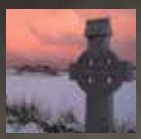

CROSS PURPOSES
The Constitution's provisions on religion are actually quite ambiguous

TYPE CAST
Outsourcing your typing requirements can give you a much-needed edge

KEY PLAYERS
What can landlords do if commercial tenants just hand back the keys?

LAW SOCIETY GAZETTE

€4.00 November 2012

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Is shaken baby syndrome science or myth?

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Dublin 2
Tel: 01 707 5800
Email: solicitorspi@glennons.ie

Kelleher Insurance
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Co. Louth
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Email: solicitors@kellehers.ie

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Only one name...

Matheson

The law firm of choice for international companies and financial institutions doing business in and through Ireland has changed its name.

Formerly Matheson Ormsby Prentice, the firm is now known as Matheson.

For further information, please contact:
Liam Quirke, Managing Partner
E liam.quirke@matheson.com

*FT Innovative Lawyers Report 2012

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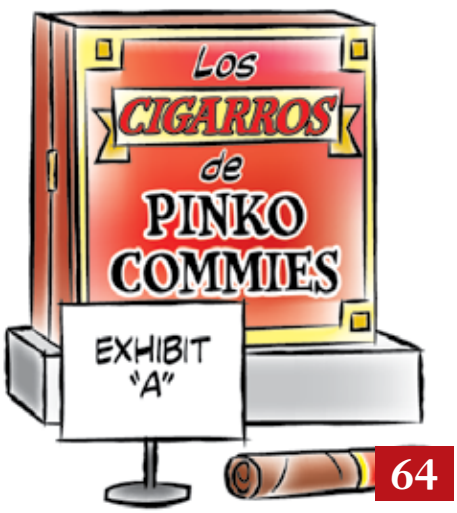

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You can also check out:

- Current news
- Forthcoming events, including the **27th Hugh Fitzpatrick Lecture at the Royal Dublin Society Library, Ballsbridge on 14 November**
- Employment opportunities
- The latest CPD courses

... as well as lots of other useful information

Nationwide

Compiled by Kevin O'Higgins

Kevin O'Higgins has been a Council member of the Law Society since 1998

Trip to Tipp

TIPPERARY

This being the AGM season, new officers are sprouting up in bar associations throughout the country and I know that, in Tipperary, colleagues will be especially well served following the election of an old college pal of mine, John Lynch from Clonmel. Ronan Kennedy is stepping down after a mammoth eight years as honorary secretary – I thought *I* held the record for such longevity in bar association office, but he pips me by a year!

Ar dheis Dé go raibh a anam dílis

CORK

The legal community in Cork and elsewhere is hugely saddened by the death of our colleague and Law Society Council member James O'Sullivan, a partner in Ronan Daly Jermyn. Our deepest sympathy is extended to his family, partners, colleagues and friends.

It's not unusual. Or is it?

MAYO

Claremorris's Charlie Gilmartin is the new president in Mayo, where he succeeds Evan O'Dwyer. Mayo presidents are unusual in that they serve for a two-year term, and this must require much stamina. Evan represented his association with great dignity and effectiveness and his bar association charity initiative for Temple Street Hospital, involving a climb up the Reek, can be said certainly to have brought the association to new heights.

Evan O'Dwyer (then president of the Mayo Solicitors' Bar Association) presents a cheque of nearly €45,000 to Dr David Corcoran (consultant paediatrician, Temple St Children's Hospital) with staff from St Michael's B Ward. The proceeds came from Mayo solicitors who climbed Croagh Patrick last July

Sisters are doing it for themselves

DUBLIN

Well over 100 colleagues turned up for the DSBA AGM. This ensured a lively evening, at which Geraldine Kelly relinquished her chain in favour of the evergreen John Glynn, with Keith Walsh as vice-president, Julie Doyle as honorary secretary, Aaron McKenna as treasurer, and Eamonn Shannon as programmes director. Before Geraldine left office, she hosted a unique lunch occasion for our female colleagues throughout Dublin and beyond. Stinky men were definitively not welcome, but we understand they got on just fine without us!

'Under Pressure'

Under Pressure, a new play by barrister, Rachel Fehily, dramatises a senior counsel's intense consultation with her client, a doctor, accused of the murder of his wife.

The play will be performed as a lunchtime reading at the United Arts Club, 3 Upper Fitzwilliam Street, Dublin 2 at 1pm on Saturday, 1 December 2012. Tickets €15 (lunch included). VIP tickets €30 (includes lunch, glass of wine and mention as a supporter on the programme). The United Arts Club supports this event.

Tickets available at www.eventelephant.com/underpressure. Mob: 087 262 0482, www.dublinarts.com.

In News this month...

Legal fundamentals aired at IBA's Dublin conference

At the IBA/Law Society Finuas conference were *(from l to r)*: Carol Eagar (YDS), Jane McCluskey (SYS), Attracta O'Regan (head of Law Society Finuas Network), Paul Kennedy (SYS), Rebecca Bedford (speaker), Minister Brian Hayes, Michelle Nolan (Law Society Finuas Network), Michael Greene (IBA organising committee), Clifford Healy (YDS), Jon Grouf (conference chairman) and Tracey Donnery (Skillnets Ltd)

'The Fundamentals of International Legal Business Practice', organised by the International Bar Association in association with the Law Society Finuas Network, the Society of Young Solicitors and the Young Dublin Solicitors, took place at Blackhall Place on 29 September.

A broad range of topics, including dispute resolution, international M&A, intellectual property, commercial contracts, technology law and EU competition law were discussed by a panel of international speakers.

The event was launched by Minister Brian Hayes who commented that the focus of the Irish Government over the next four years would be on jobs growth in the international financial services sector.

New moniker for MOPs

Matheson Ormsby Prentice is changing its name to Matheson, with effect from Tuesday 30 October 2012. The firm says that many of its international clients already refer to them as 'Matheson' and that rebranding the firm is therefore "a logical but nonetheless exciting milestone for us".

Two of Matheson's ancestor firms can be traced back to 1825. The firm became known as Matheson Ormsby Prentice from the early 1900s, with the first MOP office opening in 1907 (an anniversary it shares with the founding of the *Law Society Gazette*).

The firm's telephone and fax numbers will remain the same. However, its email addresses will change to the format firstname.lastname@matheson.com. Any emails sent to its current email addresses will be automatically redirected. The website will become www.matheson.com.

Hugh M Fitzpatrick Lecture

Legal practitioners are invited to a lecture to be delivered by Charles Lysaght on 'The Old Munster Circuit and other tales of the Irish Bar'. The lecture will be delivered in The Library, Royal Dublin Society, Merrion Road, Ballsbridge, Dublin 4, at 6pm on Wednesday 14 November. The chairman will be James O' Reilly SC, while the welcoming speech will be made by John Holohan, chairperson of the RDS Speaker Series.

The Royal Dublin Society is offering free parking for the duration of the lecture. Cars should enter at the Merrion Road entrance. Refreshments will be provided afterwards.

RSVP: Hugh M Fitzpatrick, Lectures in Legal Bibliography, 9 Upper Mount Street, Dublin 2. Tel: 01 269 2202; fax: 01 661 9239, email: hmfitzpa@tcd.ie.

New SCs appointed

A total of 13 barristers were appointed senior counsel in ceremonies conducted by the Chief Justice in the Supreme Court on 3 and 4 October 2012.

Those taking silk included: Edward Patrick Roughan Banim, John Henry Boyd Connolly, Damien James Colgan, Alan Martin Doherty, Mark Kevin Harty, Niamh Margaret Hyland, Brian Francis Kennedy, Declan McGrath, Patrick Finbarr O'Reilly, Martin O'Rourke QC, Seán Ó hUallachain, Teresa Mary Pilkington and Ciaran Oisín Ramsay.

An AGM with a difference

The AGM of the Irish Legal History Society (ILHS) will be held in the museum, Glasnevin Cemetery, on Friday 30 November 2012 at 5.30pm, following which Prof Norma Dawson will deliver an address entitled: 'The Ulster Plantation Case 1892-'98 – the end of the adventure?'

The meeting will be preceded by a guided tour of the graves of former members of the legal profession, assembling at the museum building at 3pm.

The tour will conclude before dusk with a visit to the O'Connell mausoleum. It promises to be an interesting afternoon, as aspects of the rich tapestry of Irish legal heritage are uncovered.

Further details on the award-winning Glasnevin Cemetery and museum are available at www.glasnevinmuseum.ie.

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Legal Practice Irish project takes top European language award

The Law Society's Legal Practice Irish project has been awarded the European Language Label 2012.

On 5 October, staff from the Society's Education Centre received the award from the European Commission and Ireland's Department of Education, through Léargas.

In presenting the European Language Label, Léargas sought evidence of new initiatives in the teaching and learning of languages, as well as the use of new techniques. The visiting jury's award criteria investigated evidence of innovation, creativity, originality, comprehensiveness, motivation of learners and how these could be transferred to other projects.

The Society's Irish project in legal practice began back in 2008 as part of the Law Society's response to the requirements of section 40 of the *Solicitors Act 1954* (as amended in the *Legal Practitioners (Irish Language) Act 2008*), which replaced the previous 'First Irish/Secon]d Irish' examinations.

All trainee solicitors are now acquiring the skills to deal with clients who wish to avail of legal services in our first language. Trainees can greet a client *as Gaeilge*, use legal terminology and refer potential clients to solicitors who practise *trí Ghaeilge*. Trainees and qualified solicitors who pass the ALPI course are entered onto *Clár na nGaeilge (An Dlí-Chumann)*.

Personal insolvency – the role of practitioners

The Law Society has made a comprehensive submission on the licensing and regulation of personal insolvency practitioners under the *Personal Insolvency Bill*. The Society has argued that:

1) Solicitors should be entitled to be personal insolvency practitioners,
2) Solicitors should be equally preferred to other professions in this area,
3) The Law Society should be the licensing and regulatory authority for solicitor personal insolvency practitioners, and
4) The Society can design and deliver suitable education and training for solicitor personal insolvency practitioners.

The submission is available on the Society's website in the policy documents page of the members' area.

Law Society President Donald Binchy said: "It is the view of the Society that solicitors are ideally placed to take on the role of personal insolvency practitioners, due to the depth of knowledge and experience of the profession in this area."

James O'Sullivan, Council member, RIP

The Law Society was saddened to learn of the sudden passing of one of its Council members, James O'Sullivan, on 17 October 2012.

James was a dedicated member of Council for many years, was current vice-chairman of the Complaints and Client Relations Committee, a member of the Finuas Network Committee and the Skillnet Committee, and was the Law Society's nominee on the Property Services Regulatory Authority's Interim Appeal Board. In the past, he served as chairman of the Education Committee and sat on many other Society committees, ably and diligently representing the interests of members.

Law Society President Donald Binchy said: "I and all of the Council were shocked and greatly saddened to hear of the untimely death of James. Ever since he came onto the Council for the first time in the year 2002, James was a very significant contributor to the business of the Council and any committees with which he was involved – most especially the Education Committee, which he chaired in the past. James was also very good company and very well liked by his colleagues and he will be greatly missed by us all, both on a personal and professional level. On behalf of the Law Society, I extend my sincerest condolences to his partner Catherine, his mother and brothers and sisters."

In addition to his Society responsibilities, James was a past-president of the Southern Law Association (SLA) and served on its council for many years. SLA President Kieran Moran expressed his shock and profound sadness at the passing of "our esteemed friend and colleague".

"James was always a great friend to the Southern Law Association and worked tirelessly on its behalf at Law Society level," he said. "He will be greatly missed by all his friends and colleagues in the SLA. We extend our heartfelt sympathies to his partner, family, friends, and his partners and colleagues at Ronan Daly Jermyn."

Ar dheis Dé go raibh a anam dílis.

Seminar analyses the Children's Rights Referendum

Minister for Children, Frances Fitzgerald, was the keynote speaker at a seminar at Blackhall Place on 24 October 2012. Titled 'Cherishing all children equally – the constitutional referendum on the rights of the child', the event was organised by the Society's Family Law Committee in collaboration with Law Society Professional Training.

The aim of the seminar was to provide an objective and informed analysis of the forthcoming referendum on the rights of the child and its potential impact for children into the future. The minister addressed all four provisions of the referendum, as follows:

1) Recognition of natural and imprescriptible rights of all children,
2) State intervention where there is exceptional failure by parents and the safety/welfare of the children are affected,
3) Adoption in exceptional circumstances, and
4) That the best interests and views of children are taken into account in family law proceedings.

At the seminar on the Rights of the Child were *(l to r)*: Muriel Walls (McCann FitzGerald), Carol Anne Coolican (chairman, Family Law Committee), the Minister for Children and Youth Affairs, Frances Fitzgerald, Vice-President of the Law Society James McCourt, Dr Geoffrey Shannon (Special Rapporteur on Child Protection), Sinead Kearney (Family Law Committee) and Michelle Nolan (Law Society Professional Training)

Speaking at the event, Carol Anne Coolican, chair of the Family Law Committee said it was an historic development and had the potential to make a real and positive difference to the lives of children in Ireland. It represented the chance for a new beginning for the children who had been let down by the system in the past, she said.

Article 42A.2.2 allows for the adoption of any child where there has been a failure of parental duty for such a period as prescribed by law, and where the best interests of the child so require. Dr Geoffrey Shannon, special rapporteur on child protection, said: "This amendment is asking the people to give children a 'second chance' to experience stability and security within a caring and loving family. There are hundreds of children who are currently caught in a twilight zone between a family that cannot fully care for them and a family that cannot fully adopt them."

The committee welcomed the minister's commitment to deliver the resources necessary to fully implement the sentiments expressed in the referendum proposal – and to review the necessary legislation to encompass the views and best interests of all children.

Law Society announces finance facility 2012/13 for members

The Law Society is pleased to advise that it has selected Bank of Ireland as the exclusive provider of the Law Society's finance facility for members who wish to apply for funding for payment of preliminary tax, pension contributions, professional indemnity insurance and practising certificate(s).

Bank of Ireland's short-term business loan will enable members or their firms to spread the cost of any large annual payment(s) over a term of up to 12 months, thereby improving business cash flow.

RATES*
Secured lending: 5.74%
Unsecured lending: 6.74%
Repayments vary depending on amount borrowed, for example:**
***Repayment based on unsecured lending rate of 6.74%.**

To apply for a business loan today, please complete Bank of Ireland's application form, which is available on the Bank of Ireland website (www.bankofireland.com/business/loans) or in your local branch. The bank's website also has a wide range of supports to help you in completing the application form, including a useful cash-flow planning tool to help you forecast your cash position for the next 12 months. Up-to-date financial information will be required to complete a lending application. As with all borrowing, normal lending criteria, terms and conditions apply.

Alternatively, to discuss your financial needs in general, call Bank of Ireland's credit line on 1890 354 454 to arrange an appointment, or call in to your branch and meet your local business team.

Bank of Ireland is one option available to members. However, each member should shop around to obtain the best finance available for his/her own individual circumstances. Any member who would like to obtain independent financial guidance on alternatives can contact Liz McGrath, financial adviser, on 087 131 6906.

Terms and conditions apply. Bank of Ireland is regulated by the Central Bank of Ireland.

Please note that the Law Society of Ireland is not an agent, broker or financial institution and cannot accept any responsibility whatsoever for any financial decisions made on foot of the information provided above.

LOAN AMOUNT	INTEREST RATE	TERM IN MONTHS	MONTHLY REPAYMENTS	TOTAL COST OF CREDIT
€5,000	6.74%	12	€431.95	€183.40
€10,000	6.74%	12	€863.90	€366.80
€15,000	6.74%	12	€1,295.84	€550.08
€20,000	6.74%	12	€1,727.79	€733.48

Variable rates quoted are correct as at 1/10/2012 and are subject to change. The rates apply to loans of up to €300,000 and 5.74% applies where tangible security has been provided to secure the facility. The level of security required and rate applicable will be determined by the amount, purpose and term of facility, in conjunction with the nature and value of the security being offered. Lending criteria, terms and conditions apply.

Finding a mediator – made easy

At the 'Find a mediator' launch were *(from l to r)*: Ken Murphy (director general), senior vice-president James McCourt, Mr Justice Peter Kelly and Larry Fenelon (vice-chairman of the Arbitration and Mediation Committee)

The Society's new online search facility 'Find a mediator' was launched by Mr Justice Peter Kelly at Blackhall Place on 8 October 2012.

Opening the event, senior vice-president James McCourt said that the Law Society welcomed this timely initiative, particularly as members awaited the imminent publication of the *Mediation Bill*. "The Society is continuously promoting all forms of dispute resolution," he said. "We recognise that everybody is looking for a speedy and cost-efficient way to resolve disputes. This search engine will enable and facilitate a quick search for quality mediators."

The search engine has been designed with simplicity in mind. Mediators can be found with a few clicks of the mouse, and there's no cost for searching. Once a suitable mediator has been found, he or she can be contacted directly to discuss availability. In addition, mediators with specialist knowledge and appropriate degrees of expertise are available for selection.

Finding a mediator couldn't be easier. On the Law Society's homepage, visitors should click on the 'find a mediator' icon, when they will be directed to the 'search for a mediator' page. Mediators can be found by surname, first name, the counties they practise in, areas of speciality and mediation qualifications.

In order to select multiple options from the lists provided, hold down the 'ctrl' key while clicking on the selections required. Clicking 'search' will bring up a list of mediators within the parameters specified. More information on the mediator is available by clicking on 'show details'.

Society members can update their member profiles if they wish to add mediation details. Simply go to the homepage at www.lawsociety.ie and log in using your roll number and password. Once logged in, members can click on their name (underlined and in bold text at the top right-hand corner of the page).

On the page 'account dashboard' (in the left-hand column), members have the option of clicking a box to register as a mediator and upload their mediator details.

Members' email addresses, telephone numbers, addresses and year of qualification are pre-populated. All that's required is to select the counties in which you practise, the areas of mediation, and your mediation qualifications before clicking the 'update registration button'. Selecting multiple options is possible from the lists provided – again, holding down the 'ctrl' key while selecting other items on the list.

Once the entry is completed, click 'update registration'. The message 'your mediator details were changed successfully' will appear, indicating that you have registered as a mediator. Of course, registration can be cancelled at any time. Once registration is completed, this information appears instantly on the mediator search.

For further information on this service, contact Colleen Farrell (secretary to the Arbitration and Mediation Committee) at c.farrell@lawsociety.ie.

REPRESENTATION

NEWS FROM THE LAW SOCIETY'S COMMITTEES AND TASK FORCES

Practical issues for ROS and CAT

PROBATE, ADMINISTRATION AND TRUSTS COMMITTEE

In advance of the 31 October pay-and-file deadline for CAT (15 November for online pay and file), the Probate, Administration and Trusts Committee is in ongoing discussions with the Revenue Commissioners regarding practitioners' queries to date in relation to ROS as it applies to CAT. The committee welcomes feedback from practitioners on the CAT ROS process this autumn, so as to ensure that all practical issues arising can be raised with Revenue.

Practitioners experiencing technical issues should continue to refer to Revenue Technical Services as per the guidelines on www.revenue.ie/en/practitioner/index.html.

Updated client information leaflet available

PROBATE, ADMINISTRATION AND TRUSTS COMMITTEE

The Probate, Administration and Trusts Committee has reviewed the administration of estates client information leaflet as part of their ongoing review of material of assistance to solicitors, and the updated leaflet is available for download at from the members' area at www.lawsociety.ie/Pages/Committees/Probate-Administration-and-Trusts/Resources-Probate/.

Solicitors can insert their contact details and/or firm logo on same, prior to printing and providing to clients.

POETRY AND THE DEFENCE OF HUMAN DIGNITY

The world's Bar Leaders attending the IBA Annual Conference in Dublin enjoyed a very special audience with Nobel Prize-winning poet Seamus Heaney, followed by a dinner at Blackhall Place. Mark McDermott reports

Mark McDermott is editor of the Law Society Gazette

Lawyers from across the globe travelled in their thousands to Dublin for the International Bar Association's (IBA) annual conference, held from 30 September to 5 October 2012. In all, 5,200 lawyers attended the IBA event in Ireland, which was launched by Taoiseach Enda Kenny and described as "the Olympics for lawyers".

The last time this particular IBA event visited these shores was in 1968. This time around, legal practitioners were accompanied by 1,500 partners, exhibitors and support staff – representing the largest gathering of bar association members and international lawyers ever. During the week, more than 200 sessions, lectures and other events took place, in addition to more than 1,500 networking meetings and receptions hosted by Irish and overseas law firms.

"What good is poetry in a world of suffering and injustice? Can it come to the aid of the human when the human is assailed by the inhuman?"

Undoubtedly, the highlight of the week proved to be the Bar Leaders' dinner which followed an audience with Seamus Heaney. He delivered a specially prepared paper for the event titled 'The web and the world' on 2 October. The Bar Leaders represent millions of lawyers across the world, and they came from Europe, North America, South America, Australia and New Zealand, Asia, the Middle East and Africa. Special guest on the night was IBA President Akira Kawamura from Japan, accompanied by international bar and law society presidents from around the world.

Welcoming the prestigious guests, Law Society President Donald Binchy thanked the IBA for the support it had shown for Irish lawyers when it, along with the CCBE and the American Bar Association, had despatched their most senior personnel to Ireland last December to speak out about the need to protect the independence of the Irish legal profession and the judiciary from the measures proposed by the *Legal Services Regulation Bill 2011*.

The Law Society's Ken Murphy spoke about the "absolutely unique" event that was the IBA's annual conference in Ireland and added that the Law Society was honoured by the presence of so many Bar Leaders.

Nobel Laureate, Seamus Heaney

Dr Hans-Juergen Hellwig (IBA council member), Brendan Twomey (Council member, Law Society of Ireland), Marcella Prunbauer (president, CCBE) and Geraldine Clarke (past-president, Law Society of Ireland)

IBA President Akira Kawamura admires President Donald Binchy's chain of office

Frode Elgesem, Merete Smith (secretary general, Norwegian Bar Association), Anne Ramberg (secretary general, Swedish Bar Association) and Ken Murphy (director general, Law Society of Ireland)

In his introductory remarks about the poet Seamus Heaney – one of Ireland's four Nobel Laureates in Literature, which also include WB Yeats, George Bernard Shaw and Samuel Beckett – Murphy quoted the words of the Nobel Academy when they awarded the prize to Seamus Heaney "for works of lyrical beauty and ethical depth which exalt everyday miracles and the living past". He also cited the BBC as the authority for a report that books by Seamus Heaney made up two out every three sales of books by living poets in Britain – a phenomenal level of popularity.

Heaney's address, 'The web and the world' proved to be less about modern technology and its impact on communications, and more about the "worldwide web of principles", where the role of the poet interweaves with that of the lawyer when defending human rights and the cause of justice. The 1995 Nobel Laureate in Literature took as the foil for his subject a line from the WH Auden poem, *In Memory of WB Yeats*. Here, Auden states: "For poetry makes nothing happen."

> ***"I want to affirm the importance of imaginative work done by individual creative thinkers. How influential and beneficent they have been in the formation of values and human consciousness"***

Describing the line as "perhaps too famous", Heaney set about sharpening his pen before striking his mark: "Implicit in the whole poem is the question of art's ability to face, or perhaps, outface atrocity. Auden is being haunted here by the perennial question: 'What good is poetry in a world of suffering and injustice?' Can it come to the aid of the human when the human is assailed by the inhuman? Or, to put it another way, is human utterance effective in the cause of human rights and justice, and if so, just how effective is it in that cause?"

Heaney appeared to challenge the effectiveness of poetry in defending the dignity of mankind, by comparing and contrasting it with the apparent efficacy of the law: "One human utterance that was effective in that cause was the United Nation's *Universal Declaration of Human Rights*, issued over 60 years ago. In ratifying the principles in the declaration, the governments of the world gave epoch-making sanction to the human need for fairness and natural justice and, in doing so, they strengthened the moral standing of international law.

"Even if the articles of the declaration are not legally binding, and even if they are cruelly forborne every day, there is an immense potency about the cogent, simple language in which the articles are framed," he stated. "The 30 articles, I would say, constitute a worldwide web made up of 30 measures, each one being one of the articles of the declaration, especially the all-encompassing first article: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.'

"On different occasions, I've heard Mary Robinson, our former President and former commissioner for human rights at the UN, say that the important word here is 'dignity' (coming from *dignus* – maybe 'worth' or 'worthy'). So, 'dignity', which makes the individual worthy of respect. 'Dignity', which is the basis of his or her self-respect and inner freedom at a personal level; on the basis of his or her right to just treatment and democratic representation at a public, political level.

"And behind the primary words and sentiments of that first article, you can hear echoes of many of the great foundational texts of western civilisation.

Marie Heaney and Robert Brun QC (president, Canadian Bar Association)

Yvonne Chapman, Peter D Maynard (PPID chairman, IBA) and Patricia Nolan

Dr Hans-Juergen Hellwig (IBA council member for Germany and past-president of the CCBE)

Mr Justice Michael Kirby (retired Justice of the High Court of Australia)

Catherine Gale (president, Law Council of Australia)

John F Buckley (former treasurer of the IBA) and Ambrose Lam (vice-president, Law Society of Hong Kong)

Sophocles' paean to the wonders of man in *Antigone*, for example, in the famous line when the chorus talks about the human creature. The human creature who has mastered thinking, roofed his house against hail and rain, and worked out laws for living together."

The fight against tyranny

"But equally and more immediately," he added, "there is to be heard in the articles of the UN declaration echoes of the *New Testament* and, in particular, Christ's sermon on the mount; just as there are resonances throughout also to the pronouncements of the American *Declaration of Independence*, and the French *Declaration of the Rights of Man*.

"These documents did, undoubtedly, lay the foundation for the moral consensus," he said, "and they articulate the basic rights which are appealed to by those who hunger and thirst after justice. They provide the strong fibre from which a worldwide web of principles is born. Principles and values woven over the centuries, long before the electronic web could even have been imagined.

"And it is, of course, widely acknowledged how vital a part the digital revolution has played – the electronic communications. How vital they have been in the last years in terms of transmitting news, transmitting information, transmitting protest, transmitting conviction.

"Yet, central to this development in the fight against tyranny, it is not the web that I want to talk about," he said. "I want to affirm the importance of imaginative work done by individual creative thinkers. How influential and beneficent they have been in the formation of values and human consciousness."

In delivering his robust defence of the role of the poet, Heaney quoted a litany of famous poets and writers from the Irish, Russian, Polish, Hungarian, Czech, Romanian and Swedish traditions who had kept alive "conscience and the spirit of freedom, not only within the individual's psyche but also within the collective mind of nations and people. Writers, too, are weavers of the web", he said.

"But where the private man is a poet, and the private act that he values is writing a poem, then a crisis in society becomes a crisis and literary problem too. Is the role of the poet a defensible one in such a time?"

The spirit of freedom

Mr Heaney, suffering occasionally from hoarseness, had cause to take a lengthy draught from a glass of water during his presentation, after which, again quoting Auden from the poem *September 1, 1939*, he joked: "All I have is a voice" – which won laughter and applause from his rapt audience.

This poem, the Nobel Laureate pointed out, was written after the Nazis invaded Poland, on the day that Britain declared war on the Reich. "Its slight note of defensiveness – 'All I have is a voice' – betrays anxiety about the adequacy of poetry in that dark time. An anxiety that all poets experience at moments of great national crisis or when faced with the spectacle of great injustice."

One became mindful of the present economic hardships being faced in Ireland and around the world, as well as the tragedy of wars in Syria and the ongoing threat of war in other parts of the Middle East and across North Africa.

Heaney spoke about Auden's friend, the poet Stephen Spender, who, in the 1930s, wrote: "The pressure of public life upon the private,

Marilyn Rivkin, Mr Justice Nicholas Kearns (President of the High Court), Ken Murphy (director general, Law Society of Ireland), David Rivkin (secretary general, IBA) and Eleanor Kearns

Malgorzata Kozuch (vice-president, Bar Council of Poland) and James MacGuill (past-president, Law Society of Ireland)

David Nolan SC (chairman, Bar Council of Ireland), Laurel Bellows (president, American Bar Association) and Mr Justice Garrett Sheehan (High Court, Ireland)

IBA President Akira Kawamura meets Nobel Laureate Seamus Heaney with Donald Binchy (president, Law Society of Ireland)

the sense of immediate history as an aggressor against private man becomes evident and prevalent in times of crisis." And quoting from Samuel Hynes's critical essay on Spender, he added: "External events, if they are dire enough – a war or the collapse of a society – challenge the value of private acts and put the personal life to the test."

Heaney then interjected: "But where the private man is a poet, and the private act that he values is writing a poem, then a crisis in society becomes a crisis and literary problem too. Is the role of the poet a defensible one in such a time?" he enquired. "And, if so, what sort of poem should he write?"

Quoting the poet and Nobel Laureate Czeslaw Milosz, he answered the question as follows: "What is poetry if it does not save nations or people? A connivance with official lies; the song of drunkards whose throats are about to be cut.

"The challenge here is delivered first and foremost to the poet himself and is all the more sombre because it realises an awareness of poetry's frailty," Heaney explained.

The Hungarian poet, Miklós Radnóti, who died in the Holocaust, used the voice of the biblical prophet Naum in his *Eighth Eclogue* to talk to his people at the moment of greatest terror. "It's a majestic voice," said Heaney, "and one that displays by its sentiments – but also by its language and imagery. The staff, for example, is an image of being upright and supported physically, but establishes a refusal to let human dignity be abased, and it implies the need for human solidarity to be maintained.

"The poem begins a category of writing that has gained painful and necessary prominence in the 20th century and which is now generally known as the 'literature of witness' – a genre which admits those works I mentioned earlier: *The Ballad of Reading Gaol*, First World War poetry, Solzhenitsyn's *One Day in the Life of Ivan Denisovich*, *Dr Zhivago* etc, and everybody can name their own.

"All of these were written to protest and protect justice and rights. Nevertheless, when their theme is the survival of the individual spirit and the dignity of the individual human being, they still address themselves to matters of public concern; to the *res publica*; to the cruelty of regimes and the oppression of nations and peoples; and their authors would agree to a greater or lesser extent with the attitude implicit in those words of Milosz: 'What is poetry that does not save nations or people?'"

IBA CONFERENCE HOST COMMITTEE – DUBLIN 2012

Chair: **Michael Greene (A&L Goodbody).**
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Rare privilege

Seamus Heaney had much more to say about poetry, human dignity and the rights of man – all of it inspiring and thought-provoking. As director general Ken Murphy said in his closing remarks to the audience: "This has been a rare privilege."

Two members of the enthralled audience were in full agreement with his sentiments. Richard Keen, chairman of the Faculty of Advocates of Scotland, remarked to Ken Murphy afterwards: "In any other country, the guest speaker would have been some clapped-out politician, but you have given us a genius!"

Perhaps Dr Hans-Jurgen Hellwig summed it up best. The head of the German Bar's delegation and a former president of the CCBE who has been attending IBA events for decades, commented: "Of all the events I have attended at IBA conferences, this was the high watermark."

Jan Loorbach (president, Netherlands Bar) and Jonathan Temm (President of New Zealand Law Society)

Margery Nicoll (vice-chair, Bar Issues Commission) and Catherine Gale (president, Law Council of Australia)

Michael Holcroft (president, Law Institute of Victoria) and his wife Terre

Chief Justice Susan Denham and Charles Plant (chairman, Solicitors Regulatory Authority)

William T Robinson (past president, American Bar Association) and Jan Loorbach (president, Netherlands Bar)

COURT'S JURISPRUDENCE ON SEXUAL ORIENTATION EVOLVES

For the first time, the European Court of Human Rights has upheld a complaint related to sexual orientation under article 3 of the ECHR. Sarah McDonald examines the judgment

Sarah McDonald is the Law Society's human rights executive

On 9 October 2012, the European Court of Human Rights published its Chamber judgment in the case of *X v Turkey* (application no 24626/09). The court unanimously held that there had been a violation of article 3 (prohibition of inhuman or degrading treatment) of the *European Convention on Human Rights* and, by six votes to one, that there had been a violation of article 14 (prohibition of discrimination) in conjunction with article 3. This judgment is particularly important, because it is the first time in the history of the court's jurisprudence that it has upheld a complaint related to sexual orientation under article 3 of the *European Convention on Human Rights*. Commentators are viewing the judgment as a critical development in the evolvement of the court's jurisprudence on sexual orientation.

The case concerned a homosexual prisoner who, after complaining about acts of bullying and intimidation by his fellow inmates, was placed in solitary confinement for over eight months.

The court found that these detention conditions had caused the applicant both mental and physical suffering, together with a feeling that he had been stripped of his dignity, and therefore took the view that this represented 'inhuman or degrading treatment' in breach of article 3 of the convention. The court further found that the applicant had not been placed in solitary confinement for his protection, but rather on the basis of his sexual orientation. Therefore, the court concluded that there had been a breach of article 14 on the grounds of discriminatory treatment.

Under articles 43 and 44 of the convention, this Chamber judgment is not final. During the three-month period following the delivery of the judgment, any party may request that the case be referred to the grand Chamber of the court. If such a request is made, a panel of five judges will consider whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver the final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

> **"The applicant had not been placed in solitary confinement for his protection, but rather on the basis of his sexual orientation"**

Midnight express

The applicant is a Turkish national, born in 1989, and lives in Izmir, Turkey. He is currently serving prison sentences for a range of offences related to fraud.

In 2008, the applicant was remanded in pre-trial detention in the Buca remand prison (Izmir). The applicant was originally placed in a shared cell with heterosexual prisoners. Following intimidation and bullying by his fellow inmates, he asked the prison administration, for safety reasons, to transfer him to a shared cell with homosexual prisoners. He was immediately placed in an individual cell.

According to the applicant, the cell in which he was placed was seven square metres in size, furnished with a bed and a toilet but no washbasin, very poorly lit and very dirty. He was segregated and deprived of any contact with other inmates and of participation in social activity. He had no physical exercise and was only allowed out of the cell to see his lawyer or attend hearings. The applicant complained that the cell in which he was placed was used for violent inmates who needed solitary confinement and requested that he be moved to a standard cell and treated in an equal way to all other prisoners.

After a number of unsuccessful requests made to the public prosecutor's office and the post-sentencing judge, where Mr X argued that his solitary confinement had resulted in a deterioration of his mental and physical health, the applicant was ultimately transferred to a psychiatric hospital for his mental state to be assessed. He was there diagnosed as being depressive and remained for about one month in hospital before returning to prison.

On returning to prison, another homosexual inmate was placed in the same cell as the applicant for about three months. During that period, both the applicant and the fellow inmate filed a complaint against a warder for homophobic conduct, including insults and physical attacks. The applicant was subsequently deprived again of any contact with other inmates, and he withdrew his complaint.

This situation ended in February 2010, when the applicant was transferred to the remand prison of Eskisehir, where he was placed with three other inmates in a standard cell where he enjoyed the rights usually granted to convicted prisoners.

Judgment day

In relation to article 3, the court observed that the applicant had stayed in solitary confinement for more than eight months, in a cell that had

a living space not exceeding half of the surface area. The cell had been fitted with a bed and toilet but had no washbasin. The court further noted that the authorities did not dispute the fact that it was poorly lit, very dirty and visited by rats. It also observed that the cell was intended for inmates who had been placed in solitary confinement for disciplinary reasons. While in that cell, the court made reference to the fact that the applicant had no contact with other prisoners, engaged in no social activity, and had no access to outdoor exercise. The court observed that certain aspects of those conditions were stricter than those applied to prisoners serving life sentences in Turkey.

The court acknowledged that the prison authorities had been concerned about the risk of Mr X being harmed. However, even if such safety measures had been necessary, it held that it was not sufficient to justify a total exclusion from the shared areas of the prison.

In noting that his complaints had been unsuccessful, the court found that the applicant had been deprived of any domestic remedy in respect of his complaint concerning the conditions of his detention, and furthermore that he had not been held in conditions that were appropriate or respectful to his dignity. The conditions the applicant had to endure during his detention in solitary confinement had caused him both physical and mental suffering. It had also caused a strong feeling of being stripped of his dignity. Those conditions, together with the lack of an effective remedy, constituted 'inhuman or degrading treatment' and therefore there was a breach of the applicant's rights under article 3.

In relation to article 14 taken together with article 3, the court observed that, although the prison authorities had legitimate concerns about potential threats to the applicant's integrity, these threats were not sufficient to justify or warrant the measure of total exclusion from the prison community. On the contrary, the court found that the actions taken by the prison authorities indicated that they had not performed a proper assessment of the risk to the applicant's safety. Because of the applicant's sexual orientation, the prison authorities had simply believed that he risked serious bodily harm.

> ***"The authorities did not dispute the fact that it was poorly lit, very dirty and visited by rats"***

The court concluded that the main reason for the applicant's total exclusion from prison life was his homosexuality. As a result, he had sustained discrimination on the grounds of sexual orientation, and there had therefore been a violation of article 14 in conjunction with article 3.

The court also held (under article 41 – just satisfaction) that Turkey was to pay the applicant €18,000 in respect of non-pecuniary damage and €4,000 in respect of costs and expenses.

The verdict

This judgment is important because it is the first time in the history of the court's jurisprudence that it has upheld a complaint related to sexual orientation under article 3 of the *European Convention on Human Rights*. It also indicates that when prison authorities try to protect a prisoner from harassment by fellow prisoners, measures taken should be proportionate in the aim of protection. As found by the court, a proper risk assessment should take place. The judgment also outlines that there are still prejudicial attitudes existing among some state authorities in Turkey – but certainly not only in Turkey – relating to sexual orientation.

As noted by Dr Paul Johnson, sociologist at the University of York, in *JURIST*, "it is hoped that this [judgment] is the first step in an evolution of the court's jurisprudence that will progressively recognise how the widespread social discrimination experienced by homosexuals underpins a range of inhuman and degrading treatment." G

PROPOSED AMENDMENT IS FAR FROM CHILD'S PLAY

In response to Geoffrey Shannon's call for a 'yes' vote in the October *Gazette*, Malachy Steenson argues that the proposal seeks to alter the balance of justice by penalising parents for what they might or might not sometime do

Malachy Steenson is a partner in Canning Landy & Co and a criminologist living and working in the north inner city of Dublin. He is a well-known left-wing community activist and a regular contributor to broadcast and print media in relation to matters of social justice, crime and the economy

On 10 November, Irish citizens will be asked to vote to change the Constitution, the fundamental law of the State, in order to incorporate the vague notion of the 'rights of the child'. Instead of seeing children as equal citizens with the rest of society, the proposed amendment would set them apart with extra rights.

The amendment is designed to place the State as the decider of what is in the best interest of the child – not the parents or family. What in reality is needed at this time is support for families, not legislation or increased pressure that could lead to the break-up of the family.

Looking back at the 90 years since the foundation of the State, can we say that we trust this Government or the State in anything they have done? We have seen inquiry after inquiry, tribunal after tribunal – all of which goes to show that the political and establishment class have betrayed the trust of the people. Bearing that in mind, would you trust them to rear your children?

The current Constitutional position, as set out in article 42.5, permits the State, in exceptional circumstances, to intervene in the family where the parents have failed in their duty towards their children and, by appropriate means, endeavour to supply the place of parents while having due regard for the natural and imprescriptible rights of the child.

The various legislative acts protecting children, backed up by article 42, are sufficient to ensure that those children who are abused or neglected are taken into care on foot of care orders. It should be made clear that, in advocating a 'no' vote to this amendment, we are not saying that care orders should not be made in cases where they are needed.

> ***"Public law childcare proceedings are the only area of law in this country where rumour, suspicion and innuendo are treated as fact. Hearsay evidence is permitted, and the same evidence appearing month after month in reports becomes the truth"***

Surrounding climate

It is impossible to debate or vote on this amendment without taking the surrounding climate into account. Following the *Ryan Report* into institutional care, great effort was made by the establishment to say that these issues were historical, yet the recent report into St Patrick's Institution, to which some politicians expressed surprise, followed on from the *Prison Chaplains' Report* of two years ago. And numerous other reports over the years, beginning with the *Whitaker Report* in 1985, show quite clearly how the State treats the children it has already taken into care on foot of court orders.

Cases like Kilkenny, Roscommon, and so on, are being used by those on the 'yes' side to push this amendment. However, in these cases and others, the HSE was involved and aware of what was going on for years – yet they failed to act. It was not the lack of specific constitutional protection for children above all other citizens that allowed these cases to continue, but the inaction of a dysfunctional, unaccountable care system that is more concerned about budgets, careers and protecting itself than it is about children.

Much commentary has revolved around all of these reports, and arguments are made that the reason for this amendment is to prevent this happening again. This ignores that fact that those primarily responsible for placing our children in these hellholes were agents of the State itself – a State that continues to permit such abuses in the institutions it now controls.

There are currently care applications in district courts all over the country, where the HSE seeks to take children into care. In some of these cases, children are undoubtedly being abused – but in many cases, it is questionable whether this is true or not.

Hearsay evidence

Public law childcare proceedings are the only area of law in this country where rumour, suspicion and innuendo are treated as fact. Hearsay evidence is permitted, and the same evidence appearing month after month in reports becomes the truth.

Parents are treated as if they are criminals, and they often don't know what they are to be accused of until they walk into court. Parents are only allowed to read the reports that are to be submitted to the court in the presence of their solicitor. While the HSE pays its own costs and those of the guardian *ad litem*,

it contests any application for costs by the parents. If the parents qualify for legal aid, the Legal Aid Board (LAB) will provide them with a solicitor. The State provides the parent(s) with a State-employed solicitor to defend their rights against another State organisation. This is not a reflection, however, on the many LAB solicitors who do Trojan work in trying circumstances.

If this State was seriously concerned about children and what is happening in the care system, then it would abolish the system of secret courts, with the *in camera* rule in care proceedings, and publish what is happening (redacting any identifying characteristics). The Irish people would be stunned at what would be revealed. The *in camera* rule is now used to protect the State and its institutions from public scrutiny, and not to protect the interests of the child. Justice is required to be done in the open – except for children, it seems.

"It was not the lack of specific constitutional protection for children above all other citizens that allowed these cases to continue, but the inaction of a dysfunctional, unaccountable care system that is more concerned about budgets, careers and protecting itself than it is about children"

Abuse of powers

It cannot be just or fair to grant more powers to a State that has continually abused the powers already granted to it. Already, we have a system that is overloaded and dysfunctional and, most of all, unaccountable. Why would we, in all sanity, allow the State to intervene more? The State should fix the current system, which would then show that it is caring and compassionate, before we allow it to destroy more families.

Current Supreme Court judge Adrian Hardiman said in the *Baby Ann* case that the Constitution fully "acknowledges the natural and imprescriptible rights of children". Former Supreme Court judge Hugh O'Flaherty has said that there is no need for this referendum to protect children, and Judge Ann Ryan, sitting in the Children's Court in Dublin recently, said that the passing of the amendment would not help the children currently in care in the State.

The proposed amendment seeks to alter the balance of power and of justice by penalising parents for what they might do in the future by the insertion of the following at 2.1, where parents "fail in their duty to their children to such an extent that the safety or welfare of any of their children is likely to be prejudicially affected".

Again, this will be the only body of law in Ireland where opinion of something that may or may not happen in the future will be used as fact. It is incredible that those before the criminal courts on murder charges are afforded more rights and have the rules of evidence to assist them – yet a system is being created where, I would suggest, parents have more to lose than their mere liberty: the liberty of their child is what is at stake.

A British case is before the ECtHR currently. Sam, a 23-year-old mother, is seeking justice: her daughter was removed from her care two years ago at the age of six months and placed for adoption. The justification used was that Sam was in care herself and had lived with around 12 different foster families and was, therefore, psychologically damaged and so incapable of rearing her own child. She has also been told by social workers that any future child she has will be taken off her at birth. There is no reason to believe that similar cases will not occur in this jurisdiction if this amendment is passed – but, because of the secret *in camera* court system, these cases will not see the light of day.

I would urge readers to vote 'no' on Saturday 10 November, and thereafter put pressure on the State to reform the current systems and ensure that this country is a safe place for children. And I believe that this can be done within the current legal framework – if we had the political courage and the will to do it.

It is a sad reality that, if this amendment is passed, the political class will dust off their hands – saying 'job done; what's next?' – and children will continue to be ignored in this State.

WHAT'S THE DAMAGE?

While media reports sometimes suggest otherwise, there is nothing especially novel about securing substantial damages in cases where there has been significant proven criminality, says Dara Robinson

Dara Robinson is a partner in the Dublin law firm Sheehan & Partners and a member of the Law Society's Criminal Law Committee

We have grown sadly accustomed to hearing that yet another fatal shooting has taken place on our streets. On 9 October 2012, a fresh slant on those awful stories emerged from the High Court in Dublin, when Ms Justice Mary Irvine awarded over €700,000 in damages to Margaret Madden, widowed when her husband was gunned down in a grudge shooting by a contract killer engaged by a neighbour.

Mrs Madden sued three men, and the estate of a fourth, all of whom had been prosecuted and convicted for offences arising from the shooting. The three were still serving life for murder, and the convictions had been affirmed by the Court of Criminal Appeal. The action for damages – for, among other things, assault, battery and conspiracy – included claims for loss of future earnings by the deceased, and nervous shock.

On finding for the plaintiff in the conspiracy aspect, Irvine J noted that it "would be a travesty of justice if a person who conspired to injure would not be liable in the civil courts". The award included €150,000 for 'nervous shock', believed to one of the highest such awards in this jurisdiction. It is also notable that the total award greatly exceeds the statutory amount – just over €25,000 – that is payable under the *Civil Liability Act 1961*, a feature of the case that was specifically commented on by Ms Justice Irvine in her judgment, echoing many previous observations by her colleagues in the past.

> ***"In the Madden case, two of those convicted of murder entered full defences, but were eventually estopped from continuing with those defences, on the basis that the weight of the evidence had resulted in their convictions to the required criminal standard"***

Nothing novel

While media reports suggested that this was the first such case, there is, in fact, nothing especially novel about securing substantial damages in cases where there has been significant, proven criminality. Only a few months ago, a Dublin woman, Ailish Smith, waived her anonymity to bring civil proceedings for damages for sexual assault against her father, Gerard Smith, who had been convicted and jailed in 2006 for offences against her, securing a judgment for €375,000 from Mr Justice de Valera.

Bearing in mind the lesser burden of proof in civil proceedings, being 'on the balance of probabilities' rather the higher standard of 'beyond a reasonable doubt' in criminal cases, a criminal trial resulting in conviction opens the door in a big way to success in a subsequent damages action. In fact, in the *Madden* case, two of those convicted of murder entered full defences, but were eventually estopped from continuing with those defences on the basis that the weight of the evidence had resulted in their convictions to the required criminal standard and that the convictions had been upheld on appeal.

But even where the DPP declines to prosecute or fails to secure a conviction, as a consequence of the lower standard of proof required in civil proceedings, there is no obstacle to a complainant bringing a civil action: in 2011, Dana Doherty was awarded €400,000 by Judge Sean Ryan against her former dance teacher Michael Quigley. This was despite the fact that, in earlier criminal proceedings, juries had failed twice to agree verdicts against Quigley.

On both sides of the Atlantic, numerous cases, many of which have settled, have been brought against former members of the clergy, regardless of whether criminal proceedings have been brought or have succeeded.

Criminal and civil wrongs

As a matter of principle, most, if not all, assaults of a criminal nature constitute both criminal and civil wrongs. Before the reader sharpens up his or her metaphorical pick and shovel and sets out to mine this potentially rich vein of litigation, the questions as to whether any given case should be the subject of either or both types of proceedings – and, more importantly, why – must be considered. The obvious issue that emerges at once is that of winning more than a Pyrrhic victory in the civil courtroom – actually recovering the award.

Clearly, in many instances of civil litigation, where the defendant, or one of them, is an insurance company, corporate entity, or institution, the successful litigant and his advisers will be confident that any awards of damages and costs respectively will be met by the other side. Much court time is also taken up by actions taken on the basis of alleged misbehaviour by citizens, where a second, monied defendant (an employer being the obvious

John V Kelly of Callan Tansey reads a statement on behalf of his client, Mrs Margaret Madden *(left)*

example) is also being sued on the basis of vicarious liability for the deeds or misdeeds of its employee.

But radically different considerations apply when the defendant is a citizen, without a large corporation as the second, and realistic, defendant. In such cases, advisers will be thinking a long game – in reality, and almost regardless of the attractiveness and merits of the case, what are the prospects of actually collecting the winnings? It will be well known to criminal practitioners that, these days, many persons accused of a wide variety of assaults, including sexual assaults, produce as part of their mitigation in a guilty plea to a criminal charge a sum of money described, perfectly properly, as "a token of remorse", and "without prejudice to the injured party's rights at civil law".

But all the parties understand that, in most cases, that is the full depth of the pocket of the accused, having scraped together what they could from family, friends and the Credit Union, none of whom can be made vicariously liable in subsequent civil proceedings. There is then no realistic prospect of bringing home a subsequent civil claim, to the point of recovering the award, against an impecunious, perhaps unemployed, defendant.

Men of property

What seems, therefore, to have set Mrs Madden's case apart from the rest was the fact that her husband's killers were, or seem to have been, men of property in various ways. It appears, furthermore, that her solicitor, John V Kelly of Callan Tansey, was sufficiently possessed of foresight to research the lands owned by the defendants and to include in the proceedings applications for injunctions to freeze certain of the assets so that they would subsequently be available to satisfy a judgment in a case that carried a high probability of success.

> ***"The obvious issue that emerges at once is that of winning more than a Pyrrhic victory in the civil courtroom – actually recovering the award"***

By contrast, the aforementioned Ms Doherty, according to media reports, is now engaged in round two of her action, seeking to set aside property transfers made a number of years prior to her successful action, whereby Mr Quigley transferred a house and a site to his wife, in order to secure her award. The case is pending.

Another issue that is likely to operate as a deterrent to similar actions is the almost complete unavailability of State-funded assistance for plaintiffs in such cases. Although civil legal aid is available as a matter of principle, the combination of a tightly controlled and very stringent means test, and the fact that the system is operated by the Legal Aid Board, which is effectively swamped by the tide of family law work, means that, in effect, plaintiffs must either fund their own cases or, alternatively, rely on a legal team that will take the case on in the expectation, or perhaps hope, that their fees will ultimately be paid on a successful outcome for their client.

So, while the *Madden* case is undoubtedly of interest and not without value as a precedent for a number of reasons as set out above, it is unlikely to result in a flood of like actions. More than anything, perhaps, it highlights the lack of a properly funded State system of compensation for persons whose lives are shattered by criminal misconduct. Mrs Madden was obliged to engage diligent lawyers to fight her corner for over a decade to secure compensation that many people might think was her entitlement as of right. As to that issue, there is little evidence that change is at hand. G

SENTENCING COUNCIL WOULD ENHANCE CONSISTENCY

While sentencing should not be based on the public's reaction to any particular case, it is vital that there is public confidence in the justice system. Lessons can be learned from Britain, argues Liam Herrick

Liam Herrick is executive director of the Irish Penal Reform Trust

Concern is often voiced in the media and in public discourse about a perceived problem of inconsistency in sentencing – and, in particular, a perceived problem with unduly lenient sentences for some serious crimes.

While sentencing should not be founded on public reaction to any particular case, as refracted through the media, it is vital that there is public confidence in the justice system. How can this be best achieved without resorting to knee-jerk responses such as mandatory sentencing (arguably a key factor in the dramatic increase in Ireland's prison population over the last decade)?

To address this question, Mr Justice Colman Treacy, of the Sentencing Council for England and Wales, gave the IPRT's annual lecture on sentencing guidelines and the work of the council on 20 September in Kilmainham Gaol. An independent, non-departmental public body of the British Ministry of Justice, the council's stated aims are to "promote a clear, fair and consistent approach to sentencing, primarily by issuing sentencing guidelines; produce analysis and research on sentencing; and work to improve public confidence in sentencing".

Setting guidelines

The main work of the council is in developing guidelines for sentencing in particular areas of crime policy. The council's aims in drafting sentencing guidelines include not only promoting a consistent approach to sentencing, but also improving the wider public understanding of the process involved in sentencing offenders. In the words of Judge Treacy: "We want to demystify sentencing and get the public to understand what we are doing in their name and why."

> *"Low levels of knowledge about how the criminal justice system works contribute to public opinion that sentencing is lenient"*

Initial draft guidelines are produced based on research that can include interviews with victims and members of the public, along with other stakeholders. In its drafting of the guidelines, the council is required by the 2009 act to consider factors such as the need to promote consistency in sentencing, the impact of sentencing decisions on victims of offences, the cost of different sentences and their relative effectiveness in preventing re-offending, and so on.

A draft guideline and consultation paper are published in a variety of formats, including a consultation paper aimed at the public and another version aimed at legal professionals and interest groups. These are promoted widely through proactive media work, and the council reports high numbers of responses from across the board. A resource assessment of the likely impact of the guidelines on provision of prison places, probation, and youth justice services is also produced.

Following the consultation process, the council publishes a definitive guideline with an implementation period of around 12 weeks. The 2009 act states that judges "must follow" the guidelines, except when it is in the interests of justice not to do so. Judges are obliged to give their reasons for departing from the guideline.

Judicial practice

The Crown Court Sentencing Survey, which requires all judges in the Crown Court in England and Wales to complete a short form every time they pass sentence, informs the council about the effectiveness of the guidelines in terms of achieving a consistent approach to sentencing. Aggregated and anonymous information from the survey is published and helps improve public confidence that judges are sentencing rationally.

SENTENCE STRUCTURE

The Sentencing Council has its origins in concern about the growth of the British prison population, which led to an investigation in June 2007 into options for improving the management of penal capacity and "greater transparency or predictability" in the effect of sentencing decisions on penal resources.

Established on 6 April 2010 by the *Coroners and Justice Act 2009*, the Sentencing Council is made up of eight judicial members from across the judicial spectrum and six non-judicial members drawn from the fields of criminology, policing, probation, victims' issues and the legal professions, who play an equal role on the council. A further four advisers include a social scientist, a former chief executive of a crime reduction and rehabilitation agency, a criminologist with expertise in communications and the media, and a senior lecturer in criminology with a special interest in human judgment and the psychology of decision making.

A small multidisciplinary team of 16 civil servants make up the Office of the Sentencing Council and includes four policy advisers, two legal advisers, an economist, two social researchers, three statisticians and a communications team. The council's annual budget is Stg£1.54 million.

Socrates: they really done one over on him

> ***"In Ireland, the Government has often rushed legislation through without any such examination of resource implications or effectiveness in tackling crime"***

It is likely that the process of completing the survey has a positive effect too, as it leads judges to systematically go through a detailed list of all the relevant factors relating to the offence and the offender, including age and/or lack of maturity where it affects the responsibility of the offender, or whether the offender is the sole or primary carer for dependent relatives.

Another critical aspect of the work of the Sentencing Council is that it can be asked by government to assess the impact of policy and legislative proposals – for example, the resource impact of increasing the length of a suspended sentence order from 12 months to two years. It also reports on the relative effectiveness of various sentences in preventing reoffending.

This is in contrast with experience in Ireland, where the Government has often rushed legislation through without any such examination of resource implications or effectiveness in tackling crime. Take, for example, the *Fines Act 2010*, which still awaits full implementation more than two years after being signed into law due to the need to upgrade the courts' ICT system; meanwhile, thousands are imprisoned every year at huge social and economic cost. Another example is the presumptive sentencing for drugs offences, brought in by the *Criminal Justice Act 1999*, which is now recognised as having played a leading role in prison population growth, with questionable effectiveness in terms of reducing drugs-related crime.

Building public confidence

The council's role in improving public confidence in sentencing is also crucial. Surveys have found that low levels of knowledge about how the criminal justice system works contribute to public opinion that sentencing is lenient (fuelled, of course, by media fighting for its share in the market). In response, the Sentencing Council has created a number of initiatives to give members of the public an insight into "the multi-dimensional nature of sentencing, rather than the often very one-dimensional nature made out in the media reporting of crime".

These activities include 'You be the Judge', run by the Ministry of Justice, where, given all the details of a particular case, participants discovered that the sentences they would have handed down were either the same as or more lenient than the sentences judges would have passed. Also, in March 2011, the council hosted its first ever sentencing competition for aspiring law professionals. The council also has a strategy of proactive engagement with the media and works with relevant organisations to increase understanding of sentencing among victims and witnesses.

Absence of data

In the most recent Law Reform Commission report on mandatory sentencing, the commission outlined its preference for the proposed Judicial Council to assume the role of the setting of guiding principles for members of the judiciary. This aligns with the IPRT's position that mandatory and presumptive sentences should be removed from the statute book in Ireland and that public confidence in judges and the law – which is, after all, carried out in their name – should instead be nurtured through the introduction of alternatives such as sentencing guidelines.

However, in the absence of data and information about what current sentencing practice is, policymaking around sentencing reform in Ireland remains hindered. The Irish Sentencing Information System initiative of the Courts Service was a welcome first step in this regard, but investment is necessary to expand the initial pilot projects under that system. Only with such information available can we begin to address any concerns relating to the consistency, transparency and predictability of sentencing practice in Ireland. G

LOOK IT UP

- Mr Justice Treacy's lecture can be accessed at www.iprt.ie/contents/2423
- The IPRT launched a comprehensive position paper on reform of parole, temporary release and remission on 22 October (www.iprt.ie/contents/2443
- Irish Penal Reform Trust: www.iprt.ie
- Irish Sentencing Information System: www.irishsentencing.ie/
- Sentencing Council for England and Wales: www.sentencingcouncil.org.uk

SHAKY *foundations?*

Hilary C Lennox is a barrister who has been practising for five years in Dublin. She was selected by the Bar Council to spend three months with the Innocence Project in the University of Wisconsin Law School. Special thanks to Keith A Findley, law professor and president of the Innocence Network, for his help with this article

It appears that showing the presence of the classic symptoms is not as open-and-shut a case in proving shaken baby syndrome as was originally thought. So, asks Hilary Lennox, is the syndrome science or myth?

Shaken baby syndrome (SBS) arises when an infant dies of sudden brain bleeding and swelling with no evidence of external injury. The theory is that a caregiver, parent or *au pair* shakes an infant so hard that it causes such symptoms, which no other method or accident could cause. The symptoms include subdural haematoma (bleeding in the brain), retinal haemorrhage (abnormal bleeding of the blood vessels in the retina) and cerebral oedema (brain swelling/accumulation of excessive fluid in the substance of the brain). Usually there are no signs of external trauma. From this triad of symptoms, doctors infer child abuse caused by intentional shaking.

Caregivers, parents and *au pairs* have been convicted and incarcerated for child abuse with little other evidence of abuse save for the triad of symptoms. Sometimes no motive or history of abuse is necessary. The medical evidence alone could prove all elements of the crime: the medical evidence speaks for itself. Frighteningly, the medical expert testimony alone, to the effect that nothing besides shaking could have caused the infant's unexplained brain bleeding, has been enough. However, cracks are beginning to show in the SBS medical theory, so much so that the medical world is becoming divided, raising the question: is it science or is it myth?

> ***"The research base for the SBS hypothesis is simply unable to support the conclusion that the classic triad of symptoms is caused by violent shaking and only violent shaking"***

Monkey see. monkey do

The science of SBS originated from an experiment undertaken in the 1960s. A neurosurgeon, Ayub Ommaya, decided to determine how much acceleration it would take to cause a head injury. Ommaya strapped 50 rhesus monkeys onto chairs, leaving their heads unsupported. He then mounted the chairs onto a long track and crashed the monkeys into a wall at high speed. The results of such an experiment revealed 15 monkeys developing cerebral haemorrhages, with some also incurring brain stem or cervical cord injuries.

In the 1980s, two paediatricians used the results of the above experiment and concluded that unexplained bleeding in the brain was possible without directly banging the head area and without neck injury. This evidence was given a name, and the hypothesis of 'shaken-baby syndrome' was born.

Because unexplained bleeding was possible without direct impact, they hypothesised, then it must be shaking that causes the injuries; how else would a child receive these types of

FAST FACTS

- 'Shaken baby syndrome' arises when an infant dies of sudden brain bleeding and swelling with no evidence of external injury
- Caregivers, parents and *au pairs* have been convicted and incarcerated for child abuse with little other evidence of abuse save for the triad of symptoms
- However, medical experts aren't in agreement about conflicting data and research, and opinion is growing that numerous natural and accidental causes can cause every element of the classic symptoms

injuries and die? A child doesn't just die, the argument went: there is blood and swelling on the brain, and the blood vessels in the eyes are bleeding, and there are no external symptoms of trauma. They are pretty horrific symptoms for anyone to imagine, particularly on a little child only a few months old. Therefore, it must be the result of abusive shaking – an exhausted, frustrated caregiver or young *au pair* angrily shaking a baby to stop it crying.

Armed with this very plausible hypothesis and a medical expert who will testify that shaking can generate the same force as throwing an infant from a second-story window or being hit by a car at 30mph, prosecutors obtained convictions for shaken baby syndrome all over the world.

Louise Woodward

Audrey Edmunds

Miscarriage of justice

One of the most famous of these cases, on both sides of the Atlantic, was the 1997 conviction of 19-year-old British *au pair* Louise Woodward, who had been caring for two boys in Massachusetts. Woodward was deemed the "most notorious criminal convicted in Massachusetts" by Boston law magazine *Exhibit A* ten years after the death of one of the boys in her care. Matthew Eappen had fallen into a coma, dying on 9 February 1997 from a fractured skull and subdural haematoma (bleeding in the brain). Eappen was eight months old. There was a month-old injury or fracture to the wrist. Doctors at the hospital in Massachusetts observed retinal haemorrhages, characteristic of shaken-baby syndrome.

Prosecutors claimed that Woodward admitted to shaking the infant, dropping him on the floor and tossing him on a bed. The prosecutors' theory was that Woodward became so frustrated with the infant that she began shaking him violently to stop his uncontrollable crying. Medical experts for the prosecution testified that the infant hit the floor with force equivalent to a fall from a second-story window. The injuries from the fall and the shaking allegedly caused Matthew Eappen's death.

The lead defence counsel at Woodward's trial, and the architect of her medical and forensic defence, was Barry Scheck, co-founder of the Innocence Project. He argued that Woodward's alleged mishandling of the infant did not cause his death, and that a pre-existing medical condition may have killed the infant. Scheck logically asked for DNA tests on the child in an attempt to find genetic disorders that could have affected his bone strength, development or caused brain haemorrhages.

Woodward was found guilty of second-degree murder. She faced 15 years to life in prison under Massachusetts law. Woodward's legal team filed post-conviction motions and, on 10 November, Judge Hiller B Zobel reduced the conviction to involuntary manslaughter, stating that "the circumstances in which the defendant acted were characterised by confusion, inexperience, frustration, immaturity and some anger, but not malice in the legal sense supporting a conviction for second-degree murder", adding "I am morally certain that allowing this defendant on this evidence to remain convicted of second-degree murder would be a miscarriage of justice".

Woodward's sentence was reduced to time served (279 days). She was freed and returned to England.

Last person in time

The Wisconsin Innocence Project took on a landmark SBS case. Audrey Edmunds, a pillar of society who ran a small playschool and had three children of her own, was found guilty of first-degree reckless homicide based on SBS. In October 1995, seven-month-old Natalie Beard was dropped off at Edmunds' day-care centre, as was their routine. Natalie was inconsolable and wouldn't take her bottle. She became unresponsive; Edmunds' first thought was that the child was choking on her bottle, and she frantically called 911.

The doctors found the classic triad of symptoms, and so determined SBS. Edmunds was the last one with Natalie. The theory was that, once you shake a baby to that extent, it would collapse, become unresponsive and slip into a coma almost immediately. Hence, the last person in time was the perpetrator.

> ***"If the medical community can't agree about all the conflicting data and research, how is a jury supposed to reach a conclusion that's beyond a reasonable doubt?"***

Edmunds was sentenced to 18 years in prison in Wisconsin.

After 11 years, Edmunds had a hearing to determine whether she should have a new trial. Dr Robert Huntington III, a prosecution witness in her first trial, took the stand – but this time for the defence. Keith Findley, president of the Innocence Network and Edmunds' lawyer, asked whether Huntington was comfortable with the testimony he gave in 1996. His response was: "No, sir; no I am not." Huntington went on to explain that, in the years since Edmunds' first trial, he had observed a different child with subdural and retinal bleeding who had been lucid for some time between her brain injury and her collapse. This resulted in Huntington investigating the science of SBS more carefully.

Huntington is now of the opinion that a "lucid interval is a distinct, discomforting but real possibility". He said he could no longer precisely time the injury that caused the child's death. Findley asked Huntington how long the child may have appeared relatively normal – fussy, but not obviously in crisis. His response was "I'm sorry, I just don't know." Huntington also testified that, while at trial he had been certain the child had to have been injured by shaking, he was now no longer certain that shaking was involved at all. He noted that the whole matter of SBS had become much more uncertain, based on new research, than it had been at the time of Edmunds' trial.

The cracks in the medical science were beginning to widen and, at Edmunds' appeal

hearing, five doctors joined Huntington on the side of the defence. The Wisconsin Court of Appeals ruled in January 2008 that the disagreement among the physicians represented a shift in medical opinion and warranted a new trial: a jury would have to hear both sides. Six months later, prosecutors dropped the charges against Edmunds.

Tattered hypothesis

So, is shaken baby syndrome a myth? It appears that the presence of the classic triad of symptoms does not indicate an open-and-shut case, as was originally thought. There are a myriad of causes for the triad of symptoms, like genetic or birth disorders, cot death, toxins or poisons – the list is long and could include as yet undiscovered causes. The fact of the lucid period, which can be indeterminate in length, now takes the automatic blame away from the last person with the child when they collapse. The Edmunds case, specifically, turned that theory into disarray.

Patrick Barnes, a paediatric neuro-radiologist at Stanford University, says that the research base for the SBS hypothesis is simply unable to support the conclusion he had been taught in medical school – that the classic triad of symptoms is caused by violent shaking and only violent shaking. Based on extensive new study and research, he is now of the opinion that numerous natural and accidental causes can cause every element of the triad; indeed, something as mundane as an ear infection can spread to the brain with dire consequences.

A biomechanical experiment in 2005 demonstrated that forceful shaking could severely injure or kill an infant. This is because the neck would be severely injured, not because of the subdural haematomas that would also be caused by violent shaking. A broken neck is rarely found in SBS cases. Furthermore, 'shaking cervical spine injury' can occur at much lower levels of head velocity and acceleration than those reported for SBS. SBS symptoms, in their most acute form, are not usually caused by shaking alone. Although shaking may be part of the process, it is more likely that such infants suffer blunt impact.

Indeed, the SBS hypothesis has become so tattered that the American Pediatric Association, and most paediatricians worldwide, no longer officially refer to it as SBS; instead, shaken baby syndrome is now called 'abusive head trauma' (AHT) by most – a more general term that avoids defining the precise mechanism of injury.

Not even a theory

Dr Norman Guthkelch (now 96 years old) is one of the two paediatricians who used the results of the rhesus monkey test and is, perhaps, the father of SBS. Not long ago, he said to an Innocence Project professor: "It [SBS] is not a theory. It was merely a hypothesis, and so you have got to quit calling it a theory, because it's not even a theory."

The Wisconsin Innocence Project's Keith Findley has said that, while we would all like a 'gold standard' that distinguishes quickly and accurately between abuse, accident and natural causes, the medicine is uncertain and evolving, and the cases are complex. "No one wants child abuse," says Findley, "but we should not be prosecuting and convicting people in shaken-baby cases right now, based on the triad of symptoms, without other evidence of abuse. If the medical community can't agree about all the conflicting data and research, how is a jury supposed to reach a conclusion that's beyond a reasonable doubt?"

INNOCENCE PROJECT

The Innocence Project is a non-profit legal organisation committed to exonerating wrongfully convicted people through the use of DNA evidence and to reforming the criminal justice system to prevent future injustices. The project was founded in 1992 by Barry Scheck and Peter Neufeld.

LOOK IT UP

Cases:

- *Commonwealth of Massachusetts v Woodward* 694 NE 2d 1277 (1998)
- *State of Wisconsin v Audrey A Edmunds*, Court of Appeals decision no 2007 AP 933, 31 January 2008

Literature:

- Bandak, FA (2005), "Shaken baby syndrome: a biomechanics analysis of injury mechanisms", *Forensic Science International*, 151(1), pp71–79. See www.ncbi.nlm.nih.gov/pubmed/15885948
- Findlay, Keith et al (2012), "Shaken baby syndrome, abusive head trauma and actual innocence: getting it right", *Houston Journal of Health Law and Policy*, April 2012, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2048374

STOP THE *presses!*

One of the Britain's foremost media commentators, Roy Greenslade, speaks to the *Gazette* about phone hacking, the Leveson Inquiry, the media invasion of privacy – and making mistakes. Colin Murphy rummages through his bins

Colin Murphy is a journalist and radio documentary maker in Dublin, specialising in social and cultural affairs. A selection of his work can be found at www.colinmurphy.ie

A newspaper journalist I know was once given the job of monitoring the garda radio frequency for possible stories. The newsroom had a radio tuned to the garda frequency; he was responsible for listening out for leads and then going to the scene of the crime. If he picked up the address of a victim, he would call to the house after the gardaí to get some good quotes.

On one occasion, he arrived at the family home of a man who had died in an accident. A woman answered the door. She showed no sign of upset. Immediately, he knew what had gone wrong: he had arrived before the gardaí. She hadn't yet been informed of the death of her husband. He mumbled something about being at the wrong address and fled.

Phone hacking is the current favourite example of dubious journalistic practice, and provoked the Leveson Inquiry in Britain (see panel). But, as Roy Greenslade pointed out in his lecture at the Law Society conference on privacy in September, phone hacking was not an aberration. Rather, it was "part of a pattern", the culmination of (at least) a half century of practice by reporters of the "dark arts".

Those dark arts included stealing photographs from people's homes, pretending to be a relative of a patient in order to get into a hospital, bribing police officers and, as Greenslade recalled in an interview with the *Gazette*, "making expenses up – another bit of illegality which we thought was a bit of fun".

Sick transit's glorious Monday

As media commentator for *The Guardian* and journalism professor at City University London, Greenslade has been intrigued – perhaps obsessed – by questions of journalistic ethics for decades. And as a former Fleet Street editor, he has experience of the sharp end of the issue. I asked him if there were any stories he regretted. He replied immediately with two – from his time as editor of Robert Maxwell's *Daily Mirror* in the early 1990s.

At the time, Prince Edward was dogged by rumours that he was gay. Early in Greenslade's

ALL PICS: MIRANDA DRISCOLL

FAST FACTS

- Roy Greenslade (65) is professor of journalism at City University London and media commentator for *The Guardian*
- On the role of journalists: "We journalists are in the disclosure business. Inevitably … we do intrude into the privacy of individuals"
- On tabloid editors: "Tabloid editors cast themselves as moral arbiters – the secular equivalent of the mutaween, Saudi Arabia's religious police"
- On stories he regrets: two stories based on what proved to be false allegations, while he was editor of the *Daily Mirror*
- On getting it wrong: "You have to be swift to make people understand *how* you got it wrong"
- On press regulation: "Thanks to the internet and social media, we are hurtling towards a future of unmediated media, where the only rules will be those enshrined in law"

tenure, one of his reporters, acting on his own initiative, approached the prince at a function in New York and asked him, "Are you gay?" He denied it. The *Mirror* duly ran a story headlined "Prince Edward: 'I'm not gay'".

"I really regret that one," says Greenslade ruefully. The other one that he is repentant about is more serious, and he has written about it for *The Guardian* (see 'Look it up' panel). In 1990, the *Mirror* ran a weeklong exposé on Arthur Scargill, who had led the

"Phone hacking was not an aberration. Rather, it was 'part of a pattern', the culmination of (at least) a half century of practice by reporters of the 'dark arts'"

miners' strike of 1984-85. The *Mirror* alleged that Scargill had received funds for the strike from Libya and that he had diverted them to pay off the mortgage on his house.

Churchill flies back to front

The story was untrue. Scargill denied it, but didn't sue. Years later, the *Mirror's* key source for the story was exposed as being unreliable. Greenslade believes he had likely been acting for MI5, the British security service, in a bid to discredit Scargill and his National Union of Mineworkers. (MI5 was revealed to have conducted extensive 'counter-subversion' operations against the union and its leaders.)

Greenslade had inherited the story from his predecessor as editor, who had overseen a prolonged investigation (during which the sources were paid thousands of pounds for their revelations) and was uneasy about it, particularly as the *Mirror* was a traditionally left-leaning newspaper and would have been supportive of the miners.

But ITV's *Cook Report* also had the story and was going to air it. Greenslade decided to publish. They put written questions to Scargill but, fearing an injunction, they didn't specify the mortgage allegations. "That was an ethically suspect decision," Greenslade wrote later, "breaking a time-honoured tradition in which people are given a chance to answer press allegations." He subsequently met Scargill and apologised in person. "I regret that story greatly," he says now.

Greenslade's decision to admit and account for his mistake in public was unusual. "In journalism, we claim the right to get it wrong occasionally (though that right is not in the *European Convention on Human Rights*). It's in the nature of our work. So it's incumbent on us to be completely transparent when we get it wrong. You have to be swift to make people understand *how* you got it wrong."

Freddie Star ate my hamster

The Prince Edward story illustrates a different ethical conundrum – what constitutes 'public interest'? Newspaper owners and editors claim the right to publish material that is in the public interest, even

ROY OF THE ROVERS

Roy Greenslade, a boyish 65-year-old, is Professor of Journalism at City University London and one of the Britain's foremost media commentators.

He joined a local newspaper out of school and eventually rose to become managing editor of news at *The Sunday Times* and editor of the *Daily Mirror*. Since 1992 (with brief interruption), he has been *The Guardian's* media commentator, where he writes an influential daily blog.

His wife is from Falcarragh, Co Donegal, and they spend the summer there. He is a republican in both senses of the word, believing that Britain should be a republic and that Ireland should be reunited.

In 2008, it emerged, in a book by *Guardian* journalist Nick Davies, with whom Greenslade collaborated, that Greenslade had written occasionally for *An Phoblacht*, under a pseudonym, while working at *The Sunday Times*.

GOTCHA!

Phone hacking is the process of secretly getting access to someone else's voicemail messages. (This is easy to do if the person hasn't set a PIN number on their voicemail.) In July 2011, after a steady drip of revelations about *News of the World* journalists hacking the phones of celebrities, *The Guardian* revealed that the phone of murdered schoolgirl Milly Dowler had been hacked.

The public outcry led to the closure by Rupert Murdock of the *News of the World* and put British Prime Minister David Cameron under pressure; his former aide, Andy Coulson, had previously been editor of the *News of the World*.

Cameron duly established a judicial inquiry, tasking Lord Justice Brian Henry Leveson with inquiring into "the culture, practices and ethics of the press". (A second part of the inquiry, examining unlawful conduct at news organisations and the police, has been deferred, pending the completion of criminal investigations.)

The inquiry has questioned Cameron and three former prime ministers and provoked the resignation of then commissioner of the Metropolitan Police Service, Sir Paul Stephenson.

when it is invasive of privacy, and claim that they are best placed to assert what is in the public interest. (At its most elementary, they equate the public interest with whatever the public is interested in.)

In his Law Society lecture, Prof Greenslade cited a famous definition of "news", referred to by broadcaster Jeremy Paxman at the Leveson Inquiry and also once posted in giant lettering in the newsroom of *The Sun*: "News is something someone, somewhere, doesn't want you to know – the rest is public relations."

"We journalists are in the disclosure business," Greenslade said. "Inevitably … we do intrude into the privacy of individuals."

Identifying when that intrusion is justified – when it is in the public interest – is difficult because of the coincidence of "human fallibility" and "commercial greed". Ordinary people will give out about intrusions on privacy and then go and buy the paper that has the sauciest story. Newspaper proprietors will defend a story as being in the public interest because they know the public is interested, which means they will sell more copies. "Tabloid editors cast themselves as moral arbiters – the secular equivalent of the mutaween, Saudi Arabia's religious police," he said.

Super Cally go ballistic, Celtic are atrocious

This mindset, Greenslade believes, led to the hacking scandal and to a "self-regulatory regime" in Britain that has been "noticeably light of touch and unable to grapple with the most heinous of privacy intrusions".

The courts, meanwhile, have not given consistent guidance. They are tasked with balancing articles eight and ten of the *European Convention on Human Rights* (respectively, the right to respect for private and family life, and freedom of expression).

> ***"The 'super injunctions' appeared to favour article 8 of the European Convention on Human Rights, but more recent decisions have favoured article 10. The fact that the judiciary have made contradictory rulings suggests that there's no hard-and-fast definition of public interest"***

"The 'super injunctions' appeared to favour article 8, but more recent decisions have favoured article 10. The fact that members of the judiciary have made contradictory rulings suggests that there's no hard-and-fast definition of 'public interest'."

Are the privacy invasions of the tabloids perhaps the necessary price we have to pay for a robust press? "That's a squalid argument," he responds. "It suggests that the people who are the victims of that tittle-tattle ought to be thrown to the wolves in order that we might have a serious press elsewhere."

Leveson is due to make recommendations as to a new regulatory regime, but Greenslade is sceptical. "It's not Leveson's decision – it's a political decision. That's the *realpolitik*."

How do you solve a problem like Korea?

"No politician at this stage of a government is ever going to legislate against the press. David Cameron is already on the back foot – he's running a coalition government during a recession. If the government were to try to impose statutory control of the press, the press would turn against them and never come back."

The outcome, he suggests, will be to "recast the present form of self-regulation, probably taking some of the advice of John Horgan". (Horgan, the press ombudsman in Ireland, gave evidence to the Leveson Inquiry on the Irish system of independent regulation. See 'Look it up' panel.)

In any case, "Leveson's recommendations will only last five to ten years," he judges. "Press regulation is moving towards being irrelevant. On my blog, sometimes I'm irrelevant: people are simply talking to each other. I'm just the medium."

Thanks to the internet and social media, he says that we are hurtling towards a future of "unmediated media", where "the only rules will be those enshrined in law". The big problem then, he suggests, will involve information crossing legal boundaries, such as someone's criminal history being put online in a different jurisdiction. As I write, a Melbourne court has just ruled that material about the man alleged to have murdered Jill Meagher be removed from the internet, though the judge has acknowledged that the unregulated nature of the internet may mean that such a ban will prove futile.

That poses a whole other series of questions on the future of professional journalism. Greenslade is not sanguine. "*The Guardian* is losing more than Stg£1 million per week. Print sales are down and the website doesn't generate enough revenue to fund people like me."

The *Daily Mail* website, meanwhile, is commercially successful because "it provides information that the vast majority of people want to read – on celebrity, sex and sport".

"I'm massively concerned about the future of serious journalism," he admits. That, though, is a debate for another day.

LOOK IT UP

- Evidence by Roy Greenslade and John Horgan to the Leveson Inquiry: www.levesoninquiry.org.uk (search for 'Greenslade' and 'Horgan')
- Greenslade's reflections on Leveson in the current issue of the *British Journalism Review*: www.bjr.org.uk
- Greenslade's blog: www.guardian.co.uk/media/greenslade
- His *mea culpa* for the Scargill story: http://tiny.cc/greenslade
- For an alternative take on privacy, listen to Brian O'Connell's radio documentary about the political blogger: *Guido Fawkes, Our Man in Westminster*: www.rte.ie/radio1/doconone.

The PRICE is right

Declan O'Neill is one of the two taxing masters appointed by the Government to provide an independent adjudication of legal costs in dispute

In the second of two articles, new taxing master Declan O'Neill outlines some of the changes to the taxation of costs that are likely to be brought about by the *Legal Services Regulation Bill*

Practitioners are aware of the general provisions of the *Legal Services Regulation Bill*, and I merely deal with some of its provisions in order to highlight any new features or departures from current law or practice.

Firstly, given that the term 'legal practitioner', pursuant to section 2 of the bill, means "a person who is a practising solicitor or a practising barrister", the definition of a 'bill of costs' under section 80 also appears to include any fee note prepared by a barrister. This has implications with regard to the current practice, whereby barristers' fees constitute part of the disbursements usually incurred by solicitors in the course of conducting or defending litigation. Effectively, barristers may be regarded as conducting litigation in conjunction with solicitors. The relationship between solicitors and barristers, whereby it is the responsibility of the solicitor to ensure payment of counsel's fees, may no longer be appropriate.

Section 90 of the bill amounts to a replacement of some of the requirements under section 68 of the 1994 act. The 'section 68 letter' is replaced, whereby certain specified and relatively detailed information must be provided to the client when the legal practitioner receives instructions, or as soon as is practicable thereafter. Subsection 2 of section 90 sets out the information that it is obligatory on the legal practitioner to provide to the client, including:

- The amount of costs,
- VAT thereon or the amount of likely costs,
- The necessity for engaging witnesses,
- An undertaking not to engage an expert witness without obtaining the likely cost involved, and the specific instructions of the client,
- The likelihood of increased costs arising,
- Provision of notice thereof,
- An explanation of irrecoverable costs, and
- The circumstances in which the client may be required to pay costs to another party.

Clearly the intention is that the client, in circumstances of litigation, should be kept regularly informed of the costs being incurred and the likelihood of costs increasing. There is also provision for a 'cooling-off period', which is entirely new and is mandatory, whereby some period should be specified within which the client may consider whether or not to instruct the legal practitioner to continue with an action.

This obligation does not extend to the period beyond the date of service of notice of trial. Failure to comply with these obligations will result in the disallowance of relevant costs under the provisions of section 97(5), unless the legal costs adjudicator decides that such disallowance would "create an injustice between the parties". While this latter provision is expressed as applying between "a legal practitioner and his or her client", it will inevitably

FAST FACTS

- The definition of a 'bill of costs' under section 80 also appears to include any fee note prepared by a barrister
- In circumstances of litigation, the client should be kept regularly informed of the costs being incurred and the likelihood of costs increasing
- A bill of costs that has been properly prepared and delivered to a client will not be amenable to adjudication after the expiry of six months from date of issue of the bill or three months from the date of payment, whichever occurs first

"The relationship between solicitors and barristers, whereby it is the responsibility of the solicitor to ensure payment of counsel's fees, may no longer be appropriate"

be argued that this provision has implications for party and party taxations also.

Onerous obligations

Accordingly, section 90 of the bill imposes onerous obligations on the legal practitioner concerned. Legal practitioners may consider it appropriate to enter into an agreement with the client, as envisaged under section 91 of the bill, "concerning the amount, and the manner of payment, of all or part of the legal costs that are or may be payable by the client to the legal practitioner for legal services provided in relation to a matter".

Subsections 2 and 3 outline the consequences of such an agreement being entered into. There appear to be two principal results:

- Adjudication of the costs between the legal practitioner and client would not appear to be possible where a specified figure for professional fees and other outlays are agreed. This would appear to be the combined effect of subsections 1 and 3. In such circumstances, it seems that the legal costs adjudicator would have no function in assessing the costs. Subsection 3 provides that "the agreement shall constitute the entire agreement between the legal practitioner and the client as respects the provision of legal services in relation to the matter concerned, and no other amount shall be chargeable in relation to those legal services, except to the extent otherwise indicated in the agreement". However section 99 of the bill provides at subsection 1 thereof that a legal costs adjudicator may refer a question of law, on foot of an application for adjudication, to the High Court. Subsection 2 of section 99 makes it clear that the court has full powers to adjudicate on costs agreements. It appears, therefore, that at all times a client will have an entitlement, even in the case of a sum for costs having been stipulated in an agreement, to apply to the adjudicator and ultimately to the court for directions.
- Section 91(2) contains an important provision, whereby the agreement may

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include all of the particulars stipulated under section 90 (the replacement of section 68 provision). In effect, the agreement can contain clauses whereby the legal practitioner sets out the relevant matters referred to in section 90. Any agreement would probably incorporate an undertaking to keep the client advised of ongoing costs and likely increases thereof, as envisaged in section 90.

The obligation of a practitioner to produce a bill of costs to the client as soon as is practicable following the conclusion of the provision of legal services is dealt with at Section 92. There would not seem to be much point in producing a detailed bill of costs to a client in circumstances in which there is already in existence an agreement between legal practitioner and client as to the amount chargeable. In such circumstances production of an invoice may be all that would be required, but this is not yet clear.

Rights and entitlements

Section 94 deals with the rights and entitlements of parties to the adjudication process, whether between legal practitioner and client or as between party and party. The full bill or any item thereof may be subject to adjudication. There is an obligation on the parties to endeavour to resolve any dispute without recourse to adjudication in the first instance.

"Section 90 of the bill imposes onerous obligations on the legal practitioner concerned"

A bill of costs that has been properly prepared and delivered to a client will not be amenable to adjudication after the expiry of six months from date of issue of the bill or three months from the date of payment, whichever occurs first. This is a new departure. Heretofore, a bill between solicitor and own client was not amenable under statute law to taxation if the costs had been paid or if 12 months had expired from date of delivery. It remains to be seen whether the courts' inherent jurisdiction over its officers – which was confirmed in *Gallagher Shatter v De Valera* ([1986] ILRM 3) as entitling the court, in special circumstances, to order taxation as between solicitor and own client, even where the costs had been paid or the statutory period had expired – has survived the enactment of these provisions.

The matters outlined at subsection 95, which stipulate the factors to be taken into account by the legal costs adjudicator in assessing fees, do resonate with my earlier observations relating to the necessity of keeping proper and accurate records of instructions received and attendance notes as to work carried out (see last issue). The adjudicator will be required to verify that the work was actually done and that any claimed disbursements were actually made. The nature and extent of any work, who carried it out, and the time taken must also be ascertained.

As matters currently stand, the adjudication process shall, pursuant to section 97, be determined otherwise than in public.

Possibly controversial

Important and possibly controversial provisions arise at section 98, whereby under subsections 2 and 3 thereof, certain penalties may arise in the event of "the costs of the legal practitioner concerned" being reduced by less than 15% or more than the same percentage. In the former situation, "the party chargeable to those costs shall pay the costs of the adjudication". In the latter situation, "the legal practitioner who issued the bill of costs shall be liable for the costs of the adjudication".

It appears that the costs of the taxation process, whether as between party and party or between legal practitioner and own client are to follow these events. Whether there should be a distinction between the two modes of taxation may be a matter for further consideration as to the desirability of linking a client's entitlement to party and party costs to the property of the legal practitioner.

The adjudication is also to be guided by reference to the principles outlined at schedule 1 to the bill and which it is mandatory to apply.

These principles include, in addition to the requirement that the allowable costs have been reasonably incurred and are reasonable in amount, that: "(c) where a bill of costs relates to the costs as between party and party, if, in addition to the principles at paragraphs (a) and (b), it is reasonable to expect the party from whom payment is sought to indemnify the party whose costs are the subject of the bill of costs on the basis of the matters and items in the bill of costs and the amounts claimed in respect of such matters and items."

This is a provision that undoubtedly is going to be the subject of much debate. The intention would possibly be to introduce a concept of proportionality to the adjudication process, but no doubt other interpretations will be proffered in due course.

The other principles outlined at subsection 2 of the schedule are to some extent a reflection of the matters already contained in order 99, rule 37(22)(ii), but also requires the adjudicator to take into account whether a limitation of the liability of the legal practitioner might be considered, and other matters such as whether research or investigative work was carried out. The level of the legal practitioners' overhead costs would also appear to be considered a relevant factor. G

JINGLE mail

Conor Feeney is a Dublin-based barrister

Commercial tenants unable to afford rent under leases with time left to run may think that, by handing back the keys to their landlords, they are ending their tenancies. So what options do landlords have in protecting their interests? Conor Feeney sticks his foot in the door

More and more commercial tenants, unable to afford rent under leases with time left to run, are simply vacating their premises and returning the keys to the landlord. Could this action lead to the surrender of the tenancy, and what can landlords do to protect their interests when the keys are returned?

The main question is whether there has been a surrender of the tenancy by "act and operation of law" pursuant to section 7 of *Deasy's Act* of 1860. The court will look at whether the acts of both parties to the tenancy are inconsistent with the continuation of the tenancy.

For obvious reasons, it is not enough for a tenant to just unilaterally return the keys and vacate the premises. Furthermore, the eventual re-letting of the premises obviously operates as an act of surrender on the part of the landlord. It is the period between these two actions that is of interest for present purposes. It is the actions of the landlord, viewed objectively, as opposed to his or her subjective intention, that are crucial.

A distinction is drawn in the case law between 'equivocal' and 'unequivocal' acts – or between "gratuitous acts done for the benefit of the tenant" and acts "done in the exercise of ownership". Unequivocal acts of ownership on the part of the landlord are inconsistent with the continued existence of the tenancy and therefore imply surrender.

"Landlords faced with a vacant property under an unexpired tenancy will not prejudice their position against abandoning tenants by attempting to re-let the property, maintaining and securing it, and carrying out any urgent repairs"

Equivocal acts

Attempting to re-let: In *Oastler v Henderson*, when the tenant gave back the keys, the landlords engaged an agent to put up bills in the house and advertised it to let. The court found that the surrender was not accepted until the house was eventually re-let as, up until that point, the landlords had done "nothing but what they might reasonably be expected to do under the circumstances for the benefit of all parties".

This should be of relief to many landlords who find themselves torn between not wanting to prejudice their claim against a tenant who has abandoned the premises and their desire to minimise their loss, particularly in circumstances where they may never recover any unpaid rent from the tenant.

Inspection, maintenance and repairs: In *Smith v Blackmore*, the landlord advertised the property to let but also carried out necessary repairs at the property. The court followed *Oastler* in finding that there was no surrender, as such action was not inconsistent with the continuation of the tenancy.

It would seem that a landlord can even put a caretaker into the property to take care of it (see *Bird v Defonvielle*).

FAST FACTS

- Surrender "by act and operation of law"
- In the period between the return of the keys and the re-letting of the premises, the objective rather than subjective actions of the landlord are crucial
- The distinction drawn between equivocal and unequivocal acts continue to influence the case law
- The mere act of attempting to re-let the premises will not, of itself, constitute an act of surrender on the part of the landlord
- Entering to inspect or carry out repairs or maintenance on the premises is consistent with the parties' rights and obligations under the lease
- Unequivocal acts by a landlord, prior to the re-letting of the premises, that could indicate acceptance by the landlord of the surrender of the tenancy

The key here is that entering to inspect or carry out repairs or maintenance on the premises is consistent with the parties' rights and obligations under the lease. It is submitted that this would also extend to cover the maintenance of a garden and the renewal of the insurance in respect of the premises.

Securing the premises: In *Artworld Financial Corporation v Safaryan*, in outlining the principles in this area, Dyson LJ put securing the premises into the same category as repairing and maintaining the premises and described such actions as "self-help, necessary to preserve the landlord's interest in the value of his property" and "a reasonable response to the tenant's evinced intention not to perform the obligations of the tenancy". The judge referenced, in this regard, *Relvok Properties Ltd v Dixon*, in which the landlord instructed estate agents to change the locks on the premises.

Conditional acceptance of surrender: In *Proudreed Ltd v Microgen Holdings plc*, the tenant company went out of business, and discussions took place between the landlord and the tenant's sureties with a view to the latter taking a new lease in accordance with their surety obligations.

The tenant's receivers sought the landlord's consent to an informal surrender of the lease, and the landlord's solicitors responded that the landlord would consent and asked for the original lease to be returned, together with the keys. The tenant returned the keys but could not find the original lease. The sureties then contended that the lease had been surrendered and that they were released from their obligation to take a new lease.

The Court of Appeal found that the lease had not been surrendered, as the landlord's acceptance had been subject to two conditions with which the tenant and sureties had failed to comply: the return of the original lease, and the grant of a new lease to the sureties.

Omissions: In *Bellcourt Estates Ltd v Adesina*, in seeking to establish surrender, the tenant sought to rely on the landlord's failure to seek rent, rent arrears or service charges from her during the period of vacancy. The court found that there had been no surrender prior to re-letting and questioned whether "mere inaction" could ever amount to "unequivocal conduct by the landlord".

Making occasional use of a part of the premises: Another factor in *Oastler* was that the landlords had allowed two workmen to temporarily occupy two rooms in the house that was the subject of the proceedings. The court did not regard this as an unequivocal act accepting the surrender of the tenancy. It is submitted that this finding stretches the category of equivocal acts to breaking point, and that landlords should be slow to allow anyone into occupation of any part of the property, other than in a caretaker capacity.

Taking action to dispossess trespassers: In *McDougalls Catering Foods Ltd v BSE Trading Ltd*, the landlord brought court proceedings to remove trespassers from premises that had been abandoned by the tenant. The Court of Appeal found that this act of the landlord had not been an unequivocal act of surrender.

Again, a note of caution is required: it is highly questionable whether such an act is in fact consistent with the continuation of the tenancy. It is submitted that the Court of Appeal, in repeatedly emphasising the landlord's intention, as stated in correspondence, to continue to rely on the lease, may have strayed into applying a subjective test to the issue.

Looked at objectively, a landlord cannot have standing to bring such proceedings unless the tenancy is at an end and the landlord has the right to possession, a point recognised in the similar case of *McVicar v Jackson*.

In *McDougalls*, that case was distinguished on the basis that "there were no surrounding circumstances to suggest that the plaintiff might not have accepted surrender". Again, this suggests a subjective analysis of the actions of the landlord and does not answer the question of how a landlord of a subsisting lease could have standing to bring such proceedings.

Operating licensed premises: In *Buchanan v Byrnes*, the tenant abandoned a hotel premises and the landlord re-entered and made arrangements to carry on the hotel business so that the hotel's licence would not be forfeited. While the case was not decided on grounds of surrender, the High Court of Australia was satisfied that the landlord's actions would not have constituted acts of surrender.

The court emphasised the fact that the tenant had covenanted "during the currency of the lease … to use, exercise and carry on in and upon the premises the trade or business of a licensed victualler or publican … and keep open and use the said hotel as a public house for the reception, accommodation and entertainment of travellers".

The tenant further covenanted not to do anything that might cause the licence to be forfeited. In such circumstances, the actions of the landlord may be regarded as, in the words of Dyson LJ in *Artworld*, "a reasonable response to the tenant's evinced intention not to perform the obligations of the tenancy".

Unequivocal acts

The following unequivocal acts on the part of a landlord, prior to the re-letting of the premises, would be regarded as so inconsistent with the continued existence of the lease that they indicate acceptance by the landlord of the surrender of the tenancy.

> *"For obvious reasons, it is not enough for a tenant to just unilaterally return the keys and vacate the premises"*

Removing the tenant's name from the premises: In *Phene v Popplewell*, the tenants left the key with the landlord, and the landlord put up a board to let the premises, used the key to show the premises to interested parties, and painted out the tenants' names from the front. The court found that the surrender dated back to the putting up of the board on the premises, because such earlier "equivocal acts", which could be regarded as "mere acts done for the benefit of the tenants", could be rendered unequivocal by later acts that were clearly "done in exercise of ownership", in this case, the painting out of the tenants' names.

Occupying or using the premises: In *Artworld*, the landlord company allowed the beneficiary of the trust of which the company was a vehicle to park his car at the property and stay there for a period of six weeks. The court found that these actions meant that "the landlord's acts, taken as a whole, went significantly beyond anything consistent with a continued existence of the tenancy". In a clear demonstration of the objective nature of the test, the court found that the surrender had been accepted shortly after the keys were handed back, despite the fact that the landlord's solicitors had at that stage asserted in correspondence that the lease was continuing.

Redecorating or otherwise improving the premises: Another factor that weighed on the court in *Artworld* was the fact that redecoration works had been carried out by the landlord. Any such works may be regarded as going beyond the "self-help" measures discussed above, such as repairs or securing the premises. However, the line between repairs consistent with the continued existence of the tenancy (as discussed above) and more significant works beyond the scope of the rights and obligations

in relation to repair in the lease can be difficult to define. Landlords carrying out repairs on abandoned properties should be careful to only carry out necessary repairs, consistent with the covenants in the lease, and to ensure that the property is returned to a habitable state following the repairs (see *Smith v Roberts*).

Landlords faced with a vacant property under an unexpired tenancy will not prejudice their position against abandoning tenants by attempting to re-let the property, maintaining and securing it, and carrying out any urgent repairs. However, any further actions in relation to the property on the part of the landlord may lead, whether of themselves or in conjunction with other actions, to a finding that the tenancy has been surrendered. G

LOOK IT UP

Cases:

- *Artworld Financial Corporation v Safaryan* [2009] 2 EGLR 27
- *Bellcourt Estates Ltd v Adesina* [2005] EWCA Civ 208, [2005] EGLR 33
- *Bird v Defonvielle* (1846) 175 ER 171
- *Buchanan v Byrnes* (1906) 3 CLR 740
- *McDougalls Catering Foods Ltd v BSE Trading Ltd* [1997] 2 EGLR 65
- *McVicar v Jackson* 75 WN 46
- *Oastler v Henderson* [1877] 2 QBD 575
- *Phene v Popplewell* (1862) 142 ER 1171
- *Proudreed Ltd v Microgen Holdings plc* [1996] 1 EGLR 89
- *Relvok Properties Ltd v Dixon* (1972) 25 P and CR 1
- *Smith v Blackmore* (1885) 1 TLR 267
- *Smith v Roberts* (1892) 9 TLR 77

Legislation:

- *Landlord and Tenant Law Amendment (Ireland) Act 1860* (*Deasy's Act*)

PAPA, DON'T *preach*

Contrary to much popular perception, the Constitution's provisions on religion are actually rather ideologically ambiguous and embrace no single model of Church/State relations. Eoin Daly gets a belt of the crozier

Dr Eoin Daly is a lecturer at the School of Law, UCD, and author of Religion, Law and the Irish State *(Clarus, 2012)*

The religious influences on the Irish Constitution are widely known: more than any other aspect of our legal system, it reflects the close relationship between Church and State that developed in the decades following independence. Yet, in many senses, its provisions on religion are, in fact, rather ideologically ambiguous and are sufficiently flexible to have facilitated the dramatic transformation in the Church/State relationship that has occurred in the 75 years since its enactment.

In contrast to other Western systems – whether staunchly secularist models like France, or those providing for an established church like England – the Irish Constitution embraced no single model of Church/State relations. It is tentatively poised between different models, neither privileging (at least explicitly) any particular denomination, nor mandating a strictly secularist conception of Church/State separation. To some extent, this reflected a political compromise between the Catholic nationalism of early independent Ireland – which might have constitutionally enshrined the status of the dominant Church – and a lingering Republican concern to pay lip-service, at least, to the principle of religious equality.

Consequently, the constitutional provisions on religion are somewhat Janus-faced. They include symbolic affirmations of the centrality of religion in our national identity. The powers of Government are said to derive, "under God", from the people, while article 44 affirms, in seemingly bellicose terms, that "the homage of public worship is due to Almighty God". The State must "honour and respect" religion. The original text recognised the "special position" of the Catholic Church "as the guardian of the Faith professed by the great majority of the citizens" – along with recognising other denominations – but this was removed by referendum in 1972.

> ***"The Constitution is far removed from the caricature that sometimes prevails – that of a bellicose, arcane assertion of religious triumphalism"***

Thus, the eventual product was far more moderate than an initial draft that had recognised the Catholic Church as the "Church of Christ". Therefore, the final draft was, in fact, relatively liberal compared with other European constitutions, as Justice Gerard Hogan has argued in his recent scholarship. Indeed, the recognition of the "Jewish congregations", along with the Protestant minorities, was remarkably progressive by the standards of the 1930s.

Therefore, the Constitution is far removed from the caricature that sometimes prevails – that of a bellicose, arcane assertion of religious triumphalism. Its rhetoric on the importance of religion sits uneasily

PIC: GARRETT O'BOYLE

FAST FACTS

- The Constitution's provisions on religion were sufficiently flexible to have facilitated the dramatic transformation in the Church/State relationship
- It contains quite detailed rights protections in the area of religion
- The practical implications of the Constitution for religious individuals and communities are unclear: the vague rights it contains have not yet been sufficiently developed in case law

with contemporary, liberal sensibilities but, in truth, they are of almost no practical significance – at least to potential litigants.

Of far more importance are the concrete guarantees in article 44 on freedom of religion, freedom of conscience, and religious equality. The State is prohibited from discriminating on grounds of religious "profession, belief or status", while the "free profession and practice" of religion are subject only to "public order and morality". The State is also prohibited from endowing any religion, effectively precluding any established church. However, this has been interpreted narrowly and probably allows for most instances of State funding for religious bodies, insofar as it is ultimately used for some secular purpose such as charity or education. Indeed, the ban on religious endowment did not prevent the development of a notoriously close relationship between Church and State following independence.

Denominational schools

Compared with other constitutions, the *Bunreacht* contains quite detailed rights protections in the area of religion. For example, notwithstanding the heavily denominational character of the education system, article 44 explicitly prohibits discrimination in the funding of different denominational schools, and provides that denominational schools in receipt of public funds cannot require children to attend religious instruction classes. However, this right in particular appears to be minimally interpreted and quite begrudgingly accommodated in many schools – not only because practical arrangements for the exercise of this right are often lacking, but also by virtue of the fact that the religious 'ethos' tends to be integrated in the whole school environment, not just in formal timetabled classes.

Indeed, constitutional questions underlie the debate of recent years on the ethos and control of schools. In many areas, the predominance of Catholic schools means parents may effectively enjoy little option but to avail of schools committed to inculcating religious beliefs contrary to their own. The Constitution, through article 42, tacitly mandates this "patronage" model, whereby the State "provides for" free

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primary education, indirectly, by recognising and funding schools under the ownership and control of different denominational bodies. Yet this state of affairs – which undermines the freedom of many parents to educate their children in accordance with their beliefs – is difficult to square with the seemingly extensive provision for freedom of conscience and religion in article 44.

'Natural' and 'inalienable' rights

This underlies something of a paradox in the constitutional framework for religion and education. In article 42, parents are recognised as having "natural" and "inalienable" rights in respect of religious and moral education. Yet in the practical model of educational provision that the Constitution envisages and underpins, these rights can only ever be secured in a very precarious and unequal way. Notionally, the State is constitutionally obliged to provide education in such a manner as respects parental 'choice'. In practice, however, the right to secure education in accordance with one's convictions depends on the availability of appropriate schools and, in the absence of a non-denominational alternative, this depends in turn on the vagaries of the school recognition process: faith-specific school recognition will simply be impracticable in many cases, leaving non-Catholic parents in a precarious and unsatisfactory position.

The practical implications of the Constitution for religious individuals and communities are unclear: the vague rights it contains have not yet been sufficiently developed in case law. Compared to jurisdictions like the United States, it is surprising that there has been a relative dearth of litigation in Ireland on issues surrounding religion. In particular, it is unclear what specific rights stem from the protection of freedom of religion, a notoriously vague and problematic right.

Cases involving religious freedom rarely involve laws regulating and targeting religious practices as such; more commonly, legal regulation of some secular issue inadvertently impinges upon religious requirements. This might arise, for example, in relation to noise pollution or planning law, cremation and burial practices, or uniform requirements in public services.

Worldwide, there is debate as to whether religious freedom simply requires legislation to remain neutral with respect to religious beliefs and identities or, alternatively, entitles religious communities to be exempted from statutory requirements that, while not targeting religious practices as such, may conflict with their rituals and beliefs. A good example is the ritual religious use of prohibited drugs. This arose in the landmark 1990 American case *Employment Division v Smith*, where the Supreme Court controversially held that the free exercise of religion guaranteed under the constitution did not entitle religious practitioners to be exempted from statutory requirements that are neutral and "generally applicable" with respect to religious and non-religiously motivated performances of the prohibited conduct. Thus, the concept of religious freedom was thought reducible to the principle of state neutrality; it did not warrant any special accommodation of religious communities and requirements. To hold otherwise, the court reasoned, would give the state a problematic role in determining which religious doctrines were to be exempted, and thus in interpreting the content of religious doctrine and belief.

"Constitutional questions underlie the debate of recent years on the ethos and control of schools"

Religious freedom

In Ireland, however, given the exalted constitutional status that religion enjoys, it seems unlikely that religious freedom could similarly be interpreted as merely requiring State neutrality towards religion: in some circumstances at least, it is likely to be interpreted as obliging the State to positively accommodate and exempt religious groups, whether in legislation or administrative processes. This was confirmed in one of the few Irish cases dealing with religious freedom, *Quinn's Supermarket v Attorney General* (1972). The Supreme Court held that the Constitution strictly prohibits any legislative distinctions using religious criteria – even those benignly intended as accommodating religious practices. This appeared to invalidate legislative provisions accommodating the Jewish Sabbath in respect of butchers' opening hours. Yet Walsh J held that this ostensibly strict prohibition on any religious distinctions in legislation could be relaxed where necessary to protect religious freedom – in fact, the State was positively obliged to do so, given the primacy of religious freedom as a constitutional value.

However, the case sketched a rather vague set of principles concerning religious freedom, and it is difficult to interpret its implications for potential litigants whose religious practices may be frustrated by statutory or administrative requirements. In particular, it remains unclear in what circumstances and under what conditions the Constitution entitles religious communities to be exempted from generally applicable statutory prohibitions – and, in particular, what limits, based on "public order and morality", may be placed on the exercise of this right. Problematically, the *Quinn's Supermarket* case may require courts to interpret religious doctrine itself in order to ascertain the scope of any appropriate exemption – a task to which secular authorities are arguably ill suited.

In legislation itself, there is a fairly *ad hoc* approach to religious accommodation: some statutes exempt specific denominations, others, as in the case of the *Juries Act 1976*, use a more general formulation in exempting "ministers of religion" from the relevant obligations. It remains open to question whether the Constitution may be used to infer religious exemptions in statutes that are silent as to religion. Given the diversification of Ireland's religious demographics over recent decades, it is probably unrealistic to expect that the legislature can foresee and specifically recognise the multitude of religious beliefs and rituals that might require accommodation: denomination-specific exemptions are probably too piecemeal and *ad hoc*.

Resurgent Church/State controversy

While these issues may seem rather abstract, this is, in some respects, an era of resurgent Church/State controversy. For example, the issue of religious freedom has been raised in relation to the proposed legislation on the mandatory reporting of suspected child abuse – which some have feared will override the seal of the confessional. In the context of civil partnership legislation, there was broad rejection across the political spectrum of the Catholic bishops' argument that Christian civil registrars should have been exempted from any obligation to officiate at civil partnership ceremonies. By way of contrast, religiously motivated medical professionals were historically successful in their claims to be protected from any obligation to provide contraception or abortion information.

Thus, the legal principles pertaining to religion remain curiously underdeveloped, there being little sign of any consistent principled approach to religious accommodation transcending *ad hoc* political choice. Yet, given the diversification of Ireland's religious demographics over recent decades, and renewed signs of Church/State conflict, this is likely to change. G

A departure from TYPE

Peter McKenna is a solicitor with McKenna Durcan Solicitors, Lower Leeson Street, Dublin, and is a member of the Society's Technology Committee

Deciding to outsource or contract out typing and other document-production services can give smaller firms the edge over bigger ones – but be aware of the potential pitfalls. Peter McKenna takes a letter

We are a small commercial law firm, but I would wager that we have nearly the same number of typists available to us at any particular moment in time as any of the largest five firms have in-house. We have someone available to type a letter at 6am, 6pm or six minutes past midnight. If one of our secretaries is on holidays or suddenly goes sick, we have a typing replacement immediately available.

How? We have an agreement in place with a third party that has a large pool of independently contracted typists to whom we can contract out our typing as required.

Contracting out document-production services involves creating a data file (comprising an audio file) and sending it to another company's server, from where the typist accesses the file, converts the dictation into a document, and sends it back to the author.

Normally the preserve of the larger firms, the reasonable cost of accessing this technology has made outsourcing this administrative element of your business practice an attractive and realistic proposition for the medium and smaller-sized firm.

> *"The reasonable cost of accessing this technology has made outsourcing typing an attractive proposition for the medium and smaller-sized firm"*

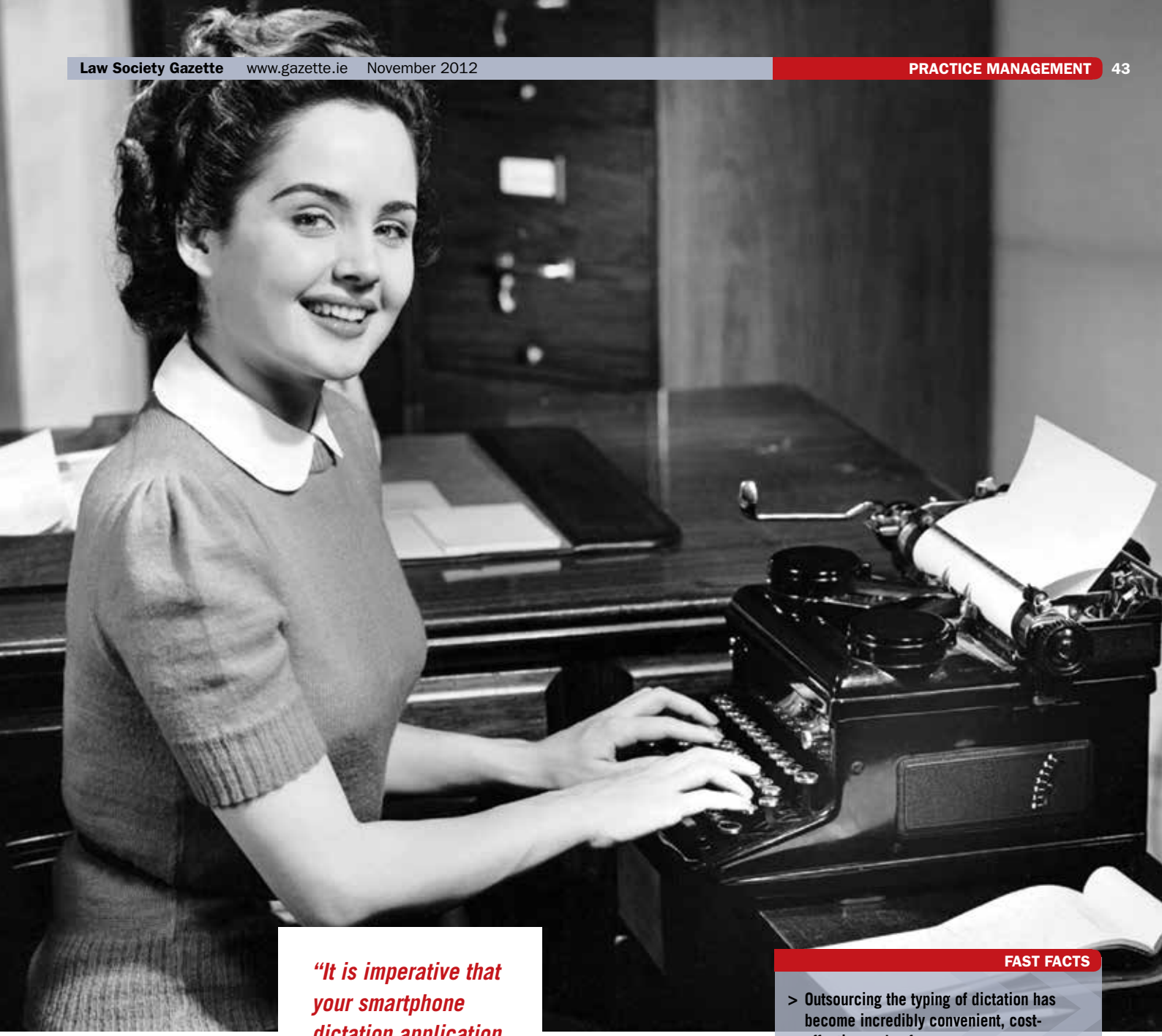
Recent developments

Traditionally, the outsourcing or contracting out was achieved off-site by the solicitor dictating the material onto a tape and sending it to the independent contractor typist (for example, former secretary, secretary on study leave, and so on) to play on a compatible machine, type, print and then post back the finished work to the solicitor – not necessarily the safest, fastest or most secure means of outsourcing this administrative element of work.

With the development of digital voice recorders (DVRs), solicitor can now record and store their voice on digital files, transfer these to their PC, and email them to the typist off-site, with the finished work being emailed back. DVRs are relatively inexpensive and are used in much the same way as a tape Dictaphone. Again, however, it's not necessarily the most secure means of transferring confidential data.

The goods news is that recent developments in the use of digital dictation technologies now provide for configuring the system on the solicitor's network so that the dictation file is encrypted and sent on a virtual (and secure) private network to the server of the third-party provider (TPP), where it can be accessed by the independently contracted typist. This can be achieved using a dictation device connected by a cable to your computer and 'exported' to the TPP or, indeed, as some providers now offer, via an application on your smartphone that turns it for those few moments into a dictation machine.

The dictation does not leave the TPP's password-protected server. The finished work is saved on the same



server by the typist, from where it can be downloaded by the solicitor, saved by the typist back into the solicitor's own system, or emailed directly to the solicitor. Data is stored and remains securely on the TPP's server and is deleted within the terms of the agreement with the TPP. The independently contracted typists sign a confidentiality agreement with the third-party provider.

A word of warning though. Not all digital dictation applications on smartphones encrypt dictation. Therefore, if not encrypted, should the dictation be sent to the wrong addressee, it can be easily opened and listened to by unwanted ears. It is imperative that your smartphone dictation application encrypts the dictation so that the confidential nature of the material and security of the system employed is not compromised.

"It is imperative that your smartphone dictation application encrypts the dictation so that the confidential nature of the material and security of the system employed is not compromised"

Why should we?

So why should you do it? It's a 24/7 service. Depending on the terms of your agreement with the TPP, the normal turnaround time is less than 24 hours and, if urgent, less again. There is no hourly rate or part thereof. The typing is normally charged per recorded minute of dictation as opposed to the time

FAST FACTS

- Outsourcing the typing of dictation has become incredibly convenient, cost-effective and safe
- Safety depends, however, on you and your third-party provider (TPP) using file encryption. Make sure that you invest in the right hardware and software
- Nail down the data-protection and privacy-of-data liabilities with your TPP
- Agree performance indicators in any service level agreement (SLA) that you sign with your service provider
- Carefully consider the scope and nature of any proposed limitation-of-liability provisions in the SLA
- Ensure that the TPP does not allocate your work to a typist who also types for the other side in a matter
- There may be PII issues if you intend using this type of service, so make sure that your cover extends to associated risks

GIBNEY
COMMUNICATIONS

New Managing Director at Gibney Communications

Gibney Communications, one of Ireland's leading independent public relations firms is pleased to announce that **Donnchadh O'Neill** has been appointed Managing Director while **Ita Gibney** takes on the role of Chairman.

Donnchadh has been with the company for more than seven years and has been Deputy Managing Director for two. He will also join the Board of the Company.

In his new role he will continue to service clients while leading the management of the 15-strong professional team. As a journalist, RTE radio producer and PR consultant he brings over 20 years of experience to the business and clients.

Ita Gibney who has led the firm since its establishment in 1995 will continue to remain fully active in the continued growth of the company and to serving key clients.

Gibney Communications is an independent Irish public relations firm and recently marked its 17th year serving clients in Ireland.

www.gibneycomm.ie

Christmas Cards

In aid of the Solicitors' Benevolent Association

Card A
MADONNA AND CHILD
Antonio Correggio

This is an opportunity to support the work of the Solicitors' Benevolent Association, whose needs are particularly acute at Christmas time

GREETING PRINTED INSIDE EACH CARD:

With Best Wishes for Christmas and the New Year

Card B
THE CHRISTMAS EVE BALL

Order form

Firm: _____ Contact: _____

Address: _____

DX: _____ Tel: _____ Fax: _____

Each card sold in packets of 50 costing €125 (including overprinting of your firm's name). Minimum order 50 cards. Add €7.00 for postage and packaging for **each** packet of 50 cards.

I wish to order _____ pack(s) of card A @ €125, _____ pack(s) of card B @ €125. _____

Text to be overprinted: _____

SAMPLE OF OVERPRINTED TEXT WILL BE FAXED FOR CONFIRMATION BEFORE PRINTING.

I enclose cheque for € _____ payable to Santry Printing Ltd **(€132 per pack)**.

SEND ORDER FORM AND CHEQUE TO:
SBA Christmas Cards, Santry Printing Ltd, Unit 5, Lilmar Industrial Estate, Coolock Lane, Dublin 9. Tel: 842 6444. Contact: Amanda

taken to type. It is also possible to pick and choose which dictation jobs you wish to export to the TPP, so that you can allocate your most urgent work in-house and the soul-destroying, more laboursome work to the TPP. This solution also gives you greater control over when the work is typed to help ensure you meet your clients' needs.

There are a number of reasons why this type of service has become attractive to firms:

- It's competitive – the legal services market is experiencing lower profit margins, which makes the service cheaper for users,
- The reduced cost, improved client service and competitiveness have led to an increased interest in the profession for outsourcing certain business processes to TPPs,
- Recent developments in legal practice-management systems involve the emerging use of digital dictation, and
- It's secure, thanks to the advent of encrypted internet and mobile transmission of data and sound files.

A further consideration is the *Protection of Employees (Temporary Agency Work) Act 2012*, which was enacted on 16 May 2012. Under the act, all agency workers who were on assignment on 5 December 2011 will be entitled to equal treatment in relation to pay from that date, as if they were directly recruited by the hirer to the same or similar job.

Lemmon zest

Agency workers on assignment after 5 December 2011 are entitled to equal treatment in relation to pay from the date of their assignment as if they were directly recruited by the hirer to the same or similar job. Equal treatment in relation to all other aspects of basic working and employment conditions outlined in the legislation came into effect from the date of enactment. For this purpose, pay is being defined as basic pay and, if applicable, shift premium, overtime premium, and Sunday premium, among other matters.

Agency workers are entitled to equal treatment in their basic working and employment conditions as if they were directly recruited by the hirer to the same or similar job. Basic working and employment conditions are being defined as working time, rest periods, night work, annual leave, overtime, and public holidays.

This means that a practice looking to engage an agency worker will need to consider each term and condition of employment of its comparable employee, identify whether it needs to be matched for temporary agency workers, and quantify the potential cost.

"There are specific risks in relation to contracting out typing that practices should thoroughly assess before making the decision to outsource"

Potential benefits

A careful due diligence with the assistance of your IT provider and a cost/benefit analysis will need to be carried out by each individual practice to see if this type of service will meet its needs, but, if properly implemented, the gains to be made can be:

- Improved business practices through intelligent allocation of resources,
- Refined costs – reduce salary overheads and office space requirements,
- Greater flexibility and capability – determine how, when and the frequency of use of this service to suit your practice needs,
- Improved turnaround times for document production,
- A contingency plan for busy periods, staff holidays or unexpected sick days,
- Improved quality and efficiency of service, with shortened work-in-progress time, and
- Enhanced profitability.

As previously mentioned, the reasonable cost of accessing this technology has made outsourcing typing an attractive proposition for the medium and smaller-sized firm. It may require a small capital investment in hardware and software in order to install and implement this system, but it gives a smaller firm the opportunity to level the playing field with bigger players.

Outsourcing or contracting out typing and other document-production services gives the smaller and medium-sized firm access to a typing resource 'on tap' that would normally only be available to larger firms. How this constant access is managed or employed depends on the particular needs of each firm. It is, however, a useful tool in a market where the large do not apologise for competing with the small for work.

ISSUES TO BE CONSIDERED

Much the same issues that relate to cloud computing technologies apply here. There are specific risks in relation to contracting out typing that practices should thoroughly assess before making the decision to outsource. These include:

- ***Quality of work*** **– it will be necessary to monitor and assess the typed work on an ongoing basis.**
- ***Data protection and location of data*** **– confirm where the data physically resides and ensure there is no breach of the solicitor/practice obligations.**
- ***Security*** **– identify security measures being employed by the TPP – what compliance and security protections are enforced for those locations? Does the data go to any other entity outside of the TPP? Does it ever leave the country/EU? Is the TPP running intrusion detection or intrusion protection on its network?**
- ***Privacy of data*** **– ascertain whether your firm will have dedicated or shared infrastructure. If shared, how does the TPP maintain isolation and privacy of your data?**
- ***Confidentiality*** **– the service level agreement (SLA) must have adequate confidentiality provisions regarding the TPP's obligations to keep the data confidential, but also must ensure that all typists allocated to your work sign confidentiality agreements.**
- ***Breach*** **– how often does the TPP update firewall rules/policies? What insurance coverage does the TPP have in the event of an IT security breach? What is its incident response plan/process?**
- ***Liability*** **– agreement of protocol and definition of who assumes risk in these situations should be contained in the SLA. Carefully consider the scope and nature of any proposed limitation-of-liability provisions in the SLA.**
- ***Conflicts*** **– what protocols are put in place to ensure the TPP does not allocate your work to a typist that also types for the other side in a matter?**
- ***Auditing and the provision of reports by the TPP on use and access to data*** **– do you have the ability to track progress of work to ensure that you are getting value for spend?**
- ***Professional indemnity insurance*** **– it would be strongly advisable to make your insurer aware that you intend using this type of service and seek confirmation that your cover extends to associated risks.**
- ***Client consent*** **– for the contracting out of work involving a client's file, the client's consent should be sought. This may be achieved through an appropriately drafted letter of engagement and an acknowledgment by the client in return.**

Waterford Law Society annual dinner on 12 October

ALL PICS: GARRETT FITZGERALD PHOTOGRAPHY

At the Waterford Law Society annual dinner in Waterford Castle on 12 October were *(front, l to r)*: Kieran Moran (President, Southern Law Association), Judge Terence Finn, Ger O'Herlihy (President, Waterford Law Society) and Donald Binchy (President, Law Society of Ireland). *(Back, l to r)*: Michael Howlett (Waterford Institute of Technology), Niall Rooney (county register), James McCourt (senior vice-president, Law Society of Ireland), Ken Murphy (director general), Judge Kevin Staunton, Jack Purcell (court manager) and Johnny Walshe BL

Kerrie O'Shea, Nicola Walsh and Sharon Kearns were among those attending the Waterford Law Society annual dinner on 12 October

Catching up at the Waterford Law Society annual dinner were *(l to r)*: Gillian Kiersey, Rosie O'Flynn and Marie Dennehy

At Waterford Castle were *(l to r)*: Jo Geary, Jill Walsh, Ellen Hegarty and Gillian Ormonde

Eoin O'Herlihy, Ger O'Herlihy (President, Waterford Law Society), Tom Murran and Paul Murran were at Waterford Castle on 12 October

Marie Dennehy *(left)* and Finola Cronin made a special presentation to Waterford Law Society council member, Bernadette Cahill, for her tireless work on behalf of Waterford solicitors throughout the year

Solicitors, Bar and court staff at the June sitting of the High Court in Waterford. Seated with Gerard O'Herlihy (President, Waterford Law Society) are Mr Justice Eamon de Valera *(left)* and Mr Justice John Hedigan

Big changes in the wee county

The County Louth Solicitors' Bar Association, comprised of solicitors who practise in Dundalk and Ardee, hosted a dinner in honour of Mr Justice Raymond Groarke on his appointment as President of the Circuit Court and Mr Justice Matthew Deery on completion of his term of office in that role.

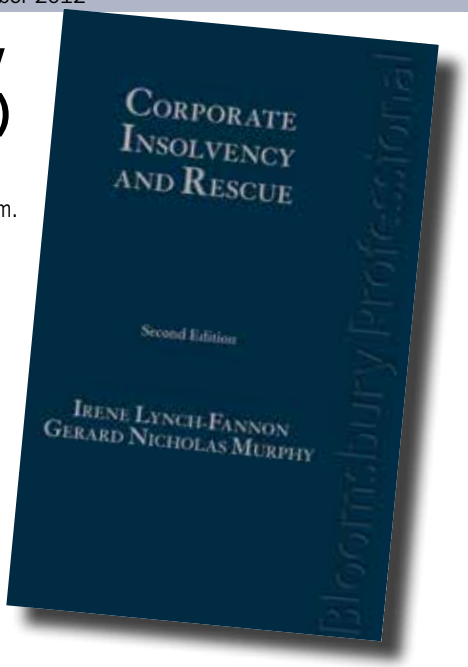
Judge Groarke was assigned to the Eastern Circuit, which includes Louth and Meath, before the appointment of the present occupant, Judge Michael O'Shea, who was also honoured at the event.

In welcoming the guests, Conor MacGuill, the bar association's president, also paid tribute to local colleagues John Woods on being 50 years in practice, Don McDonough on reaching a significant birthday, and Fergus Mullen on his appointment as state solicitor for Louth.

In acknowledging the significant role and efficiency of the Courts Service, a presentation was made to county registrar Mairead Ahern to mark the 20th anniversary of her appointment.

At the Louth Solicitors' Bar Association (LSBA) dinner in the Ballymascanlon Hotel were *(l to r)*: Elaine Connolly (secretary), Mr Justice Raymond Groarke, Conor MacGuill (president), Mr Justice Matthew Deery and John McGahon (treasurer)

Corporate Insolvency and Rescue (2nd ed)



Irene Lynch-Fannon and Gerard Murphy. Bloomsbury Professional (2012), www.bloomsburyprofessional.com. ISBN: 978-1-84766-379-5. Price: €185.

The economic crisis into which Ireland was plunged in 2008 has led to significant changes in the legal and financial landscape affecting corporate insolvency and rescue, and this timely publication successfully provides a practical and useful guide on all aspects of this area. This book is comprehensive, current, practical and relevant for any individual advising in the ever-developing area of corporate insolvency and rescue.

A detailed and comprehensive analysis is provided in a number of areas, including liquidations, receiverships, examinerships, schemes of arrangements, priority of creditors' claims, fraudulent and reckless trading, and restriction and disqualification of directors. The book contains succinct summaries of the relevant case law for each applicable area and, importantly, it includes an analysis of recent decisions of the High Court such as *DR Developments* (sale of fixed charged asset by an official liquidator), *JD Brian Motors* (crystallisation of floating charges) and *Kavanagh and Lowe* (ability to appoint a receiver).

The book contains practical guides and information, such as the procedure and practical considerations of compulsory liquidations. All insolvency practitioners will find the 'Guide to Preferential Creditors' contained at the end of chapter 8 particularly useful. It has helpfully reproduced the new *Rules of the Superior Courts* introduced by SI 121/2012 as an appendix to the book. Of assistance and included also as appendices are practice directions HC28 and HC55 and a precedent draft winding-up petition and advertisement. This book also includes an analysis of the statutory receiver introduced by the *National Asset Management Agency Act 2009* and the growing emergence of pre-pack receiverships.

The law relating to corporate restructuring and insolvency has grown and developed at an unprecedented rate in recent years, with many new developments that are of direct implication, and this book is an indispensable tool for all insolvency practitioners of all levels of experience. G

Andrea Brennan is an associate in A&L Goodbody's restructuring and insolvency team.

LIBRARY SERVICES

- **Online catalogue and app,**
- **Book loans,**
- **Enquiry service,**
- **Precedents service,**
- **Document delivery,**
- **Weekly judgments alerter.**

Further details on any of the above services are available by contacting the library on tel: 01 672 4843/4, email: library@lawsociety.ie.

JUST PUBLISHED

New library books available to borrow

- Anderman, Steven *et al*, *EU Competition Law and Intellectual Property Rights: the Regulation of Innovation* (2nd ed; OUP, 2011)
- Kelly, Emma and Farhat Bokhari, *Safeguarding Children from Abroad: Refugee, Asylum Seeking and Trafficked Children in the UK* (JKP, 2012)
- Lenaerts, Koen *et al*, *European Union Law* (3rd ed; Sweet & Maxwell, 2011)
- McIntyre, T *et al*, *Criminal Law* (Round Hall, 2012)
- Weatherill, Stephen, *Cases and Materials on EU Law* (10th ed; OUP, 2012)
- Whish, Richard and David Bailey, *Competition Law* (7th ed; OUP, 2012)
- Willems, Marcel (ed), *Cash Pooling and Insolvency: a Practical Global Handbook* (Global Law & Business, 2012)

BRIEFING

Practice notes

Professional indemnity insurance common proposal form

Following on the successful introduction of the common proposal form in the current indemnity period, the Society has released the common proposal form for the 2012/2013 indemnity period. This form is available to download from the Society's website at www.lawsociety.ie/Pages/PII/ under the 2012/2013 renewal resources section. The form will also be circulated by insurers, directly or through brokers.

This common proposal form will ensure that each firm will have to complete only one proposal form at the next renewal, thereby simplifying the renewal process for the profession and making it easier for firms to obtain multiple quotes.

Guidelines for the common proposal form, including guidance for specific areas of the form, can be found on the Society's website.

Points to note

Ultimately, you are responsible for obtaining PII before the renewal date.

Your proposal form should be submitted early, be completed fully and correctly, have all required documentation attached and be clear, accurate, well presented and comprehensive. Try to avoid submitting handwritten proposal forms.

Firms are not required to provide certificates of good standing with the common proposal form, and insurers did not seek to have a requirement to provide this certificate included in the common proposal form. Please note that the fee for obtaining a certificate of good standing from the Society within ten working days is €100, to be paid in advance of the certificate issuing. Certificates of good standing issued later than ten working days are free of charge.

Answer all questions – if you are unsure of any question, answer what you think the insurer is looking for and provide additional information to clarify. Check and recheck the form to ensure that all questions have been answered correctly.

Check that all additional documentation has been attached to the form and is correctly cross-referenced.

Make sure that the figures add up. For example, ensure that gross fee income figures add up to 100%.

The insurer must accept a fully completed proposal form as a duly completed application for a policy and must not require the firm to complete or submit any other proposal form or application for a policy.

An insurer cannot require a firm seeking a policy to provide it with supplemental information until such time as the insurer has received and reviewed a proposal form fully completed by that firm.

The insurer can only request a firm to provide it with supplemental information where the insurer reasonably requires such information in order to decide whether to insure the firm. In this case, the insurer must make a statement to that effect and request that the firm provide such supplemental information within a reasonable timescale.

It is proper practice for firms to notify insurers of claims or circumstances arising 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 must notify their current insurer of all claims and circumstances before the end of the indemnity period.

The common proposal form is an application for normal PII, not for run-off cover. Firms should contact the special purpose fund manager, Capita Commercial Insurance Services, with regard to obtaining run-off cover through the Run-off Fund. The special purpose fund manager can be contacted by phone on 0044 207 397 4539 or email spf@capita.co.uk. More information on the Run-off Fund can be found on the Society's website at www.lawsociety.ie/Pages/PII/Run-off-Cover.

Claims information must be provided by your current insurer and be attached to the common proposal form. If you have a poor claims history, provide the insurer with further information on how the claim arose and what procedures are now in place to ensure that henceforth, as far as possible, such claims will not arise. Failure to provide a claims history or provision of an incomplete claims history may indicate to insurers that something is being hidden. Claims information is used by insurers to compare your previous loss experience against improvements to risk management you may have implemented or changes you may have made to your work-type activities.

Firms should ensure to redact any information in any documentation provided to insurers that may breach legal privilege or client confidentiality.

The risk-management section of the common proposal form has been greatly expanded, compared with forms previous to the introduction of the common proposal form. Insurers are focusing on risk management, and it would be to the benefit of firms to demonstrate to insurers that they have robust risk-management procedures in place.

Ensure that the form is signed and dated, otherwise the proposal form is invalid.

With regard to 'yes/no' questions in the form, where the answer is some variation of 'yes' or 'no', expanded answers should be provided on such questions in the covering letter submitted with the form.

Professional indemnity insurance renewal

The mandatory professional indemnity insurance (PII) renewal date is 1 December 2012. This date is not negotiable. All cover under the current indemnity period will expire on 30 November 2012.

Confirmation of cover

The PII regulations for the 2012/2013 renewal period have been amended to reduce the period for confirmation to the Society of PII cover from ten working days to three working days. Therefore, confirmation of cover in the designated form must be provided to the Society on or before 6 December 2012.

Guide to renewal

The guide to renewal for the 2012/2013 indemnity period is being published on the Society's website 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.

2012/2013 renewal resources

Renewal resources for the 2012/2013 indemnity period are available to download from the Society website at //www.lawsociety.ie/Pages/PII/ and currently includes:

1) Common proposal form,
2) List of brokers,
3) List of insurers, and the
4) Qualified Insurers Agreement.

This area will be updated frequently as more documentation becomes available.

Disclosure of financial rating by qualified insurers

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.

Qualified 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 2012/2013 indemnity period in order to:

1) Allow firms to make a more fully informed decision on their choice of insurer,
2) Ensure full transparency for the profession in relation to qualified insurers meeting, or not meeting, generally accepted standards of financial strength, and
3) Do so in a way that will not restrict firms' choice of insurer.

It should be noted that all qualified 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.

Notification of claims by 30 November 2012

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 2011 and 30 November 2012 (both dates inclusive) should be notified by the firm to their insurer by 30 November 2012.

The minimum terms and conditions for PII were amended in the *Solicitors Acts 1954 to 2008 (Professional Indemnity Insurance) Regulations 2011* (SI no 409 of 2011) 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 2012 is in place with regard to notification of claims and circumstances to your insurer.

Improvements to the renewal process

For the 2012/2013 indemnity period, insurers are required to leave quotes to firms open for a period of not less than ten working days, an increase from five working days for the 2011/2012 indemnity period.

Run-off Fund

The Run-off Fund provides run-off cover for firms ceasing practice:

1) Who have renewed their PII for the current indemnity period, and
2) 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 2012 is required to renew cover for the 2012/2013 indemnity period. Further information on run-off cover can be found on the Society's website at www.lawsociety.ie/Pages/PII/Run-off-Cover/.

PII helpline

The Society continues to operate the PII Helpline to assist firms in dealing with PII queries. The PII Helpline is open Monday to Friday from 10am to 4pm and can be contacted by phoning 01 879 8790 or emailing piihelpline@lawsociety.ie.

NOTICE

Criminal Legal Aid Panel 2012-2013: tax clearance certificates

Members who wish to retain their name on the Criminal Legal Aid Panel for the legal aid year 1 December 2012 to 30 November 2013 are required to hold a tax clearance certificate with an expiry date later than 30 November 2012.

Applications for tax clearance certificates can be made in writing (Form TC1) to Revenue Local District offices or via Revenue's Online Service (www.revenue.ie).

Note: fees will not be paid to a solicitor who accepts an assignment to a case if his/her name is not, at the time of assignment, on the relevant solicitors' panel.

eStamping: Revenue rulings on circumstances

CONVEYANCING COMMITTEE

The committee confirms that Revenue has indicated, through the Tax Advisers Liaison Committee (of which the Law Society is a member), that it will continue to give prior clarifications/confirmations (rulings on circumstances) in the same manner as it did before the introduction of self-assessment and e-filing for stamp duty.

Solicitors are also reminded that the 'expression of doubt' box on the stamp duty return can be used when making an e-filing, and this is a form of comfort also. However, it should be noted that it can only be made for filings made within 30 days of the date of the instrument – it cannot be made after that date.

Practising certificate 2013: notice to all practising solicitors

It is professional misconduct and a criminal offence for a solicitor (other than a solicitor in the full-time service of the State) to practise without a practising certificate. A solicitor shall be deemed to practise as a solicitor if he or she engages in the provision of legal services. 'Legal services' are services of a legal or financial nature provided by a solicitor arising from that solicitor's practice as a solicitor.

It should be noted that, as set out in the practice note 'Prohibition on practising as a solicitor without a practising certificate: solicitors cannot be "legal executives" or "paralegals"', as published in the *Gazette* in July 2009 and again in February 2012, it is not permissible for a firm to classify a solicitor employed by a firm as a 'legal executive' or 'paralegal' with a view to avoiding the requirement to hold a practising certificate if the solicitor is engaged in the provision of legal services.

The actions that can be taken against a solicitor found to be practising without a practising certificate include a referral to the Solicitors Disciplinary Tribunal, an application to the High Court, and a report to An Garda Síochána.

Practising certificate application forms

Application forms for solicitors in private practice will be forwarded to the principal or the managing partner in each practice, rather than each solicitor. Please note that practising certificate application forms will not be available until after 19 December 2012.

When you must apply

A practising certificate must be applied for on or before 1 February in each year in order to be dated 1 January of that year and thereby operate as a qualification to practise from the commencement of the year. It is therefore a legal requirement for a practising solicitor to deliver, or cause to be delivered, to the Registrar of Solicitors, on or before 1 February 2013, an application in the prescribed form correctly completed and signed by the applicant solicitor personally, together with the appropriate fee. The onus is on each solicitor to ensure that his or her application form and fee is delivered on or before 1 February 2013. Applications should be delivered to the Regulation Department of the Society at George's Court, George's Lane, Dublin 7; DX 1025.

Please note that any incorrectly completed application forms or applications without full payment cannot be processed and will be returned. Therefore, solicitors are strongly advised to read and take full account of the practising certificate application form guidelines when completing the form.

What happens if you apply late?

Any applications for practising certificates that are received after 1 February 2013 will result in the practising certificate being dated the date of actual receipt by the Registrar of Solicitors, rather than 1 January 2013. There is no legal power to allow any period of grace under any circumstances whatsoever.

Please note that, as mentioned above, you cannot provide legal services as a solicitor without a practising certificate in force. Therefore, solicitors whose practising certificate application forms are received after 1 February 2013 and whose practising certificates are therefore dated after 1 February 2013, who have provided legal services before that date, are advised to make an application to the President of the High Court to have their practising certificates backdated to 1 January 2013.

The Regulation of Practice Committee is the regulatory committee of the Society that has responsibility for supervising compliance with practising certificate requirements. A special meeting of the committee will be held on a date after 1 February 2013, to be decided at a later date, to consider any late or unresolved applications for practising certificates. At this meeting, any practising solicitors who have not applied by that date for a practising certificate will be considered for referral forthwith to the Solicitors Disciplinary Tribunal and will be informed that the Society reserves the right to take proceedings for an order under section 18 of the *Solicitors (Amendment) Act 2002* to prevent them from practising illegally.

If you are an employed solicitor

Solicitors who are employed should note that it is the statutory obligation of every solicitor who requires a practising certificate to ensure that he or she has a practising certificate in force from the commencement of the year. Employed solicitors cannot absolve themselves from this responsibility by relying on their employers to procure their practising certificates. However, it is the Society's recommendation that all employers should pay for the practising certificate of solicitors employed by them.

Some of your details are already on the application form

The practising certificate application forms will be issued with certain information relating to each solicitor's practice already completed. Such information will include the relevant fees due by each solicitor, including allowance for solicitors of 70 years or over, as they will not be covered under the provisions of the Solicitors' Group Life Scheme.

Payment by electronic funds transfer (EFT)

All practising certificate application forms sent out will include an EFT payment form. Any solicitor wishing to pay the practising certificate fee by EFT must complete and return the EFT payment form with their practising certificate application form. **Failure to do so will result in the application form being returned as incomplete**.

Each EFT payment must have an easily identifiable specific reference, such as the firm or company name, the solicitor's name or the solicitor's number. General references such as 'Law Society' or 'practising certificate' will not be accepted and may result in a significant delay in the issuing of the practising certificate. The payment reference used must be included in the EFT form. **Failure to include this information will result in the application form being returned as incomplete**.

Law Directory 2013

It is intended that the *Law Directory 2013* will note all solicitors who have been issued with a practising certificate by 22 February 2013. Practising certificates can only be issued following receipt of a properly completed application form together with full payment, with no outstanding queries raised thereon. It should be noted that only those solicitors with practising certificates **issued** by 22 February 2013 will be included in the *Law Directory*, not every solicitor who has submitted an application form by 22 February 2013.

Therefore, in order to ensure that your practising certificate issues by 22 February 2013 to enable you to be included in the *Law Directory*, you should ensure that the application form you return to the Society is completed correctly and includes full payment of fees due. If the form is not completed correctly or fees have not been paid in full, it will be necessary for the Society to return the form, which may result in delaying the issue of your practising certificate, despite the fact that you had applied for the practising certificate prior to 22 February 2013.

BRIEFING

The details of any solicitor whose practising certificate issues after 22 February 2012 will not be included in the *Law Directory*, but will be included in a supplementary list of solicitors that will be published at a later date on the Society's website.

What can you access on the website (www.lawsociety.ie)?
A blank, editable application form will be available in the members' area of the Law Society's website after 19 December 2012, which can be completed online prior to printing a copy for signing and returning to the Society with the appropriate fee. This area is accessible using your username and password. If you require assistance, please visit www.lawsociety.ie/help. In addition, you may request a form to be emailed to you by emailing pc@lawsociety.ie.

If you are ceasing practice
If you have recently ceased practice or are intending to cease practice in the coming year, please notify the Society accordingly.

Acknowledgment of application forms
Please note that it is not the Society's policy to acknowledge receipt of application forms. If in doubt that your application form will arrive on time, or at all, send by recorded post, tracked DX or courier.

Duplicate practising certificate
Please note that there is a fee of €50 in respect of each duplicate practising certificate issued for any purpose.

John Elliot,
Registrar of Solicitors and Director of Regulation

Registration of easement on a leasehold folio

CONVEYANCING COMMITTEE

Prior to the *Registration of Deeds and Title Act 2006* (the 2006 act), a lease of registered land was deemed to be a first registration of an unregistered leasehold interest and, as stated in sections 69 and 72 of the *Registration of Titles Act 1964*, an easement has to be created by express grant after the first registration of land for it to be a section 69 burden; otherwise it is a section 72 burden.

If an easement contained in a lease was not created by express grant after the first registration of the leasehold folio, it cannot be registered as a burden on the freehold folio. However, a note under section 72(3) can be made on the folio, on request.

After the 2006 act, a lease of registered land was deemed to be a registered land transaction, and easements created after 2006 in relation to a leasehold folio to be opened for registered land are registerable as a burden under section 69.

In respect of the first registration of unregistered land, in general terms, an easement affecting the land at the time of first registration is not registerable as it has not been created after the first registration of the land. The only thing to do in this case would be to register a section 72(3) note on the new folio to be opened.

It is therefore important when dealing with registered land, and in particular when acting for a vendor, to read through the section 72 burdens very carefully (and especially where it appears that the land was only newly registered on foot of a first registration application) to make sure that there were no easements created by express grant before the first registration of the land, and which are not shown on the folio as a burden or as a section 72(3) note, but which would be a burden under section 72(h) and would need to be disclosed in the section 72 declaration.

One would hope that, if the easement is in writing, it would be with the title deeds as a warning when drafting a section 72 declaration that this easement exists, even though there is no note of it on the folio.

If your client informs you that there is an easement in writing affecting his/her land, but it does not show up on the folio, you should seek a copy of the deed relating to same from your client and disclose it as a section 72 burden.

Practitioners are reminded to advise clients of what a section 72 declaration entails. It is recommended that the full form of section 72 declaration be used rather than the short form: a precedent of the long form is available in the members' area of the Law Society website.

Practising certificate fee waiver for solicitors participating in Skillnet, JobBridge or WPP schemes

Solicitors providing legal services through work-experience initiatives, such as Skillnet, JobBridge or WPP schemes, are required to hold a current practising certificate, just as required for any solicitor employed on a paid basis. However, the Law Society has put in place an arrangement whereby solicitors on formalised work experience schemes will be provided with a practising certificate free of charge for the duration of the placement.

Solicitors applying for such waiver must complete and return the relevant application for waiver to the Society and must meet the following criteria:

- They must be registered with the Law Society's Career Support Service as participating in the Skillnet, JobBridge or WPP scheme,
- They are providing legal services by participating in the Skillnet, JobBridge or WPP scheme,
- They are providing legal services to and for the firm or organisation providing the work experience through the Skillnet, JobBridge or WPP scheme only, and not to any other third party,
- They are receiving no salary, wage or other remuneration from the firm or organisation providing the work experience, other than that prescribed by the Department of Social Protection, and
- They have no contract of employment with the firm or organisation providing the work experience.

The waiver, if granted, shall apply only so long as all of the above provisions continue to apply to the solicitor. If any of these provisions cease to apply, the solicitor is required to notify the Regulation Department and the Career Support Section of the Society in writing with immediate effect, and is liable to pay the due amounts *pro rata* for the practising certificate for the remainder of the practice year. Any practising certificate granted under the scheme must be returned at the end of the placement.

Solicitors seeking to avail of such a waiver under one of the approved schemes listed above should contact the Society's Regulation Department at pc@lawsociety.ie. The application for waiver is available for download from the members' area of the Society's website.

BRIEFING

Land Registration (Fees) Order 2012

CONVEYANCING COMMITTEE

The above fees order comes into operation on 1 December 2012. It introduces substantially increased fees for Land Registry applications. The schedule to the fees order sets out the new rates that apply and is available on the PRA website. Practitioners are urged to immediately familiarise themselves with the new rates in order to facilitate collection of the correct fees from clients, especially during the period between now and 1 December 2012.

Practitioners should note the introduction of new bands for the relevant fees for transfers on sale and, in the context of undertakings given by solicitors to lending institutions regarding stamping and registration of clients' titles and lenders' charges, should ensure:

- That the correct registration fees are collected from clients in respect of applications for registration to be lodged on or after 1 December 2012, and
- That applications are lodged before 1 December 2012 where fees were collected from clients at the rates set out in previous fees orders.

The PRA has confirmed that a copy folio and filed plan now comes under the fee heading at no 28 in its Summary Schedule and its new fee for this item is €40.

A number of new fee headings, for example, under various *Housing Acts*, affordable home purchase schemes, and so on, have arisen since the last fees order in 1999, and new fees have been introduced in respect of these applications.

A fee of €130 has been introduced for registration of easements and profits *a prendre*.

New *Circuit Court Rules*: actions for possession and well-charging relief

CONVEYANCING COMMITTEE

Practitioners' attention is drawn to the *Circuit Court Rules (Actions for Possession and Well-Charging Relief) 2012* (SI 358 of 2012), which amends the existing rules of the Circuit Court to modify the procedure in respect of proceedings for recovery of possession of land and proceedings to declare a mortgage well-charged on land.

Prohibition on acting for both vendor and purchaser in conveyancing transactions from 2013

CONVEYANCING COMMITTEE

Practitioners' attention is drawn to SI 375 of 2012, whereby a solicitor, from 1 January 2013 onward, may not act for both vendor and purchaser in a conveyancing transaction (as defined in the SI and including a voluntary transfer), except in a few limited circumstances as set out in the statutory instrument.

NOTICE TO ALL PRACTISING SOLICITORS

Solicitors (Advertising) Regulations 2002

All practising solicitors are reminded that the *Solicitors (Advertising) Regulations 2002* (SI no 518 of 2002) particularly restrict personal injuries advertising.

The definition of advertisement is wide and includes any communication that "is intended to publicise or otherwise promote a solicitor in relation to the solicitor's practice". Websites are covered by the definition.

The regulations prohibit advertisements that refer to claims or possible claims for damages for personal injuries, the outcome of such claims, or the provision of services by solicitors in conjunction with such claims and advertisements that solicit, encourage or offer any inducement to make such claims.

Any advertisement that contains factual information on legal services provided may include the words 'personal injuries'. If a solicitor decides to refer in an advertisement to personal injuries or other contentious business, the advertisement must clearly refer to the prohibition on percentage charging in connection with contentious business.

Any words or phrases that suggest that legal services relating to contentious business will be provided at no cost or at a reduced cost are not permitted – for example 'no foal, no fee', 'most cases settle out of court' or 'insurance cover arranged to cover legal costs'.

Advertisements cannot contain cartoons, dramatic or emotive words or pictures, nor can they refer to calamitous events, such as train or bus crashes. Solicitors cannot advertise their willingness to make home or hospital visits.

Where an advertisement contains factual information on the legal services provided, no one category may be given prominence. The practice of listing different types of personal injury actions in a list of services provided has been deemed by the Law Society to be a *prima facie* breach of the regulations.

Section 5 of the *Solicitors (Amendment) Act 2002* prohibits a person *who is not a solicitor* publishing advertisements, which, if published by a solicitor, would be in breach of the legislation. The act extends the definition of misconduct to include a solicitor having any direct or indirect association with a person who is acting in contravention of section 5.

Appropriate action will be taken against solicitors committing a breach of the regulations. Such action may include proceedings under section 18 of the *Solicitors (Amendment) Act 2002* by way of an application by the Law Society to the High Court for an order prohibiting a solicitor from contravening the regulations, and an application by the Law Society to the Solicitors Disciplinary Tribunal for an inquiry into the conduct of a solicitor on the grounds of alleged misconduct.

This notice relates to aspects of the regulations that are particularly relevant to personal injuries advertising and is not intended as a comprehensive guide to the regulations. This notice is intended as general guidance in relation to the subject matter and does not constitute a definitive statement of the law.

John Elliot,
Registrar of Solicitors
and Director of Regulation

Legislation update 11 September – 5 October 2012

Details of all bills, acts and statutory instruments since 1997 are on the library catalogue – www.lawsociety.ie (members' and students' area) – with updated information on the current stage a bill has reached and the commencement date(s) of each act. All recent bills and acts (full text in PDF) are on www.oireachtas.ie, and recent statutory instruments are available in PDF at www.attorneygeneral.ie/esi/esi_index.html

SELECTED STATUTORY INSTRUMENTS

Circuit Court Rules (Actions for Possession and Well-Charging Relief) 2012

Number: SI 358/2012

Amends rules 5 and 7 of order 5B to modify the procedure in respect of proceedings for recovery of possession of land on foot of a legal mortgage or charge and proceedings to declare a mortgage well-charged on land.

Commencement: 15/10/2012

Rules of the Superior Courts (European Communities (Mediation) Regulations 2011) 2012

Number: SI 357/2012

Inserts a new rule 5 in order 56A facilitating an application to the master by a party or parties to an agreement, following the use of mediation referred to in *European Communities (Mediation) Regulations 2011* (SI 209/2011) for an order making the agreement a rule of court.

Commencement: 15/10/2012

Rules of the Superior Courts (Order 75) 2012

Number: SI 356/2012

Effects amendments to order 75 consequential on the *European Communities (Mergers and Divisions of Companies) (Amendment) Regulations 2011*, which dispense with certain requirements in the case of (a) a merger to which the *European Communities (Mergers and Divisions of Companies) Regulations 1987* (SI 137/1987) and *European Communities (Cross-Border Mergers) Regulations* (SI 157/2008) respectively apply, and (b) a division by acquisition or by formation of new companies to which the 1987 regulations apply, in the circumstances specified in the 2011 regulations.

Commencement: 15/10/2012

Rules of the Superior Courts (Trial) 2012

Number: SI 355/2012

Amends order 36, rules 2 and 15 to provide for the setting down for trial of proceedings in personal injuries actions in the city or town prescribed as a venue for the county in which the plaintiff resides or the wrong is alleged to have been committed or to have happened; for the holding of trials at a venue other than the provincial venue at which it would otherwise be triable where the effective disposal of business generally of the court requires; for an application to the court for a change of venue in certain circumstances; and for consequential amendments to the forms of notice of trial.

Commencement: 15/10/2012

Prepared by the Law Society Library

ONE TO WATCH

One to watch: new legislation

Residential Institutions Statutory Fund Act 2012

The primary purpose of this act is to provide for the establishment of the Residential Institutions Statutory Fund Board, a statutory body to use the cash contributions offered by religious congregations to support the needs of some 15,000 survivors of residential institutional child abuse who received awards from the Residential Institutions Redress Board or equivalent court awards.

The principal functions of the board are to "utilise resources available to it in a manner that promotes the principles of equity, consistency and transparency" to make arrangements for the provision of an 'approved service' to support the needs of individual former residents, and to pay grants to former residents to enable them avail of an approved service.

In the act, 'approved service' means a service belonging to one of the following class of services:

- Mental health, counselling or psychological support services,
- Health and personal support services,
- Education services, and
- Housing and support services.

In determining criteria to make a decision in respect of an application for provision of approved services and associated grants, the board will need to take account of:

- The individual circumstances, including personal and financial circumstances, of former residents,
- Assess the likely effect of the provision of a service on the health and general well-being, personal and social development, educational development or living conditions of the former residents,
- Apply limits to the moneys that may be made available for an arrangement or grant,
- Specify minimum standards to be met by a provider of an approved service,
- Specify any supporting evidence that may be required to be furnished by former residents, and
- Take into account any other matter that the board considers, having regard to the functions of the board, is a proper matter to be taken into account. G

DATE FOR YOUR DIARY

Law Society
Annual Conference
10th/11th May 2013

DATE FOR YOUR DIARY

Law Society of Ireland

10th/11th May 2013

Hotel Europe
Killarney

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 Thomas J Myles, a solicitor practising as Myles & Co, Solicitors, 21 Hillside, Monaghan, Co Monaghan and in the matter of the *Solicitors Acts 1954-2008* [4961/DT48/10 and 2011 no 76 SA]
Law Society of Ireland (applicant) Thomas J Myles (respondent solicitor)
On 25 November 2010, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) Failed to honour an undertaking given by him in letter dated 14 January 2000 to the complainant in respect of a property in Co Monaghan, in which he undertook to do the following:
   1) To ensure that all the documentation required to give the complainant a valid first legal mortgage on all of the borrower's estate and interests in the property was completed by all appropriate persons and all necessary consents obtained and independent legal advice obtained where required,
   2) To ensure that the borrower required good marketable title to the property, or if the property was already owned by the borrower, that the title be so investigated and that if requisitions were raised, satisfactory replies would be obtained,
   3) To ensure that all deeds and documents to the property were stamped and registered as appropriate, including the mortgage and counterpart mortgage, land certificate (if application) and certificate of title,
   4) To deliver all of the title documents to the complainant upon demand,
b) Failed to adequately respond to the complainant's correspondence and, in particular, letters dated 8 January 2008, 16 June 2008, 12 January 2009, 26 January 2009, 27 January 2009, 30 January 2009, 11 February 2009 and 23 February 2009 respectively,
c) Failed to register the complainant's charge on the property and instead allowing the subject property to be sold and the sale proceeds released to a third party,
d) Failed to adequately comply with the service of a notice pursuant to section 10 of the *Solicitors (Amendment) Act 1994* served on him by the Society, dated 22 April 2009,
e) Represented in a letter dated 6 May 2009 that he had notified his professional indemnity insurers when in fact he had not,
f) Failed to adequately respond to the Society's correspondence and, in particular, letters dated 9 March 2009, 23 March 2009, 23 April 2009, and 1 May 2009.

The tribunal ordered that the matter go forward to the High Court, and the President of the High Court, on 19 December 2011, made the following orders:

a) That the respondent be permitted only to practise as an assistant solicitor in the employment of and under the direct control and supervision of another solicitor of at least ten years' standing, to be approved in advance by the Society,
b) That the respondent pay the Society the costs of the Solicitors Disciplinary Tribunal proceedings when taxed or ascertained,
c) That the respondent pay the Society the costs of the High Court proceedings when taxed or ascertained.

In the matter of Thomas J Myles, a solicitor practising as Myles & Co, Solicitors, 21 Hillside, Monaghan, Co Monaghan and in the matter of the *Solicitors Acts 1954-2008* [4961/DT49/10 and 2011 no 77 SA]
Law Society of Ireland (applicant) Thomas J Myles (respondent solicitor)
On 25 November 2010, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:

a) Failed to honour an undertaking given by him to a named bank, set out in a letter of undertaking dated 5 June 2001, whereby he undertook to register a first legal mortgage over a property in Co Monaghan belonging to a named client,
b) Failed to honour an undertaking given in a letter dated 5 June 2001 to the same bank, whereby he undertook to return title deeds to the same property belonging to the named client to the bank, including a registered deed of charge and certificate of title, as soon as practicable,
c) Breached the undertaking given by him to the bank, contained in the letter dated 5 June 2001, in selling the property to a third party,

NOTICES: THE HIGH COURT

Record no 2012 no 55 SA
In the matter of Liam M O'Brien, practising as Liam M O'Brien, solicitor, 21 Quinsboro Road, Bray, Co Wicklow, and in the matter of the *Solicitors Acts 1954-2011*
Take notice that, by order of the High Court made *in camera* on Monday 2 July 2012, it was ordered that the respondent solicitor shall be suspended from practising as a solicitor until further order of the court. Publication of this matter was permitted by order of the High Court on Wednesday 19 September 2012.
John Elliot, Registrar of Solicitors, 24 September 2012

Record no 2012 no 56 SA
In the matter of Aiden Barry, practising as Aiden Barry, solicitor, Roche House, 8 Bank Place, Limerick, Co Limerick, and in the matter of the *Solicitors Acts 1954-2011*
Take notice that, by order of the High Court made on Wednesday 19 September 2012, it was ordered that the respondent solicitor shall be suspended from practising as a solicitor until further order of the court.
John Elliot, Registrar of Solicitors, 24 September 2012

Record no 2012 no 74 SA
In the matter of John R Fetherstonhaugh, solicitor, practising as Fetherstonhaugh's Solicitors, 34 Patrick Street, Mountmellick, Co Laois, and in the matter of the *Solicitors Acts 1954-2011*
Take notice that, by order of the High Court made on Wednesday 19 September 2012, it was ordered that the respondent solicitor shall be suspended from practising as a solicitor until further order of the court.
John Elliot, Registrar of Solicitors, 24 September 2012

Record no 2012 no 28 SA
In the matter of James M Sweeney, a solicitor formerly practising as James M Sweeney at 14 Cabra Road, Phibsborough, Dublin 7, and in the matter of the *Solicitors Acts 1954-2008*
Take notice that, by order of the High Court made on Monday 21 May 2012, it was ordered that the name of James M Sweeney, formerly practising as James M Sweeney at 14 Cabra Road, Phibsborough, Dublin 7, be struck off the Roll of Solicitors.
John Elliot, Registrar of Solicitors, 2 October 2012

Working Smarter, Not Longer!

USING TECHNOLOGY FOR A MORE EFFICIENT PRACTICE

Law Society Technology Committee Seminar

Castletroy Park Hotel, Limerick, Friday 30 Nov 2012, 2pm – 5.30pm. Fee €95
CPD hours: 3¼ hours management and professional development skills

1.45 – 2.00 **Registration**

2.00 – 2.15 **Opening remarks**
Frank Nowlan, chair, Technology Committee

2.15 – 3.00 **Where we are now and where we are going?**
Adrian Weckler (Sunday Business Post)
A review of the current situation with use of technology in legal practice. Adrian will consider current business uses of emerging technologies, cloud computing and the development of mobile technologies as we move towards Web 4.0. As well as being a journalist and editor on digital affairs, Adrian is also well known as a broadcaster and commentator on technology issues.

3.15 – 3.45 **Emerging technologies – what I did**
Joe Kane (Joseph Kane and Co, Solicitors)
This session will look at practical uses and efficiencies made with the emerging technologies. Joe will explain how he came to make use of cloud computing and other easily available applications to make his working environment more efficient.

3.45 – 4.00 **Coffee**

4.00 – 4.45 **Is mobile technology secure?**
Colm Fagan (Espion Intelligence)
The session will review some of the key practice issues that need to be considered when using mobile technologies. Colm will give an overview of general security, reliability, legacy issues and data protection. The session will also include a summary of Technology Committee advice in this area.

4.45 – 5.30 **Online marketing and the legal sector**
Martin Molony, Dublin City University
The session will look at ways in which you can better communicate with clients and promote your practice online. It will include an overview on how to successfully and quickly build a web presence using traditional web tools and blogs or wikis. The session will also consider the potential for use of social networking tools such as Facebook, Twitter and Linked In by the legal profession.

5.30 **Questions and answers**

The fast pace of technological innovation – particularly that of social media applications – impacts on the working environment. Mobile devices can mean that there is no longer any office downtime. This seminar will look at the use of various devices and emerging technologies – in particular, cloud computing – and how they can make for more efficient use of your working time. It will examine the practical use of various mobile devices and will provide a practitioner's own story of technology use. The seminar will also address security issues in using mobile devices and innovative applications, and will provide practical guidance on data protection and other issues.

WORKING SMARTER, NOT LONGER! USING TECHNOLOGY FOR A MORE EFFICIENT PRACTICE

VENUE: Castletroy Park Hotel, Limerick. **TIME:** 2pm to 5.30pm. **DATE:** Friday 30 November 2012. **FEE:** €95

Name: _____ Firm: _____

Address: _____

DX: _____ Phone: _____

Please reserve _____ place(s) for me on the above course. I enclose cheque for € _____

Signature: _____

PLEASE RETURN TO: VERONICA DONNELLY, LAW SOCIETY OF IRELAND, BLACKHALL PLACE, DUBLIN 7.

Law Society of Ireland

d) Remitted the sale proceeds of the sale of the property to another named third party, in error, without attending to the redemption of the outstanding liabilities to the bank,
e) Failed to adequately respond to the complainant's correspondence or at all in respect of letters dated 17 February 2002, 14 October 2003, 22 June 2006 and 20 March 2008 respectively.

The tribunal ordered that the matter go forward to the High Court, and the President of the High Court, on 19 December 2011, made the following orders:
a) That the respondent be permitted only to practise as an assistant solicitor in the employment of and under the direct control and supervision of another solicitor of at least ten years' standing, to be approved in advance by the Society,
b) That the respondent pay the Society the costs of the Solicitors Disciplinary Tribunal proceedings when taxed or ascertained,
c) That the respondent pay the Society the costs of the High Court proceedings when taxed or ascertained.

In the matter of Jacqueline M Durcan, solicitor, formerly practising as Durcans Solicitors, no 1 Hazel Grove, Spencer Park, Castlebar, Co Mayo, and in the matter of the *Solicitors Acts 1954-2011* [7083/DT46/11 and 2012 no 8 SA]
Law Society of Ireland (applicant) Jacqueline M Durcan (respondent solicitor)
On 15 November 2011, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in her practice as a solicitor in that she:
a) Failed to comply within a reasonable time or at all with her undertaking given to the complainant dated 3 May 2005, in which she undertook to put a first legal charge in place on a named property in Castlebar, Co Mayo, in favour of ACC Bank Plc in respect of a named client,
b) Failed to reply adequately or at all to the complainant's correspondence, in particular, letters dated 11 February 2008, 6 June 2008, 29 September 2009, 10 February 2010 and 12 March 2010 respectively,
c) Failed to comply with her undertaking given to the Complaints and Client Relations Committee at its meeting on 1 October 2010, whereby she undertook to lodge the stamped deed of mortgage and deed of conveyance with the Registry of Deeds within 14 days and, within the same time, to furnish the Society with a copy of her letter to the Registry of Deeds and a copy of the deeds submitted for registration,
d) Failed to reply adequately or at all to the Society's correspondence dated 16 April 2010, 11 May 2010, 28 June 2010, 19 July 2010, 4 October 2010, 20 October 2010 and 22 November 2010.

The tribunal was of the opinion that:
a) The respondent solicitor is not a fit person to be a member of the solicitors' profession,
b) The name of the respondent solicitor be struck off the Roll of Solicitors,
c) The respondent solicitor make a contribution of €5,000 towards the costs of the Law Society of Ireland.

On foot of an application to the President of the High Court, the following orders were made on 13 February 2012:
1) That the name of the respondent solicitor be struck from the Roll of Solicitors,
2) That the Society do recover the costs of the proceedings against the respondent solicitor when taxed or ascertained.

In the matter of John F Condon, a solicitor practising as McMahon & Tweedy Solicitors, Merchant's House, 27-30 Merchant's Quay, Dublin 8, and in the matter of the *Solicitors Acts 1954-2008* [3127/DT/171/10]
Law Society of Ireland (applicant) John Condon (respondent solicitor)
On 21 June 2012, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:
1) Allowed a deficit of €33,540.06 as of 31 January 2009,
2) Was in breach of the *Solicitors' Accounts Regulations*, including the following breaches:
   a) Regulation 12 for failure to maintain books of account that showed the true financial position in relation to clients' matters at all times,
   b) Regulation 12(3)(b) for failure to maintain supporting evidence of outlays disbursed on behalf of clients,
   c) Regulation 12(7) for failure to prepare balancing statements within two months after the balancing date and to keep copies of such balancing statements,
   d) Regulation 12(8) for failure to prepare office balancing statements,
   e) Regulation 7(2) for creation of debit balances,
   f) Regulation 9 for failure to maintain records of transfers between client ledger accounts,
   g) Regulation 20(1)(e) for failure to maintain a bank register,
   h) Regulation 20(1)(f) for failure to keep the returned client paid cheques in numerical order,
   i) Regulation 20(1)(b) for failure to keep/have copies of fee notes issued in a bills delivered book or file of such invoices.

The tribunal ordered that the respondent solicitor:
a) Do stand censured,
b) Pay a sum of €2,500 to the compensation fund,
c) Pay the whole of the costs of the Society, to be taxed by a taxing master of the High Court in default of agreement.

In the matter of Greg (otherwise John G) Casey, a solicitor formerly practising in the firm of Casey & Co, Solicitors, North Main Street, Bandon, Co Cork, and in the matter of the *Solicitors Acts 1954-2008* [5355/DT65/09]
Law Society of Ireland (applicant) Greg (otherwise John G) Casey (respondent solicitor)
On 25 July 2012, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he:
a) Up to the date of the swearing of the applicant's affidavit on 2 July 2009, failed to comply with the direction of the Complaints and Client Relations Committee in April 2008 that he make a contribution of €3,000 towards the costs of the Society following his failure to answer the Society's correspondence in a timely manner and his failure to arrange for compliance with a notice pursuant to section 10 of the *Solicitors (Amendment) Act 1994*, dated 3 March 2008,
b) Failed to attend or to arrange to be represented at the meeting of the Complaints and Client Relations Committee on 25 June 2008, despite having been notified by letter dated 17 June 2008 that he was required to attend the said meeting.

The tribunal ordered that the respondent solicitor:
a) Do stand censured,
b) Pay a sum of €5,000 to the compensation fund,
c) Pay €5,000 to the Society as a contribution towards their costs. G

BRIEFING

Eurlegal

Edited by TP Kennedy, Director of Education

CESL represents both a challenge and an opportunity

Ireland assumes the presidency of the EU Council on 1 January 2013. One of the issues to be addressed by Minister Alan Shatter in his role as president of the justice ministers will be what priority to give to the ambitious proposal for a Common European Sales Law (CESL). CESL was put forward by the EU Commission on 11 November 2011 as a draft regulation.

The commission has been arguing for an initiative in the area of contract law since 2001. It sees the divergence between the contract laws of the various member states as a barrier to trade, particularly for consumers and SMEs. Of course, significant European legislation exists in the area of consumer protection, but it is uncoordinated and lacks coherence.

The commission funded a large research project on the contract laws of the member states and, arising from that research, has considered a number of suggestions to deal with the twin problems of differences between the contract laws of the 27 member states and the lack of coherence in European consumer protection. These suggestions range from the replacement of the contract laws of member states with a single European code of contract law, through to a voluntary instrument setting out specimen provisions that parties could adopt for their contracts.

At the same time, the commission was preparing a major consolidation and restatement of four major directives into one coherently drafted directive, the *Consumer Rights Directive*. This directive was to be based on maximum harmonisation, unlike the existing directives, which are based on minimum harmonisation. The latter requires only that the standards set out in the directive are achieved as a minimum, but with member states free to impose more rigorous standards. The result is that substantial differences remain in the laws of the various member states.

Maximum harmonisation, on the other hand, allows only the provisions in the directive within the scope of the directive, and nothing more.

The commission's proposals on the *Consumer Rights Directive* hit heavy opposition. This was particularly because of the requirement for maximum harmonisation, which would have impacted on the established laws of the member states. As a result of that experience, the commission has recognised that the heavy-handed route of maximum harmonisation has no future in this area.

Soft law: voluntary and optional

CESL adopts a radically different 'soft law' approach. It provides a sales law that would be common throughout the EU and that the parties would be free to adopt.

It contains an extensive (but not comprehensive) statement of the main principles, definitions and rules that would be required for a contract for the sale of goods and related services and for the supply of digital content.

CESL would form part of the law of every member state. However, CESL does not replace or amend the existing laws. Rather, it exists as a parallel and alternative set of rules, which will be the same in all member states. Parties would be free to choose to contract on the basis of CESL. The commission argues that this will encourage cross-border trade because a business in one member state will be able to contract with consumers and businesses in several different member states on the basis of a common set of rules, without the need to learn about the different contract and consumer laws of each member state.

The regulation applies to sales of goods and to contracts concluded at the same time for services directly related to those goods. Other contracts for the supply of services are not covered. As many transactions are now of digital information, such as music, entertainment or software supplied online, digital content contracts are embraced by the regulations.

The commission has identified that the need for sales law arises from the additional costs and legal problems that arise on transnational or cross-border transactions. Accordingly, the regulation applies to transnational contracts only. However, member states are given the power to extend the application of CESL to transactions between parties in the same member state.

Strong consumer protection

CESL sets out mandatory rules that cannot be varied to the detriment of a consumer in business-to-consumer transactions. One of the criticisms of the draft *Consumer Rights Directive* was that it reduced the options available to a consumer in some member states. For example, in Ireland and Britain, a consumer has a right to terminate a contract and seek a refund of the price paid in the event of non-conformity of the goods with the contract. The consumer is not required to accept repair or replacement. Under the draft *Consumer Rights Directive*, the consumer could have been required to accept repair or replacement. CESL gives consumers a free choice of remedies, including the right of refund, repair or replacement. Some business organisations argue that this goes too far and will serve as a disincentive for business to use CESL.

Set of contractual rules

CESL is an impressive body of work, comprising 186 articles divided into eight parts. These deal with introductory provisions, the formation of contract, the content of the contract, the obligations and remedies of the parties, the passing of risk, the obligations and remedies of parties to a related service contract, and rules dealing with damages, interest, restitution and limitations of action. Although not a code in the Napoleonic sense, it is an attempt to set out the relevant rules in a systematic and structured fashion. Undoubtedly, there is scope for improving the drafting of the text.

It is the commission's view that CESL will cover the issues of contract law that are of practical relevance during the life cycle of a cross-border contract. However, there is much that is omitted, such as rules on legal capacity, rules in relation to joint liability, and of course the whole area of non-contractual liability, such as torts. In many cases, breach of the obligations of a seller will give rise not only to liability in contract, but also to liability in tort.

Those areas that are not cov-

B2C OR B2B WHERE ONE PARTY'S AN SME

CESL can only be used for:

- **A business-to-consumer contract,**
- **A business-to-business contract where at least one party is an SME**

However, CESL can be used where all the parties are traders, but none of them is an SME, where a member state has decided to make CESL available for that purpose.

The limitation to SMEs is required for legal and political reasons, but there appears to be no logical justification why a business of any size should not have the option to offer CESL as a basis for contracting.

ered by CESL will continue to be governed by the relevant national law. That national law will be chosen by the application of the rules of private international law, as they have been modified by *Rome I* (regulation 593/2008 on the law applicable to contractual obligations).

Opposition to the proposal

The commission's proposal is an ingenious and innovative approach. It has, however, been criticised heavily. There are concerns as to whether such a proposal may be passed by qualified majority rather than unanimity (which is politically improbable). There are arguments about its compatibility with existing laws, such as *Rome I*.

There are also strong objections from consumer organisations that the consumer protection elements do not give protections that are currently available in certain member states and that, in practice, consumers will be given no choice but to contract on the basis of CESL. On the other hand, business argues that the consumer protection provisions go too far and will serve as a disincentive to business to choose CESL.

CESL sets out an obligation on each party to act in accordance with good faith and fair dealing. This presents something of a challenge to the common law tradition. From a practical point of view, the introduction of such an over-arching obligation will give rise to uncertainty, at least until a body of jurisprudence has been amassed defining its limits.

Opponents argue that traders dealing with consumers throughout the EU would still need to be concerned with health and safety and other regulatory requirements and to take advice in relation to aspects of contract law that are not governed by CESL and in relation to non-contractual liabilities such as tort law.

Under CESL, the principle of freedom of contract applies to business-to-business transactions, save in respect of limited mandatory rules. Some of these mandatory rules that apply to business-to-business contracts are significant and represent a major change for Irish law. The commission would respond that no-one is obliged to contract on the basis of CESL, and if you do not like it, do not use it.

Solution in search of a problem?

There is widespread concern that CESL is a response to a political rather than a legal imperative. Opponents argue that the legal obstacle posed by differing contract laws is one of many, including tax, language and culture, in relation to the enforcement of remedies. They argue that the costs and uncertainties involved in introducing a new regime will outweigh the marginal benefits.

The proposal set out in the regulation is a clever example of soft law. The instrument is voluntary. It will not affect the existing laws of member states directly. Undoubtedly, however, if it does become established for contracting throughout the union, there will be a tendency to gravitate towards it as a basis for legislation.

The test of its quality will be the extent of its use in practice. Clearly, the hope of the commission is that, over time, it will become well recognised and established. The commission hopes that traders will adopt CESL and offer it to their consumers as part of their marketing strategy and that consumers will regard it as an indication of quality.

For Irish lawyers and for Irish business, CESL is a challenge, but also an opportunity. If the commission is correct that the initiative will encourage cross-border trade, an export-led economy such as ours should embrace it. In the initial stages at least, suppliers who are active in existing markets are unlikely to change their terms and conditions. However, for new markets with which they are unfamiliar and for those who wish to trade throughout the European Union, CESL may be an attractive basis for seeking to attract new business.

If the regulation becomes law, Irish lawyers will be in a position to advise their Irish clients and clients from abroad in relation to their terms and conditions of supply to a much greater extent than is possible at the moment.

It will be a major intellectual and diplomatic challenge to reconcile the differing views in relation to CESL. The Irish presidency affords Minister Shatter and his department the opportunity to mould the proposal to suit Irish interests before it passes to other hands.

Paul Keane is the managing partner of Reddy Charlton Solicitors, the vice-chair of the Business Law Committee, and the Society's representative on the CCBE committee responsible for European contract law. Dr Cliona Kelly, Cardiff Law School, has assisted the Business Law Committee in preparing its response to the commission's proposal.

NOTICES

WILLS

Flynn, Cyril (also known as Cyril O'Floinn) (deceased), late of Newtown Street, Castlebar, Co Mayo (also Northbrook Ave, Ranelagh, Dublin 6). Would any person having knowledge of a will (or documents relating to a will) made by the above-named deceased, who died on 4 September 2012, please contact **box no: 11/12/01**

Flynn, John (deceased), late of St Patrick's Community Hospital, Carrick-on-Shannon, Co Leitrim, and formerly of 11 Riverview, Straduff, Geevagh, Co Sligo, and prior to that, Knockroe, Geevagh, Co Sligo, who died on 19 September 2012. Would any person having knowledge of any will executed by the above-named deceased please contact Brendan Looby of McCarthy Looby & Co, Solicitors, Church Street, Cahir, Co Tipperary; tel: 052 744 1899, fax: 052 744 1000, email: info@mccarthylooby.ie

King, Eleanor (deceased), late of 13 Rahylin Glebe, Ballybane, Galway, who died on 25 June 2012. Would any person having knowledge of a will made by the above-named deceased please contact Mary Mylotte, MacDermot & Allen, Solicitors, 10 Francis Street, Galway; tel: 091 567 071, email: marymylotte@macdallen.ie

Lynch, John (deceased), late of 1 The Terrace, Glencollins, Ballydesmond, Mallow, Co Cork, and formerly of Glen North, Banteer, Co Cork, and Louismill, Merrill, Oregon, USA, and RT1, Box 103, Tulelake, CA96134-9720, who died on 7 July 2012. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact James Lucey & Sons, Solicitors, Kanturk, Co Cork; tel: 029 50300, email: mary@luceylaw.ie

Lynch, Teresa (deceased), late of 92 Huband Road, Bluebell, Dublin 12, formerly of Male Private, St Michael's Hospital, Dun Laoghaire, Co Dublin, who died on 21 September 2012. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Mary Cullen of Cullen & Company, Solicitors, 86/88 Tyrconnell Road, Inchicore, Dublin 8; tel: 01 453 6114, email: enquiries@cullencosolicitors.com

McCool, otherwise Boland, Mary Theresa (deceased), late of Ballycogley Castle, Ballycogley, Co Wexford, and also late of 25 Clifton Road, Tranmere, Birkenhead, Wirral, Merseyside L41 2SF. Would any person having knowledge of a will made by the above-named deceased, who died on 11 July 2012, please contact Stone Solicitors, 14 North Main Street, Wexford; tel: 00 353 5391 46144, fax: 00 353 5391 46099, email: info@stonelaw.ie

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%)

HIGHLIGHT YOUR NOTICE BY PUTTING A BOX AROUND IT – €33 EXTRA

ALL NOTICES MUST BE PAID FOR PRIOR TO PUBLICATION. CHEQUES SHOULD BE MADE PAYABLE TO LAW SOCIETY OF IRELAND. Deadline for December *Gazette*: 21 Nov 2012. For further information, contact the *Gazette* office on tel: 01 672 4828 (fax: 01 672 4877)

NOTICES

McCrohan, Patrick Joe (deceased), late of Flat 27 Moorlea, 9 Wellington Road, Bournemouth, United Kingdom, and formally of 29 Elm Mount Road, Beaumont, Dublin 9, and formerly of Custom Gap Hill, Tullow, Newport, Co Tipperary. Would any person having knowledge of a will executed by the above-named deceased, who died on 14 August 2012, please contact Melvyn Hanley Solicitors, 16 Patrick Street, Limerick, tel: 061 400 533, fax: 061 400 633, email: roisin@melvynhanley.com

McGrath, Aine Maeve (deceased), late of 10 Covesbrook, Carnew, Co Wicklow, and formerly of 12 Dunmore Park, Ballymount, Dublin 24. Would any person having knowledge of a will executed by the above-named deceased, who died on 19 November 2010, please contact Cooke and Kinsella, Solicitors, Wexford Road, Arklow, Co Wicklow; tel: 0402 32928, fax: 0402 32272, email: fergus@cookekinsella.ie

McHugh, Gavin (deceased), late of 55 Kennelsfort Road, Palmerstown, Dublin 20, and previously 66 The Coppice, Woodfarm Acres, Palmerstown, Dublin 20. Any person having knowledge of a will made by the above-named deceased, who died on 1 June 2012, please contact Sherrys Solicitors, Palmerstown Avenue, Dublin 20; tel: 01 623 2182, fax: 01 623 2183

Shortt, Brian, otherwise Brian Shorte, otherwise Brian Short, and otherwise Michael Bernard Shortt (deceased), late of Riverstown House, Monasterevin, Co Kildare. Would any person having any knowledge of the whereabouts of a will executed by the above-named deceased, who died on 19 July 2012, please contact Helena Boylan & Co, Solicitors, High Street, Westport, Co Mayo; tel 098 29835, fax: 098 29855, email haboylan@eircom.net

Somerville (otherwise Sommerville) Eileen (deceased), late of Warrenstown, Dunboyne, Co Meath, who died on 24 September 2012. Would any person having knowledge of a will made by the above-named deceased please contact Brian A Rennick, Solicitors, Main Street, Dunboyne, Co Meath; tel: 01 825 1030, fax: 01 825 1031, email: anne.osullivan@rennick.ie

LAW REFORM COMMISSION
ATHCHÓIRIÚ AN DLÍ

LAW REFORM COMMISSION INVITES SUBMISSIONS ON NEW PROGRAMME OF LAW REFORM

The Law Reform Commission is preparing a *Fourth Programme of Law Reform* under the *Law Reform Commission Act 1975*. The new Programme will form the principal basis on which we carry out our statutory mandate to keep the law under review with a view to its reform and modernisation.

We are inviting all interested parties to make submissions on possible areas of the law to be considered for reform. Submissions can be sent to fourthprogramme@lawreform.ie or Law Reform Commission, Fourth Programme of Law Reform, 35-39 Shelbourne Road, Ballsbridge, Dublin 4.

The Fourth Programme of Law Reform will be the subject of the Commission's Annual Conference 2012, on Tuesday 11th December. See www.lawreform.ie for details.

MISCELLANEOUS

At 24 Upper Mount Street, Dublin 2. Very accessible elegant hall-floor office suite, three rooms and large reception area with two car park spaces included. Rent €25,000 per annum plus rates. Please contact Robert on tel: 087 251 8856

RECRUITMENT

NOTICE TO THOSE PLACING RECRUITMENT ADVERTISEMENTS IN THE *LAW SOCIETY GAZETTE*

Please note that, as and from the August/September 2006 issue of the *Law Society Gazette*, **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*.

WILD, WEIRD AND WACKY STORIES FROM LEGAL 'BLAWGS' AND MEDIA AROUND THE WORLD

Pot shot at prosecutors over 'pot shop'

One of the world's largest medical marijuana dispensaries, based in Oakland, California, has gained an unusual ally in its fight to stop federal prosecutors from shutting it down. The Oakland city council filed a federal lawsuit in San Francisco recently, seeking to prevent the US Department of Justice from using its property-seizure powers to get Harborside Health Centre evicted, reports *The Huffington Post*.

The suit is thought to be the first that a local government has brought on behalf of a 'pot shop'. It alleges the Justice Department knew about Harborside for years and exceeded the legal deadline for taking action against it.

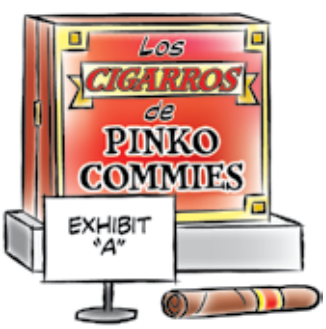
Harborside serves about 100,000 medical marijuana users a year, sells about $20 million worth of pot and marijuana products, and pays $3 million in federal, state and local taxes annually, of which about $1.2 million goes to Oakland. The executive director of the dispensary called the city's intervention "heartening and encouraging".

No stogie for smuggled cigars

Bar authorities in Illinois are seeking the disbarment of a lawyer convicted of smuggling Cuban cigars into the country back in the 1990s.

The recommendation filed by the Illinois Attorney Registration and Disciplinary Commission seeks to disbar the lawyer, who was convicted in 2002 of violating the *Trading with the Enemy Act*, falsifying his passport and conspiracy, according to the *National Law Journal*.

The lawyer, who has long denied the charges, said he made frequent trips because he was engaged to a Cuban woman. He was sentenced to 37 months in prison and fined $60,000. His conviction was upheld by the 7th Circuit in 2006.



According to the circuit court's ruling, the lawyer made 31 trips to and from Cuba between 1996 and 1999. The opinion recounts how, after a tip from his ex-wife alerting authorities to his trips, he was stopped at the Canadian border with a "trunkload of Cuban cigars". There were 46 boxes of cigars in four suitcases, which could be sold for $350 per box.

Prisoner sends minister severed finger

An inmate in a French jail mailed part of his own severed finger to that country's minister for justice recently. An envelope containing the finger part was delivered to the offices of Justice Minister Christiane Taubira, according to www.telegraph.co.uk. It was accompanied by a letter arguing for a transfer to a jail nearer to the prisoner's family, a police official said.

There is no news as to whether the inmate's ploy was successful.

French jails are plagued by overcrowding, with the prison population hitting a record 67,000 this year.

Ball of smoke!

The *Gazette* recently came across this urban legend gem.

The story goes that a lawyer purchased a box of very rare and expensive cigars, then insured them against, among other things, fire. Within a month, having smoked his entire stockpile, and without yet having made even his first premium payment on the policy, the lawyer filed a claim against the insurance company.

In his claim, the lawyer stated that the cigars had been lost "in a series of small fires". The insurance company refused to pay, citing the obvious reason – that the man had consumed the cigars in the normal fashion. The lawyer sued … and won.

Delivering the ruling, the judge agreed with the insurance company that the claim was frivolous. Nevertheless, he stated that the lawyer held a policy with the company, in which it had warranted that the cigars were insurable. It had guaranteed, also, that it would insure them against fire – without defining what it considered to be 'unacceptable fire'. Thus, it was obliged to pay the claim.

Rather than endure a lengthy and costly appeal process, the insurance company accepted the ruling and paid $15,000 to the lawyer for the loss of his cigars as a result of 'fires'.

After the lawyer cashed the cheque, the insurance company had him arrested on 24 counts of arson! With his own insurance claim and testimony from the previous case being used against him, the lawyer was convicted of intentionally burning his insured property and was sentenced to 24 months in jail and a $24,000 fine.

Sadly, however, the whole story is a ball of smoke!

In-House Lawyer

Dexia manages a large proprietary bond portfolio from Dublin. This portfolio of approximately €100 billion makes a critical contribution to the overall liquidity of the bank and is coordinated and managed on behalf of Dexia by its Portfolio Management Group in Dublin's IFSC, in conjunction with other PMG desks located in New York and Berlin.

We are looking to recruit an In-House Lawyer to join our legal department in Dublin

The Role

The main responsibilities will centre on providing legal support to various business lines within Dexia, with a particular focus on fixed income products and derivatives. This includes, but is not limited to, the following:

- Provision of legal support to front office and management in relation to a wide range of general legal issues arising from the business to include providing advice in relation to bond and loan documentation, credit derivatives, swaps, total return swaps and structuring and documenting transactions.
- Assist management in drafting, reviewing and amending legal documents to include contracts, service level agreements, engagement letters, mandates, etc.
- Negotiate and draft legal transactional documentation with counterparties in compliance with the Bank's global standards to include individual deal confirmations under ISDA, GMSLA and GMRA documentation.
- Building and proactively maintaining relationships with our business partners around the Group.
- Contact with the legal teams based in Paris and New York.

The Candidate

- Solicitor with 2-4 years experience in a financial environment, ideally within international banking / capital markets.
- The successful candidate will have exceptional analytical and communication skills together with the ability to work effectively as part of a multi-disciplinary team.
- Strong technical expertise combined with an ability to deliver clear, precise and practical advice is a must.
- Ambitious and independent self-starter with the ability to multitask.
- Team player who works well in a small and busy team environment, reporting to Head of Legal in Dublin.

Experience

The ideal candidate will be able to demonstrate:

- Sound knowledge in the technical aspects of ISDA documentation, including CSAs and the application of ISDA Credit Derivative definitions in the context of structured products and derivative transactions execution procedures.
- Good knowledge of Financial Services Law to include bonds, derivatives, securitization and structured finance.
- Experience in the financial services field and compliance will be a distinct advantage, as will previous experience of working in an in-house banking environment.

Competitive terms and benefits are on offer with this position.
To apply, please send your CV in strictest confidence to:
Una Kilduff, Human Resources, Dexia, 6, George's Dock, IFSC, Dublin 1
or by email to una.kilduff@dexia.com
Closing date for applications is Friday 23rd November, 2012.
No recruitment agency solicitations please.

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