and no cover for claims by financial institutions.

Further information on changes to run-off cover provisions can be found on the Society's website at www.lawsociety.ie/PII.

Run-off Fund

The Run-off Fund provides run-off cover for firms ceasing practice:
- That have renewed their PII for the current indemnity period, and
- Subject to meeting eligibility criteria, including that there is no succeeding practice in respect of the firm.

Any firm intending to cease practice after 30 November 2016 is required to renew cover for the 2016/2017 indemnity period.

Any applications to the Run-off Fund for cover must be made directly to the Special Purpose Fund manager, not the Society. Further information on run-off cover and succeeding practices, including the contact details of the Special Purpose Fund manager, can be found on the Society's website at www.lawsociety.ie/PII.

PII helpline

The Society continues to operate the PII Helpline to assist firms in dealing with PII queries. The helpline is available Monday to Friday, 10am to 4pm, to assist firms with PII queries; tel: 01 879 8707, email: piihelpline@lawsociety.ie.

New money laundering and terrorist financing regulations

Under the provisions of the *Criminal Justice (Money Laundering and Terrorist Financing) Acts 2010* and *2013* (the AML legislation), solicitors – as 'designated persons' for the purposes of this legislation – have statutory obligations to adopt policies and procedures to prevent and detect the commission of money laundering and terrorist financing (for example, solicitors must apply client due diligence procedures to their clients in specific circumstances).

The AML legislation also creates a reporting obligation for all designated persons under section 42(1) of the AML legislation. It requires designated persons (such as solicitors) to report to An Garda Síochána and the Revenue Commissioners any knowledge or suspicion they have that another person is engaged in money laundering or terrorist financing. In addition to imposing a legal obligation to make a report when there is a suspicion or actual knowledge, the legislation requires a report to be made when reasonable grounds exist for knowledge or suspicion. Designated persons will not be able to rely on an assertion of ignorance or naivety, where this would not be reasonable to expect of a person with their training and position.

As the 'competent authority', the Law Society is statutorily required under section 63(1) of the AML legislation to "effectively monitor the designated persons for whom it is a competent authority and take measures that are reasonably necessary for the purpose of securing compliance by those designated persons" with their statutory AML obligations.

The Law Society has decided to introduce a statutory instrument in order to assist solicitors in understanding and clarifying their existing obligations as 'designated persons' and to set out how the Society monitors compliance with these obligations.

The SI does not impose any new obligations on solicitors with regard to their statutory AML obligations, nor does it confer any new powers on the Law Society regarding its statutory role as the competent authority for solicitors (in the context of monitoring and securing their compliance with AML obligations).

The Law Society Council has approved the introduction of *the Solicitors (Money Laundering and Terrorist Financing) Regulations 2016* (SI 533 of 2016).

The regulations have an operative date of 1 November 2016.

John Elliot,
Registrar of Solicitors and
Director of Regulation

practice notes

GUIDANCE AND ETHICS COMMITTEE

Ten steps to dealing with colleagues

1) Remember that you are a professional; never make it personal or take it personally. If someone else does, resist the temptation to respond in kind. Rise above it.
2) Always remember that, while you are doing your best to represent your client's interests, you are not your client. The value you bring to the relationship with your client is the ability to view the problem as an objective professional. Do not allow yourself to lose sight of this objectivity.
3) Be reasonable and act with courtesy and integrity; treat others as you would like to be treated. If you wish to be treated with respect, act like someone deserving of respect. You can only control how you act; don't let the behaviour of others dictate how you behave.
4) Give your colleague a heads up and don't deliberately seek to catch someone off-side. For instance, if you've made changes to a document you are negotiating, inform your counterpart and draw their attention to the changes specifically. Don't be sneaky.
5) Don't contact the client of a colleague directly unless the other solicitor refuses to respond to correspondence and, in that case, inform your colleague in advance that you will have to contact their client directly if they continue to fail to respond. If a client moves to another solicitor, it is permissible, on receipt of an authority, to contact the client to seek an explanation of the reason for the termination of the relationship.
6) Use 'without prejudice' for what it is supposed to be used for: as a means of facilitating open and candid negotiation between colleagues in contentious business. Remember that, after an agreement has been concluded, 'without prejudice' communications may be adduced in proof of the agreement.
7) Understand what the solicitor's lien extends to and how it operates. Be aware of the circumstances in which your lien no longer applies and deal with requests for files accordingly. There is no lien attaching to wills; files, deeds or documents held on trust (including ATR); or moneys held as stakeholder. If you discharge the retainer in a litigation matter, your lien may be limited to the return of the file on the outcome of the litigation and therefore of no real value.
8) If the relationship with your client is over, it's over. Just get on with it, while making sure that you get whatever you are entitled to. Deal with file handovers courteously and promptly. Do not try to hold onto something you are not entitled to, and do not overestimate the power of a lien. Bill for your work properly when you do it, and don't depend on your ability to withhold the file as an alternative to good billing and cash-flow management practices.
9) Foster and honour referral arrangements with colleagues. Mutual trust in appropriate referrals is to everyone's benefit: clients obtain the best outcomes, and practitioners can focus on work that they do best. Don't take on work that you are not best placed to handle and (with the client's consent) consider referring it out to a colleague who is in a better position to deal with it. If you accept a referral on the basis, say, that you will not accept instructions in new work from that client without the consent of the referring solicitor for a given period of time, stick by that arrangement. It will be to everyone's benefit over the longer term to have a system of mutual referrals based on trust.
10) Always remember that your colleagues are probably struggling with many of the same problems as you are in their daily practices. When faced with a difficult situation with a colleague, try to take a step back and look at things from the other person's point of view. Try taking the opportunity to meet colleagues outside work from time to time to get to know one another away from the pressures of client business. While the work we do is important, always keep it in perspective – and, if ever in doubt, review Step 1!

CONVEYANCING COMMITTEE

Anglo Irish Bank Corporation 'all premises' security

The Conveyancing Committee has been asked for guidance in relation to a form of 'all premises' security entered into between Anglo Irish Bank Corporation plc (now Irish Bank Resolution Corporation [in Special Liquidation]) (IBRC) and natural persons. The mortgage deed registered in the Registry of Deeds in such cases purports to secure "all lands, hereditaments and premises" vested in the borrower(s), in addition to the specific property referred to in the schedule to the deed. It attempts to create a form of floating charge over all of the natural person's assets, notwithstanding that a floating charge cannot be effectively created over the assets of a natural person (except for chattel mortgages under the *Agricultural Credit Acts*).

The committee has considered the implications where this non-specific form of security appears on a search for a property not specified in the mortgage deed. It is aware of one case where the special liquidator issued a letter confirming that IBRC had no further interest in the mortgage and that all moneys on foot of it had been paid. The committee sought the view of the Property Registration Authority (PRA) as to whether such a letter from the special liquidator was sufficient for a first registration application or whether a formal deed of release was required.

The PRA position is that:

- **It can only register a charge where property is specifically charged/mortgaged, and a floating charge is not a registrable burden until crystallisation has occurred,**
- **As a floating charge cannot be created over the assets of a natural person, such a purported 'floating charge' is not a registrable burden under the title registration system.**

The committee is therefore of the view that, where this non-specific form of security appears on a search for a property not specified in the mortgage deed, an explanation that it "does not affect the property in sale because a floating charge cannot be created over the assets of a natural person" is acceptable.

In respect of a sale by a company, an explanation that "it does not affect the property in sale because the floating charge has not crystallised" (which must be vouched by a letter from the special liquidator) is acceptable.

Solicitors Disciplinary Tribunal

Reports of the outcomes of Solicitors Disciplinary Tribunal inquiries are 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 Daniel J Callanan, former solicitor, formerly practising as Daniel J Callanan, Solicitor, Lios Baun Industrial Estate, Tuam Road, Galway, and in the matter of the *Solicitors Acts 1954-2011* [7048/DT147/15]
Law Society of Ireland (applicant)
Daniel J Callanan (respondent solicitor)

On 20 July 2016, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

1) Failed to comply expeditiously, within a reasonable time, or at all with an undertaking given by him, dated 25 February 2004, to the governor and company of Bank of Ireland on behalf of a named client over property at Salthill, Galway,
2) Failed to reply adequately or at all to the complainant's correspondence and, in particular, letters dated 10 June 2008, 10 June 2009, 1 July 2009, 4 March 2010, 29 June 2010, 17 August 2012 and 26 July 2013,
3) Failed to reply adequately or at all to the Society's correspondence and, in particular, letters dated 10 January 2014, 24 January 2014, 28 February 2014, 30 April 2014, 27 May 2014 and 3 July 2014,
4) Failed to attend a meeting of the Complaints and Client Relations Committee on 30 September 2014, despite being required to do so.

The tribunal ordered that:

1) The respondent solicitor stand censured,
2) The respondent solicitor pay a sum of €2,000 to the compensation fund,
3) The respondent solicitor pay the Society's costs, measured in the sum of €1,000.

In the matter of Donal McCrann, a solicitor practising as principal of Donal McCrann & Co, Solicitors, Main Street, Celbridge, Co Kildare, and in the matter of the *Solicitors Acts 1954-2011* [6705/DT45/15]
Law Society of Ireland (applicant)
Donal McCrann (respondent solicitor)

On 20 July 2016, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in that he had:

1) Failed to comply with part or all of his undertaking dated 24 October 2006 in a timely manner or at all,
2) Failed to comply with directions of the committee, issued on 12 June 2012, 26 July 2012, 20 September 2012 and 28 November 2012, to provide specified detailed information in a timely manner or at all,
3) Failed to respond adequately or at all to some or all of the correspondence sent to him by the complainant.

The tribunal ordered that:

1) The respondent solicitor stand advised and admonished,
2) The respondent solicitor pay a sum of €1,500 to the compensation fund,
3) The respondent solicitor pay a sum of €2,000 plus VAT as a contribution towards the whole of the costs of the Society.

eurlegal

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

CJEU PROVIDES CLARITY ON EXHAUSTION PRINCIPLE

The doctrine of exhaustion of rights is long established in intellectual property law. Under it, an IP owner's right to control copies of their work is 'exhausted' at the point of first sale on its first sale by the owner or with their consent. The rationale behind the principle is to prevent an IP owner's right to control copies of their work from extending too far, as they will have (presumably) already had the opportunity to get reasonable remuneration for the copy at the point of licence/sale.

There was bound to be tension between that core principle and the free movement provisions of EU law, and therefore it is unsurprising that the principle has been the subject of much Court of Justice consideration. Adapted to 'fit' free movement principles, once a copyright work has been put on the market within the European Economic Area, it can be freely resold within the area, trumping the author's right to determine how his or her work should be protected.

The exhaustion principle is found in many national laws and is reflected in article 4(2) of the *Software Directive* (Directive 2009/24/EC), which provides that: "The first sale in the community of a copy of a program by the rightholder or with his consent shall exhaust the distribution right within the community of that copy, with the exception of the right to control further rental of the program or a copy thereof."

Exhaustive process

Prior to the 12 October 2016 case of *Aleksandrs Ranks and Jurijs Vasilevics v Finanšu un ekonomisko noziegumu izmeklešanas prokoratura and Microsoft Corp*, the main authority in this area, as regards software, was the 2012 decision of the CJEU in C-128/11, *UsedSoft GmbH v Oracle International*. That was a battle between a seller of 'second-hand' software (UsedSoft) and Oracle. There, the CJEU held that the transfer to a customer by a copyright holder of a copy of a computer program, along with a user licence agreement, did constitute a 'first sale' within the meaning of article 4(2) and that the rights were thereby exhausted. The decision was regarded as controversial in the software industry, because it relied heavily on the concept of software as equating to a physical product like a book or CD. Perhaps appropriately for a case concerning exhaustion, UsedSoft had a somewhat tortuous litigation journey of over eight years and, ultimately, UsedSoft withdrew from the case after several losses in later rulings in the German courts.

> It was clear that the CJEU was trying to go no further than to close an undesirable loophole, and the case is highly fact-specific

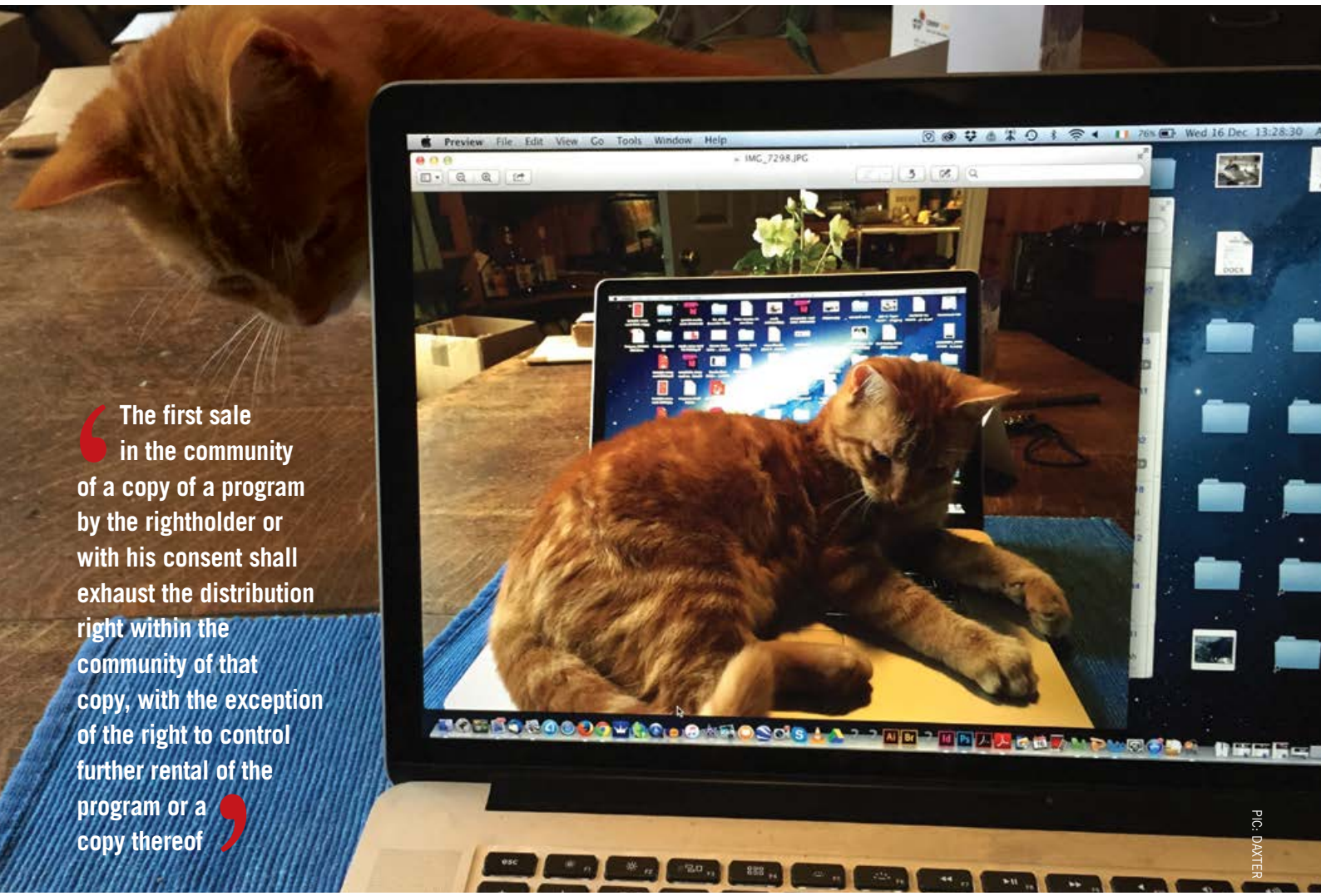
After *UsedSoft*, the position was that selling 'used' software did not infringe the owner's right, provided that the originally downloaded copy (first sale copy) was deleted or rendered unusable. Volume licences for 'used' software could only be sold as a whole, without subdivision, and then only if the first copy was deleted or unusable.

Ranks and files

In *Ranks*, the CJEU had a further opportunity to consider the doctrine of exhaustion in a software context. Mr Ranks and Mr Vasilevics were Latvians charged with the (criminal) resale of software copies. The software involved were Microsoft products, the *Office* suite and *Windows* itself. The number of products involved could not be settled upon with precision, although the CJEU referred to estimates of more than 3,000. This meant a loss of revenue to Microsoft of approximately €265,000. After being found guilty and penalised under Latvian law, they appealed the local decision that also compelled them to pay the court costs, as well as partial compensation to Microsoft. The preliminary ruling to the CJEU arose from the appeal within Latvia.

The Criminal Law Division of the Riga Regional Court referred the following questions to the Court of Justice for a preliminary ruling:

- Under articles 5(1) and 4(2) of the *Software Directive*, may a person who has acquired a computer program with a 'used' licence on a non-original disk, which works and is not used by any other user, rely upon the exhaustion of the right to distribute a copy of that computer program, the first purchaser of which acquired it from the rightholder with the original disk, where that disk has been damaged, if the first purchaser has erased his copy and no longer uses it?
- If the answer to the first question is affirmative, then does a person who may rely upon the



> The first sale in the community of a copy of a program by the rightholder or with his consent shall exhaust the distribution right within the community of that copy, with the exception of the right to control further rental of the program or a copy thereof

PIC: DAXTER

Copycats test the exhaustion principle in practice

exhaustion of the right to distribute a copy of the computer program have the right to re-sell that computer program on a non-original disk to a third person, in accordance with articles 4(2) and article 5(2) of the *Software Directive*?

The CJEU affirmed its previous decision in *UsedSoft*, making an exception concerning back-up copies of the original software. It confirmed that it had already held that "the term 'sale' in that provision, which must be given a broad interpretation, encompasses all forms of marketing of a copy of a computer program characterised by the grant of a right to use that copy, for an unlimited period, in return for payment of a fee designed to enable the copyright holder to obtain a remuneration corresponding to the economic value of that copy".

The court found that it necessarily followed that, under the relevant directive, the holder of the copyright in a computer program who has sold a copy of that program in the EU on a material medium, such as a CD-ROM or a DVD-ROM, accompanied by an unlimited licence for the use of that program, could no longer oppose the resale of that copy by the initial purchaser (licensee) or subsequent purchasers (licensees) of that copy, notwithstanding the existence of contractual terms prohibiting any further transfer.

However, the court acknowledged that the rights of the original rightholder also had to be addressed (particularly in the context of the case itself, which originated in criminal proceedings). It therefore specified that it was for the acquirer of an unlimited licence for the use of a used copy of a computer program who, relying on the rule of exhaustion of the distribution right, downloads a copy of that program onto his computer (from the rightholder's website) to establish, by any available evidence, that he acquired that licence in a lawful manner.

So, while the lawful initial acquirer of a copy of a computer program accompanied by an unlimited user licence can resell that copy and his licence to a new licensee, he may not, however, in the case where the original mate-rial medium of the copy that was initially delivered to him has been damaged, destroyed, or lost, pro-vide his back-up copy of that pro-gram to that new licensee without the permission of the original rightholder.

It was clear that the CJEU was trying to go no further than to close an undesirable loophole, and the case is highly fact-specific. If it had not, the possibility would exist that people might be tempted to re-sell 'used' software on the pretence that they were 'back-up' copies.

Jeanne Kelly is a partner in technology law at Mason Hayes & Curran.

professional notices

RATES

professional notice rates

RATES IN THE PROFESSIONAL NOTICES SECTION ARE AS FOLLOWS:

- **Wills** – €147 (incl VAT at 23%)
- **Title deeds** – €294 per deed (incl VAT at 23%)
- **Employment/miscellaneous** – €147 (incl VAT at 23%)

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ALL NOTICES MUST BE PAID FOR PRIOR TO PUBLICATION. CHEQUES SHOULD BE MADE PAYABLE TO LAW SOCIETY OF IRELAND. Deadline for December 2016 *Gazette*: 14 November. For further information, contact the *Gazette* office on tel: 01 672 4828.

No recruitment advertisements will be published that include references to years of post-qualification experience (PQE). The *Gazette* Editorial Board has taken this decision based on legal advice, which indicates that such references may be in breach of the *Employment Equality Acts 1998* and *2004*.

WILLS

Bleahen, Joseph (otherwise Bleahen Melvin) (deceased), late of Cromagh, Kilconnell, Ballinasloe, Co Galway, who died on 5 July 2016. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Thomas Barry, Thomas Barry & Company, Solicitors, 11 St Stephen's Green, Dublin 2; tel: 01 678 6003, email: tom@thomasbarry.ie

Dempsey, Christina (deceased), late of 10 Larch Grove, Blanchardstown, Dublin 15. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Shona Madden, Seamus Maguire and Company, Solicitors, 10 Main Street, Blanchardstown, Dublin 15; DX 99004 Blanchardstown; tel: 01 821 1288, email: shonamadden@seamusmaguire.ie

Donnelly Catherine (deceased), late of Greenhill (otherwise Green Hills) Passage East, Co Waterford. Would any person having knowledge of the whereabouts of any will made by the above-named deceased, who died on 14 October 1994, please contact T Kiersey & Company, Solicitors, 17 Catherine Street, Co Waterford; tel: 051 874 366, fax: 051 870 390

Keane, Laurence (Lorcan) Patrick (Ó Cathain) (deceased), late of Connolly Hospital, Dublin, and formerly of Porterstown, Clonsilla, Co Dublin, who died on 13 December 2014. Would any person having any knowledge of the whereabouts of any will made by the above-named deceased please contact Thomas K Madden & Co, Solicitors, 1 Camlin View, Longford, Co Longford; tel: 043 334 1192, email: tom@tkmadden.com

Kelly Brian A (deceased), late of 32 St Enda's Park, Rathfarnham Dublin 14, previously of 74 Brighton Road, Rathgar, Dublin 6, who was born on 4 May 1945 and died on 24 August 2016. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Mr Desmond Taylor, rear 36 Upper Churchtown Road, Dublin; D14W9V6; tel: 086 256 5910, 01 298 2892; email: destaylor255@hotmail.com

Kingston, Richard Kenneth (deceased), late of Kilpatrick House, Kilpatrick, Redcross, Co Wicklow, who died on 1 July 2014. Would any person having knowledge of a will made by the above-named deceased or of its whereabouts please contact David Lavelle, Augustus Cullen Law, 7 Wentworth Place, Wicklow, Co Wicklow; tel: 0404 67412, email: david.lavelle@aclsolicitors.ie

McGauran, Desmond (deceased), late of 12a Linn Beag, Rush, Co Dublin, and formerly of 278 Griffith Avenue, Dublin 9, who died on 4 June 2016. Would any person holding or having the knowledge of a will made by the above-named deceased please contact Michael J Kennedy and Company, Solicitors, Parochial House, Baldoyle, Dublin 13; tel: 01 832 0230, email: reception@mjksolicitors.com

Mitchell, Bridget (deceased), late of Ballyglass, Ahascragh, Ballinasloe, Co Galway, who died on 6 April 2015. Would any person having knowledge of a will made by the above-named deceased, or if any firm is holding same, please contact Crowley Millar Solicitors, 2-3 Exchange Place, IFSC, Dublin 1; tel: 01 676 1100, fax: 01 676 1630, email: info@crowleymillar.com

professional notices

Mitchell, Terence Charles (deceased), late of Church Road, Fennor, Urlingford, Co Tipperary, who died on 13 May 2016. Would any person having any knowledge of the whereabouts of any will made by the above-named deceased please contact Poe Kiely Hogan Lanigan, Solicitors, 21 Patrick Street, Co Kilkenny, tel: 056 772 1063, 056 776 5231, email: admin@pkhl.ie

Moroney, Patrick Joseph (deceased), late of 1 Durley Dean Road, Selly Oak, Birmingham B29 6SA, England, who died on 15 March 2014. Would any person having knowledge of the whereabouts of a will made by the above-named deceased please contact David Warren Jones, solicitor, Sycamore House, 23a Sycamore Road, Bournville, Birmingham B30 2AA, England; tel: 0044 121 414 1949, email: davidwarrenjones@btconnect.com

Moroney, Mary Teresa (deceased), late of Fourways, 45 Scotland Hill, Sandhurst, formerly of 1 Durley Dean Road, Selly Oak, Birmingham B29 6SA, England, who died on 4 August 2015. Would any person having knowledge of the whereabouts of a will made by the above-named deceased please contact David Warren Jones, solicitor, Sycamore House, 23a Sycamore Road, Bournville, Birmingham B30 2AA, England; tel: 0044 121 414 1949, email: davidwarrenjones@btconnect.com

Murtagh, Peter (deceased), late of Flat 21, Thorndale Court, Collins Avenue, Dublin 9. Would any person having knowledge of any will made by the above-named deceased, who died on 8 June 2016, please contact Gartlan Winters, Solicitors, 56 Lower Dorset Street, Dublin 1; DX 105004 Dorset Street; tel: 01 855 7434, email: peter@gartlanwinters.ie

O'Sullivan, Thomas (deceased), late of 23 Northbrook Avenue, Ranelagh, Dublin 6 (accountant). Would any person having knowledge of any will made by the above-named deceased, who died in or around 30 August 2016, please contact Dennison Solicitors, Main Street, Abbeyfeale, Co Limerick; tel: 068 31169, fax: 068 31614, email: info@dennison.ie

Ryan, Irene Frances (deceased), late of 15 Castle Grove, Clontarf, Dublin 3, who died on 22 January 2016. Would any person having knowledge of the whereabouts of an original will made by Irene Ryan, on 22 October 1993, please contact Mark McParland, solicitor, 11 Priory Office Park, Stillorgan Road, Blackrock, Co Dublin; tel: 01 668 8588, email: mark@mcparlandsolicitors.ie

Soden, Susan Evelyn (deceased), late of 5 Buttergate Way, Mornington Park, Donacarney, Co Meath. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact MF Newman Solicitors, 22-24 Lower Mount Street, Dublin 2; tel: 01 675 3837

Watson, Evelyn Mary (deceased), late of Cullenbeg, Dunbur Road, Wicklow Town, Co Wicklow, who died on 1 April 2014. Would any person having knowledge of a will made by the above-named deceased, or of its whereabouts, please contact David Lavelle, Augustus Cullen Law, 7 Wentworth Place, Wicklow, Co Wicklow; tel: 0404 67412, email: david.lavelle@aclsolicitors.ie

Whelan, Desmond (deceased), late of 15 Elm Mount Avenue, Beaumont, Dublin 9, who died on 9 September 1991. Would any person having knowledge of a will made by the above-named deceased, or if any firm is holding same, please contact Frances Cunneen, Dermot McNamara & Company, Solicitors, Main Street, Rush, Co Dublin; tel: 01 843 8766, fax: 01 843 8940; email: frances@dermotmcnamara.ie

in gremio legis

Rise of the machines – you must comply

Four Cambridge law students have created a robo-lawyer designed to help the victims of criminal offences, *Legal Cheek* reports.

'LawBot', created by Ludwig Bull, Rebecca Agliolo, Jozef Maruscak and Nadial Abdul, took just six weeks to make. Using 'artificial intelligence mark-up language' to "provide confidential, non-judgemental, free, easy-to-understand legal knowledge", it can currently offer advice in relation to 26 criminal offences, including property offences, sexual offences, and offences against the person.

According to Bull: "LawBot bridges the gap between legal information (which exists aplenty on the web) and legal knowledge. LawBot secures equal access to justice by explaining in simple questionnaires how the law might apply to a specific situation."

Agliolo said: "We don't believe that programs like LawBot will displace lawyers – in fact, we hope it would compel [sic] more people to seek qualified legal advice."

The *Gazette* tried LawBot out, and apparently we've been very, very bad. You can try it too, at www.crimebot.info.

She's certainly got guts

Customs officials at an Austrian airport have stopped a Moroccan passenger carrying two containers of entrails, believed to belong to her late husband, *The Independent* reports.

The woman was travelling through Graz Airport, but was stopped by officials after they observed her behaving suspiciously.

On being questioned, she said she wanted to have tests carried out on the remains in order to investigate her suspicions that her husband had been poisoned. He died during an operation in Morocco.

Austria's finance ministry, which is responsible for all customs issues, confirmed the unusual find.

However, police said they were not investigating, as no laws had been broken.

Walk of shame for 'delinquent' fee-earners

Senior lawyers at London-based giant DLA Piper could now be punished for failing to clock up at least seven-and-a-half-hours of work each day, *The Lawyer* reports.

The firm is to issue 'red cards' to partners who fail to prove they've hit their time quota. The cards could see senior lawyers having "their quarterly profit drawings withheld". Furthermore, partners that repeatedly engage in (what the firm describes as) 'delinquent behaviour' could see their monthly drawings reduced.

And *Legal Cheek* reports that another London-based firm is planning to lock the computers of staff – including partners – who fail to clock up seven hours of work each day.

Howard Kennedy expects its lawyers to chalk up seven hours a day across the working week, and fee-earners must hit at least 5.6 billable hours each day.

The tactic is designed to 'shame' lawyers, who will be forced to have their computer unlocked before they can continue with their work.

You just can't get the staff...

A British law student has allegedly complained to a newspaper that the essay he bought online was not up to snuff, *Legal Cheek* reports.

The anonymous student wrote to *The Guardian's* consumer column: "I decided to buy a legal essay from an online essay-writing service. I paid around £200 for something I was promised would be the standard of a 2:1 degree, but I was sent an appalling essay, which I do not believe could have been written by an English speaker – and someone who appeared not to have a law degree."

Demands for a refund were fruitless, however: "I was offered a revised version ... Even then, the supposedly 'revised' version was the same as the first."

In the spirit of true public service, the letter concluded: "Please help me to protect other students from being caught."

Online academic essay mills are not a new phenomenon, and 'custom written' essays can often evade plagiarism detection software. Essay-writing services and paid-for training-contract-application model answers are widely used by law students in Britain, according to the *Legal Cheek* website, with the challenging nature of the subject and competition for the best graduate jobs fuelling demand.

However, such a public complaint about the quality of the service is a new one on the *Gazette*. If it's real, of course.

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Brightwater Legal

LEGAL ROLES

PRACTICE

Property Senior Associate
€120,000 - €130,000
Top 20 / Dublin
Ref: 907953

Commercial Property Solicitor
€65,000 - €90,000
Top Tier / Dublin
Ref: 908746

Corporate Solicitor
€65,000 - €100,000
Top Tier / Dublin
Ref: 904517

Commercial Solicitor
€60,000 - €70,000
Mid Tier / Limerick
Ref: 906951

Childcare Law Solicitor
€50,000 - €55,000
Specialised Firm / Meath
Ref: 905652

Investment Funds Associate
€70,000 - €100,000
Top Tier - Top Ten / Dublin
Ref: 907535

IP / Data Protection Solicitor
€60,000 - €90,000
Top 10 / Dublin
Ref: 908447

Construction Solicitor
€60,000 - €70,000
Top Ten / Dublin
Ref: 907226

NQ Aviation Banking Solicitor
€60,000 - €65,000
Top Tier / Dublin
Ref: 906030

Medical Negligence Solicitor
Competitive
Top 10 / Galway
Ref: 909448

Featured Jobs

TECHNOLOGY/IP/DP PARTNER
€130,000 - €150,000 / Top 20 / Dublin
Our client, a Top 20 law firm, is growing its technology division by recruiting a partner to help drive and deliver their service offering. As part of a growing team of 4, you will join an existing well supported and reputable service. The job will involve mostly non-contentious work and will advise a broad range of clients within technology, content, outsourcing, e-commerce, data privacy and intellectual property. You will be responsible for mentoring junior solicitors, manage projects and stakeholders.
Ref: 909123

PROPERTY SUPPORT LAWYER
€80,000 - €85,000 / Top Tier / Dublin
The role will involve supporting the lawyers in the property department. The primary responsibilities are in the areas of know-how, L&D and the development of client-focused knowledge. The individual will report to the head of the property department and property partners. You will be responsible for developing the property department's knowledge-base, including drafting and updating precedents, practice and procedure notes, collecting and capturing know-how, keeping lawyers up to date on all relevant developments and preparing regular internal updates.
Ref: 909711

EMPLOYMENT SENIOR ASSOCIATE
Competitive Salary / Top 10 / Cork
Our client, a top ten firm, has a fantastic job opportunity for a senior employment solicitor. The role will involve advising clients on employment law issues covering all aspects of the employment relationship from recruitment and selection to termination of employment, acting on behalf of clients in relation to employment law related issues and working alongside other departments in the firm, advising on employment law issues. The position will involve supervising junior members of the team. Some business development will also be required of the successful candidate.
Ref: 909132

JUNIOR CORPORATE SOLICITOR
€50,000 - €60,000 / Top 10 / Dublin
This role will involve working alongside highly rated legal professionals within a dynamic group. You will be assisting in the provision of legal advice to leading global and domestic clients in local, national and international mergers and acquisitions across industry sectors, as well as assisting in the advice to clients on complex mergers and acquisitions, corporate restructurings, private equity, IPOs and other equity capital markets transactions. The ideal candidate will have strong corporate experience from a leading Irish or UK firm.
Ref: 909742

IN-HOUSE

Head of Legal
€140,000 - €160,000
Insurance Company / Dublin
Ref: 907106

EMEA Head Litigation Specialist
€130,000 - €150,000
Technology / Dublin
Ref: 908559

Commercial Contracts Counsel
€60,000 - €70,000
3rd level institution / Dublin
Ref: 907292

Commercial Contracts Officer
€45,000 / €55,000
3rd level institution / Dublin
Ref: 907079

Featured Jobs

SENIOR LEGAL COUNSEL
€120,000 - €140,000 / Banking/Financial Services / Dublin
Reporting to the head of legal you will be responsible for, but not limited to, capital raising, rights issues and underwriting, shareholder rights and documentation, corporate governance, Irish/UK securities law, EU banking regulation and regulatory capital requirements, litigation and dispute resolution, inquiries and investigations. The ideal candidate will be a qualified solicitor or barrister to practise in Ireland and will have senior level experience in-house or within a law firm. You should also have excellent technical knowledge in some or all of the core areas highlighted above and have a proven track record of providing transactions legal advice.
Ref: 909636

LEGAL COUNSEL
€70,000 - €80,000 / Financial Services Company / Dublin
Our client, a leading financial services company is seeking to recruit a legal counsel to join its team. The successful candidate will be responsible for providing legal advice on both internal contracts and external client contracts and negotiations. Managing all draft agreements and ensuring that all company documentation and fund documentation is correctly drafted, controlled and completed. The ideal candidate will be required to be familiar with the Irish funds regulatory environment and will be required to assist with regulatory queries from staff and clients. You should also have direct funds experience within a fund administrator or funds practice.
Ref: 909556

Should you require further information about any of these roles or any other legal recruitment requirements, please contact our legal consultants in strictest confidence:

Michael Minogue, Team Leader (m.minogue@brightwater.ie)

Deborah Crilly, Partner - Executive (d.crilly@brightwater.ie)

RECRUITMENT CONSULTANT X3 / DUBLIN / €30,000 - €40,000 (OTE €50,000 - €100,000)

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AN ENTREPRENEURIAL SPIRIT: You may come from a variety of backgrounds and have different experiences. What you certainly prefer is the adrenaline, variety and competitive edge that comes from a target driven people business, to a career stuck in front of books and computers.
If you feel you match the above characteristics, we'd love to hear from you. For a confidential discussion, please call David Bloch on 01 662 1000.

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Are you a Trainee Solicitor due to qualify with a commercial law firm in Dublin, Cork, Belfast or London interested in exploring your options on qualification?

If so, contact the Legal Team at HRM and we can assist with any potential move you are considering in the Irish market. The firm and area of law into which you qualify can have a defining impact on your career as a lawyer and as such is one which requires careful consideration.

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We can also provide you with advice around career management, CV preparation, interview guidance and of course salary and benefit structures across the various firms. Our wide-ranging expertise means that we can assist you regardless of your target practice area.

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TALENT MATTERS

CORLYTICS

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Legal Regulatory Analysts

Our Client

Corlytics provides the definitive Regulatory Risk Measurement & Calculation for Regulated Financial Services globally.

Corlytics aids regulated financial firms, regulators and their professional advisers in uncovering, understanding and measuring all forms of regulatory risk globally, within the financial services industry.

Corlytics provides a forensic understanding of the root causes leading to regulatory fines and enforcement consequences through leveraging the latest technology from a unique skill set of legal and banking risk analysts, data scientists and technologists.

The Requirement

Corlytics requires legal analysts to help create metadata from global enforcement notices. Currently covering over 50 of the top financial services regulators globally, we analyse the enforcement notices, judgements and settlement proceedings from each regulator, in addition to understanding their regulatory and enforcement legal framework. Successful candidates will possess the following attributes:

Skills & Competencies

- An interest in global rather than domestic legislation and regulation coupled with the ability to spot trends and patterns over multiple regulators and jurisdictions.
- A particular interest in US law at a Federal and State level and an understanding of the main legal processes.
- An ability to work as part of a multi-disciplined team, strong analytical skills, rigorous application of principles and attention to detail.
- Some experience of or a strong interest in financial services regulation is essential.
- Knowledge of/experience in securities or banking law would be a distinct advantage.

Qualifications

- An Honours Law Degree (at least 2.1). Masters Degree desirable.
- In addition to Law graduates, we would also be interested in hearing from junior solicitors and barristers.

Salary & Benefits

Corlytics offers a competitive package with options in a high growth Fintech company, as well as opportunities for further study and advancement globally.

www.corlytics.net

Want to find out more?

For more information, and/or a discussion in strict confidence, please contact our recruitment consultant, Michael Benson at Benson & Associates, who has been exclusively retained to conduct this assignment.

A: Suite 113, The Capel Building, St. Mary's Abbey, Dublin 7.

T: +353 (0) 1 670 3997 mbenson@benasso.com www.benasso.com

Benson & Associates
Legal Recruitment Specialists