Making waves
The *Gazette* speaks to Katie Cadden on the rewards of life outside legal practice

Keeping the connection
Technology both contributes to, and diminishes, our sense of wellbeing

In-house independence
A recent judgment of the ECJ provides clarification on in-house independence

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PRESIDENT'S MESSAGE

A STRONG VOICE IN POLICY DEBATE

I can scarcely believe that I have almost completed the first four months of my term of office. The honeymoon period is well and truly over. Since my last message in this *Gazette*, the Government has been dissolved and, as I write, we are in the hands of a caretaker government. Ahead of the 2020 general election, I highlighted the Law Society's key priorities, including access to justice and legal aid, insurance reform, Brexit and promoting Ireland as a leading centre for international legal services, and taxation.

In setting out the above priorities, I specifically noted that the Law Society of Ireland is committed to championing the solicitors' profession and providing a high standard of service to our stakeholders and members of the public at all times.

Shining example

I am proud of the quality and diversity of our lawyers who are qualifying at the Law School. They are in demand nationally and internationally – not just in the traditional areas of private practice, but increasingly as in-house counsel, valued Government employees, critical members of management teams, academia, and other positions, where their legal skills and training are seamlessly transferable.

I was delighted to attend my first parchment ceremony on 13 February, where our guest speaker was Claire Loftus. Claire is only the third DPP in the history of the State, the first female, and the first solicitor to serve in the post. She is a shining example of how women are taking a leadership role in the law. The DPP was joined on the stage by the recently elevated Court of Appeal judge and past-president of the Law Society, Mr Justice Donald Binchy.

All three speakers took as our theme the rule of law and the essential role played by an independent legal profession in a properly functioning democracy. It has been a topic of much international discussion and debate recently. I highlighted to my newly qualified colleagues that this independence is not a privilege for lawyers; rather, it is the right of citizens.

The rule of law was also the main theme of the European Presidents' Conference, held in Vienna from 20 to 21 February, which I was privileged to attend on behalf of our members.

Midlands meeting

Together with the director general, I recently attended the AGM of the Midland Bar Association in Tullamore, where we had a constructive and collaborative meeting regarding issues that are common to all practices, particularly smaller ones. It is reassuring to hear that practices are returning to a level of profitability. It is clear, however, from my interaction with colleagues throughout the country, that some smaller practices continue to struggle. The Law Society is alive to such difficulties and has rolled out a number of supports to members, including the Small Practice Business Hub at www.lawsociety.ie/businesshub. I encourage all within that cohort to access the hub. I am always open to hearing from colleagues with ideas to support all practitioners, at president@lawsociety.ie.

> INDEPENDENCE IS NOT A PRIVILEGE FOR LAWYERS; RATHER, IT IS THE RIGHT OF CITIZENS

MICHELE O'BOYLE,
PRESIDENT

PIC: SHUTTERSTOCK

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Blackhall Place, Dublin 7
tel: 01 672 4828
fax: 01 672 4801
email: gazette@lawsociety.ie

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HAVE YOU MOVED? Members of the profession should send change-of-address details to: IT Section, Blackhall Place, Dublin 7, or to: customerservice@lawsociety.ie

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REGULARS

THE BIG PICTURE

AND LO, THEY SWARMED O'ER THE LAND

Men chase away a swarm of desert locusts in the bush in Kitui County, Kenya, some 200km east of Nairobi. Large swarms have been invading the country for weeks, threatening food security. The voracious insects have infested some 70 thousand hectares in Somalia, which the UN Food and Agriculture Organisation describes as the "worst situation in 25 years" in the Horn of Africa. One swarm in Kenya was estimated to contain between 100-200 billion locusts – capable of devouring as much food as 84 million people would consume in a single day

PIC: EPA-EFE/DAI KUROKAWA

DIPLOMA CENTRE CONFERRAL CEREMONIES 2019

ALL PICS: CIAN REDMOND

First-place prize-winners who achieved the highest grades in their respective diplomas were *(back, l to r)*: Derek Duffy (Diploma in Construction Law), Lincoln Nelson and Sharon Delaney (Diploma in Mediator Training), Lorraine Heffernan (Diploma in Employment Law), John Ringrose (Diploma in Healthcare Law), and Cian Duane (Diploma in Commercial Property); *(front, l to r)*: Deirdre Flynn (acting co-head, Diploma Centre), Brendan Twomey (chair, Law Society Curriculum Development Unit), Ms Justice Aileen Donnelly and Ms Justice Bronagh O'Hanlon

Aengus Farrell achieved the highest grade in the Diploma in Aviation Leasing and Finance and received his prize from Marie O'Brien (A&L Goodbody)

Tomás Nolan achieved the highest grade in the Diploma in Sports Law and received his prize from John Treacy (CEO of Sport Ireland)

Natalie Coen attained the highest grade in the Diploma in Insurance Law and was presented with the Kennedy Prize by Andrew McGahey (Kennedys)

CERTIFICATE IN COMPANY SECRETARIAL LAW AND PRACTICE

ALL PICS: CIAN REDMOND

Certificate in Company Secretarial Law and Practice prize-winners (*l to r*): John Burns (ICSA: the Chartered Governance Institute), Eilish Rock, Lucinda Shaw (prize-winner), Aisling McCarthy (prize-winner), Alison McDonnell (prize-winner), Andrea DeCourcey (prize-winner) and Jennifer Rock

FIELDFISHER PRIZE

Aimee Dillon attained the highest grade in the Diploma in Advocacy Skills and received the Fieldfisher Prize from Mark Woodcock and Barry Walsh of Fieldfisher

DIPLOMA IN TRUST AND ESTATE PLANNING

Diploma in Trust and Estate Planning prize-winners received awards from STEP Ireland (*l to r*): Deirdre Dunne (STEP Ireland), Anne Clancy (prize-winner), Jennifer Aldwell (prize-winner), Jennifer Morrow (prize-winner), Tina Quealy (chair, STEP Ireland) and Deirdre Flynn (acting co-head, Diploma Centre, and course leader)

DIPLOMA IN AVIATION LEASING AND FINANCE

ALL PICS: CIAN REDMOND

The Diploma in Aviation Leasing and Finance conferring class of 2019 with *(front)*: Deirdre Flynn and Claire O'Mahony (both acting co-heads, Diploma Centre), and guests Judge Rosemary Horgan and Marie O'Brien (A&L Goodbody)

DIPLOMA IN JUDICIAL SKILLS AND DECISION-MAKING

The Diploma in Judicial Skills and Decision-Making conferring class of 2019 with *(in front row)*: Deirdre Flynn and Claire O'Mahony (both acting co-heads, Diploma Centre), Cian Monahan (course leader), Richard Hammond (vice-chair, Law Society Education Committee) and Brendan Twomey (chair, Law Society Curriculum Development Unit)

DIPLOMA IN INSURANCE LAW

ALL PICS: CIAN REDMOND

Diploma in Insurance Law conferees with *(front, l to r)*: Andrew McGahey (Kennedy's), Brendan Twomey (chair, Law Society Curriculum Development Unit), Ms Justice Bronagh O'Hanlon and Ms Justice Aileen Donnelly; *(back, l to r)*: Deirdre Flynn (acting co-head, Diploma Centre), Natalie Coen (Kennedy's prize-winner), Anne-Marie Butler, Joanne Ryan, Claire O'Mahony (acting co-head, Diploma Centre) and Richard Hammond (vice-chair, Law Society Education Committee)

DIPLOMA IN JUDICIAL SKILLS AND DECISION-MAKING

Attending a session of the Diploma in Judicial Skills and Decision-Making, which is organised by the Law Society's Diploma Centre, were *(from l to r)*: John Lonergan (former governor, Mountjoy Prison), Hilkka Becker (chairperson, International Protection Appeals Tribunal) and Cian Monahan (course leader, Diploma Centre)

CRIMINAL LAW DISCOURSE

Participants in a panel discussion for the Diploma in Criminal Law programme were Patricia Harvey (course leader), Áine Bhreathnach (Shalom Binchy & Co Solicitors) and Noeline Blackwell (CEO, Dublin Rape Crisis Centre)

SOLICITORS OF THE FUTURE

ALL PICS: CIAN REDMOND

A cohort of 42 transition year (TY) students from around the country visited Blackhall Place to participate in the Law Society's week-long, activity-based 'Solicitors of the Future' programme. Open to schools around the country, the programme encourages second-level students to consider a career in law and offers insights into the role of the solicitor. Activities included a visit to the Criminal Courts of Justice, tours of large commercial law firms, expert-led workshops, guest speakers, courtroom activities, a careers seminar and mock trial. The programme was facilitated by Law Society staff, PPC1 trainees and practising lawyers. For more information, visit www.lawsociety.ie/futuresolicitors

Miriam McDermott is presented with her certificate of achievement byTP Kennedy

Adam Daly is congratulated at the end of the TY programme by director of education TP Kennedy

Bebhinn Rainey receives her certificate of achievement from TP Kennedy

It's smiles all round from Tom Hanrahan and director of education TP Kennedy

Ellen Cosgrove proudy receives her certificate of achievement from TP Kennedy

Jay Burke-Flanagan is presented with his certificate by TP Kennedy

PLUGGING INTO THE LAW SOCIETY'S PPC HYBRID

PIC: CIAN REDMOND

On 10 January 2020, the Law Society welcomed 46 trainee solicitors to the Law School campus for their first on-site lectures for the new PPC Hybrid course. The course marks a new chapter for the Law School, and reduces barriers and provides greater access to the profession for trainees from diverse educational, professional and socio-economic backgrounds. Trainees were welcomed by Ken Murphy (director general), TP Kennedy (director of education), Michael V O'Mahony (past-president, Law Society), Geoffrey Shannon (deputy director of education), Rory O'Boyle (PPC Hybrid course manager) and lecturers

MIDLAND MEETING OF MINDS

Members of the Midland Bar Association (MBA) held their AGM in the Tullamore Court Hotel on 12 February. Special guests included Law Society President Michele O'Boyle and director general Ken Murphy; *(front, l to r)*: Patrick Fox (treasurer, MBA), Mary Clear (secretary, MBA), Michele O'Boyle (president, Law Society), Dermot Scanlon (president, MBA), Ken Murphy (director general), Anne-Marie Kelleher, Emeria Flood, Sinead Nea and Brian O'Sullivan; *(back, l to r)*: Brian O'Brian, Brian Carolan, John Wallace, Raymond Mahon, Michelle Mellotte, Mark Scanlon, Jane Farrell, Joanne Bane, Tom Farrell, John Cummins, Robert Marren, Patrick Martin and Dermot Mahon

SHOULD COMPUTERS HAVE A LEGAL PERSONALITY?

The question of whether computers should have a legal personality was the topic for a lively debate at the inaugural Law Society/Irish Music Rights Organisation (IMRO) copyright lecture, at Blackhall Place on 18 February.

Law Society adjunct professor Mark Hyland, who delivered the main lecture, said that copyright issues would only become more complex as the pace of artificial intelligence (AI) accelerated.

Since AI algorithms now create original work extensively on computers, the question arises about where the copyright resides when there is limited human input.

TP Kennedy (director of education), Dr Mark Hyland (Law Society adjunct professor) and Eleanor McEvoy (IMRO chair)

"This is almost certain to become more complex, as artists use more artificial intelligence," Hyland pointed out, forecasting an increased dialogue between copyright and technology, including the internet of things, 3D printing, blockchain and robotics.

IP and copyright law are of vital importance to the Irish economy, and an excellent choice of specialisation for lawyers, Carol Plunkett of William Fry said.

The fascinating and fast-evolving copyright area makes it an exciting time to be an IP lawyer, intersecting, as it does, with data protection and intellectual property, Plunkett said.

Up to 80% of corporate assets of intangible value are held in copyrighted works, such as software, art, photography, music, magazines, newspapers, movies and drama, the audience heard.

They were reminded that the 2019 *Copyright Directive* became EU law last year, and must be transposed by the Irish Government into Irish law by June 2021. The directive allows copyright law exceptions, such as pastiche or parody, as well as use for educational purposes and news reporting.

The new legal framework also allows copyright owners to pursue lower-value IP claims in the District Court.

The law of copyright, first introduced by the 1710 *Statute of Anne*, gave the right to copy one's own creative work. This acted as an incentive to creativity and creation, by protecting it economically under the law, but only gave 28 years of protection.

Copyright is a proven and flexible tool in protecting a diverse range of works, Dr Hyland said. It protects trademarks, patents and industrial design, which makes it economically very important. And copyright confers both economic and moral rights, to make money and protect the creative integrity of the copyright owner, he said.

Strong copyright laws are particularly important to Ireland, which is the second-largest exporter of software in the wold.

STREET LAW AN UNMITIGATED SUCCESS

Street Law is an initiative that places trainees and volunteers in local schools, community settings, and prisons to teach participants about law. It aims to promote legal literacy, equality, access to law, and to teach high cognitive and social skills that enhance participants' effectiveness in legal matters.

More than 3,500 students have completed the Street Law programme since the Law Society's Education Centre began running it in 2013. Originally developed in Georgetown University in the United States, the initiative places trainee solicitors studying at the Law Society in local schools to teach law in a practical way.

PIC: DEREK OWENS

The Society's Regulation department is also a major supporter. In the summer of 2018, director of regulation John Elliot gave the go-ahead to two staff members, Sheila O'Sullivan and Mary Ann McDermott, to initiate a Street Law programme for children in the local community.

This led to the country's first primary school taking part in the programme – St Francis Xavier's Primary School in Dublin 15. Students prepared for, and held, a mock trial in the Law Society's moot court and Presidents' Hall.

Now in its second year, children from the age of ten are learning about ethics, the rule of law, and gaining confidence in their ability to speak and express their opinions.

In addition this year, 42 trainee solicitors visited 15 partnering DEIS (Delivering Equality of Opportunity in Schools) schools to bring the Street Law programme to over 500 students.

'THIS IS NOT HOW CHILDREN SHOULD LIVE' – BUT CALCUTTA RUN GIVES HOPE

Calcutta Run event manager Hilary Kavanagh has seen, first-hand, how Kolkata slum-dwellers have their lives transformed by funds raised by the Irish legal profession. Hilary made her first trip to the Indian city in 2019.

Close to Bangladesh, many arrive in the city from surrounding states, and do what they can to survive. Children leave their families and hop on trains to Kolkata, often scavenging in rubbish dumps, on riverbanks or train-tracks to earn a few rupees.

During her recent trip, Hilary (with other committee members) visited four of the projects that totally rely on funding from the Calcutta Run.

Vulnerable

The BPWT Snehneer Girls Home is a residence for 46 girls under 14 who have been rescued from vulnerable situations in the slums of Kolkata.

Kasba Girls Home also supports girls under 14, providing nutrition and education, recreational activities and outings, in a safe environment, while being nurtured by kind 'aunties'.

As well as completely funding these two homes, the Calcutta Run also covers the annual costs of the HIVE Emergency Response Unit, which operates ambulances that rescue abandoned and trafficked women and children, accident victims, and people suffering from mental-health issues. Emergency response is not often available to those living on the streets or in slums, so HIVE helps those who are socially and economically marginalised.

Squalor

Hilary describes how she witnessed, first-hand, how the Calcutta Run-funded homes have given life back to children taken out of squalor. Children danced, laughed and went about their day happily, learning various subjects.

They were proud to show off trophies won for art, photography and dance projects, and how they could now use computers.

Extra funds from the 2018 Calcutta Run paid for the ground floor of the new wing of the HOPE hospital. Local hospitals tend not to care for people living on the streets. Many don't have ID cards or can't speak the local dialect, having moved to the city from the surrounding states or Bangladesh.

Maureen Forrest (HOPE Foundation CEO and founder) once had to beg a private hospital to take in a seriously ill teenage girl. The next morning, she decided to open a hospital to address this urgent issue. The hospital now employs 40 doctors and 60 staff, treating over 11,000 patients and carrying out 800 surgeries each year.

Slum villages

On her trip, Hilary also saw what passes as home for children and their families, with many thousands still living on raised beds under motorways, in slum villages, and living without running water.

"This is not how children should live, and this is why we will continue to raise much-needed funds to bring more children through the care of HOPE," said Hilary.

This year's Calcutta Run will take place on Saturday 23 May, ending with the 'Finish Line Festival' during the afternoon at Blackhall Place.

Runners and walkers can take part in a 5k or 10k route, while other athletes can participate in tennis and soccer tournaments. The Cork and Sligo legs of the event take place on Sunday 24 May.

You can support The Hope Foundation's and the Peter McVerry Trust by taking part or sponsoring the event. All information can be found at www.calcuttarun.com.

PUBLIC INTEREST 'FUNDAMENTAL CONSIDERATION' IN DPP DECISIONS

Director of Public Prosecutions Claire Loftus has said that decisions about whether to prosecute or not "can be very difficult", but doing the right thing is never easy. The DPP was speaking at a Law Society parchment ceremony at Blackhall Place on 13 February.

"My office has a lot of power, and that brings a lot of responsibility," she said. "I know a bit about making decisions that are not necessarily popular, whether that is to prosecute or not to prosecute. They can be very difficult decisions, but doing the right thing was never going to be easy.

"But I am secure in the knowledge that I make those decisions without fear or favour, and that is how you, as solicitors, should proceed," the DPP told the audience. She added that solicitors were held to a higher standard of conduct than the general public.

Her comments were made during the week when Britain's Crown Prosecution Service (CPS) decided to clarify how it makes charging decisions after being criticised for pressing ahead with a case against the late TV presenter Caroline Flack, who died on 15 February.

Last December, the 40-year-old host of the reality TV show *Love Island* was charged with assault after allegedly attacking her boyfriend at her home. Flack pleaded not guilty, and a trial was due to take place shortly. Her boyfriend had not supported the prosecution.

The CPS posted a detailed explanation of how it decides whether or not to charge an individual with a criminal offence. It said it had to review every case referred by the police, and applied the same two-stage test to every decision: does the evidence provide a realistic prospect of conviction; and is it in the public interest to prosecute?

In Ireland, guidelines for prosecutors from the Office of the DPP state that, in making a decision as to whether to prosecute or not, the public interest is the fundamental consideration.


Deceased TV presenter Caroline Flack – CPS decision to prosecute has proved controversial

"A prosecution should be initiated or continued, subject to the available evidence disclosing a *prima facie* case, if it is in the public interest, and not otherwise," the October 2016 guidelines state.

When gardaí complete an investigation, they send a file to the Office of the DPP. The prosecutor must read the file carefully and decide whether there is enough evidence to put before the court.

A jury, properly instructed by a judge on the relevant law, has to be convinced beyond a reasonable doubt that a person is guilty. It is not enough for them to think that the accused is probably guilty.

The guidelines state: "The Office of the DPP will also give careful consideration to any request by a victim that proceedings be discontinued. It must be borne in mind, however, that the expressed wishes of victims may not coincide with the public interest and, in such cases, particularly where there is other evidence implicating the accused person or where the gravity of the alleged offence requires it, the public interest may require the continuation of a prosecution, despite the victim's wish that it would be discontinued."

The Office of the DPP is totally independent of Government, and is not overseen by any minister or body.

O'REGAN APPOINTED CCBE'S RULE OF LAW ADVISOR

The Council of Bars and Law Societies of Europe (CCBE) has appointed Attracta O'Regan (solicitor and head of Law Society Professional Training), as its rule of law advisor.

Attracta's role will be to ensure the implementation of objectives cited in the CCBE statutes, to reinforce and strengthen the work of the CCBE on issues related to defence of the rule of law, and to ensure monitoring and coordinated contribution to the work and priorities of EU institutions, agencies and other relevant stakeholders.


Attracta O'Regan

O'Regan is a highly experienced expert on rule-of-law issues. She has been an expert advisor for over 12 years to high-profile international rule-of-law NGOs and has delivered numerous initiatives internationally.

Her main task will be to provide expert advice to the CCBE presidency and the standing committee on rule-of-law issues.

The role will include developing a draft a rule-of-law strategic plan, and recommending possible activities to strengthen the rule of law in Europe.

NOTICE – SBA ANNUAL GENERAL MEETING

Notice is hereby given that the 156th annual general meeting of the Solicitors' Benevolent Association will be held at the Law Society, Blackhall Place, Dublin 7, on Monday 20 April at 12.30pm. It will consider the annual report and accounts for the year ended 30 November 2019, elect directors, and deal with other matters appropriate to a general meeting.

BUSINESS OF WELLBEING SUMMIT OUTLINES BENEFITS FOR BUSINESSES

While the benefits of implementing a wellbeing programme for employees may appear self-evident, organisations do not necessarily consider the benefits that wellbeing programmes can have on their business and profit margins.

However, evidence clearly indicates that the cost of poor mental health in the workplace is substantial. In Britain, recent research (see *Mental Health and Employers: Refreshing the Case for Investment*, Deloitte, January 2020) has revealed that the cost of mental ill-health to employers amounts to Stg£45 billion per year. These costs are made up of absence costs, presenteeism (the loss of productivity that occurs when employees come to work, but function at less than full capacity due to ill health), and turnover.

Given that Ireland has one of the highest rates of mental-health illness in Europe (it ranks joint third out of the 36 countries surveyed in the annual OECD *Health at a Glance: Europe 2018* report), it is estimated that the relative cost of mental ill-health to Irish employers is just as high as in Britain. More broadly, the same OECD report has revealed that mental-health problems cost the Irish economy at least €8.2 billion annually.

Following this logic, the return on investment of workplace mental-health interventions has been shown to be overwhelmingly high. By investing in the mental health of staff, law firms have the potential to reduce absenteeism, improve productivity, increase engagement, reduce errors, improve overall job satisfaction, and ultimately attract and retain the best talent. The average return on investment amounts to 4.2:1 (*Mental Health and Employers: A Case for Investment*, Monitor Deloitte, October 2017).

The Business of Wellbeing Summit, organised by the Law Society in collaboration with Law Society Finuas Skillnet, will take place on 23 April 2020 for firms and professionals who wish to explore this further. It will look at why it makes good business sense to invest in employees' mental health and wellbeing, and will offer an evidence base for transformation and change.

In more detail, the Business of Wellbeing Summit will:

- Explore what employers should be doing to prevent, manage and deal with employees who are suffering from alleged work-related stress, what the legal position is, and what the legal/business implications are if it is not managed correctly,
- Share experiences from other jurisdictions and hear from industry experts during an interactive panel discussion on the business case for wellbeing – and why it makes good business sense to invest in employees' wellbeing and mental health,
- Showcase guidance for best-practice in supporting wellbeing in the workplace,
- Engage participants in the process of designing and agreeing upon a professional wellbeing charter, and
- Conclude with an interactive reflective wellbeing session focused on personal support.

The summit will take place at the Law Society on Thursday 23 April from 9.30am to 4.15pm. Claim six 'management and professional development skills' hours towards your 2020 CPD requirement.

To find out more and to make a booking, visit www.lawsociety.ie/wellbeingsummit or, if you'd prefer to book by post, you may download the booking form from the same page.

If you have additional queries, contact the Law Society Finuas Skillnet team at finuasskillnet@lawsociety.ie.

ENDANGERED LAWYERS

ADIL MELÉNDEZ MÁRQUEZ, COLUMBIA

Based in Cartagena, a beautiful city on Columbia's Caribbean coast, Adil Meléndez Márquez is a prominent human-rights lawyer. He coordinates the National Movement for Human Rights in Afro-Columbian Communities (CIMMARON). He joined the Movement for the Victims of State Crimes in 2005, and in 2006 was provided with protective measures by the Inter-American Commission on Human Rights, surviving threats to his life and three assassination attempts in the period since. He was involved in the successful prosecution of high-level officials for corruption in his home municipality of San Onofre.

Conflict-related violence has displaced more than 8.1 million Colombians, out of a population of 49 million, since 1985, according to government figures. And it continues: around 33,000 people were displaced in the first six months of 2019. The government's implementation of land restitution under the 2011 *Victims Law* continues to move slowly. The law was enacted to restore millions of hectares of land that were left behind by, or stolen from, internally displaced Colombians during the conflict.

Adil has particularly focused on two displaced communities in his region, working on land-restitution cases. They are threatened by paramilitary groups representing other interests. He recently received more threats by phone, which he promptly reported to the police. They were directly linked to his work as a lawyer representing alleged perpetrators who wish to testify before the Special Jurisdiction for Peace, part of the Colombian transitional justice framework, and tell their side of the story.

He is receiving protection by the authorities at the request of the Inter-American Commission on Human Rights, but this protection is not keeping up with the level of threat, and is only available in Cartagena – not in rural areas where the risks are higher. At one point, he was provided with a bullet-proof car, but this was withdrawn over a year ago. He has had bodyguards assigned to him. He recently received help from Dublin-based Frontline Defenders to enable him to better physically secure his house and office. He reports being followed, and believes that his phone data is leaked, allowing paramilitary groups to anticipate and track his movements, and further increase the risk to his life.

The Office of the UN High Commissioner for Human Rights has documented the killing of 41 human-rights defenders between January and late July 2019. The huge influx of Venezuelan refugees over the past two years (over 1.5 million) is putting further pressure on the state and the administration of justice.

Alma Clissmann is a member of the Law Society's Human Rights Committee.

THE EARLY BIRD GETS THE WORM

The Law Society is encouraging entrepreneurs and start-ups across Ireland to make sure they get the right advice from the beginning, to help plan for short and long-term success.

And one of the most important decisions to make when starting a business is which type of legal structure to use. The decisions made at the very start of the life of a business can have an impact on every aspect of its future.

"We cannot stress enough the importance of getting the right advice at an early stage," says Teri Kelly (director of representation and member services). "Different structures suit different types of businesses. A small business can choose to be structured as a sole trader, for example," she points out.

A sole-trader business is an uncomplicated structure, where the liability of the business is attached to one person. The benefits include less paperwork and less regulatory compliance. The trade-off, however, is an increased personal liability for claims or debts.

"To get this and all the other critical elements right, we always recommend seeking the expert advice of your local solicitor," she says.

"It's important to remember that the small law firm or sole practitioner down the street from you is a small business owner, as well as a legal expert. They are rooted in the local business community, as well as being uniquely plugged-in to a local, national and international network of fellow, highly qualified legal experts. No start-up challenge is too big or too small for your local solicitor."

Solicitors can also advise across all other areas of the business, including tax, employment, GDPR and more.

"It's also worth remembering that your local solicitor's firm was once a start-up business itself," Kelly adds.

In 2019, the Law Society launched a strategic plan to support and develop the more than 2,000 firms in Ireland that have five or fewer solicitors.

More information on this initiative is available at www.lawsociety.ie/businesshub.

ADDENDUM

In last month's *Gazette*, we inadvertently omitted the full title of Dr Grania Clarke, who authored the 'Only the lonely' article (p44). We are happy to point out that Dr Clarke is a clinical and counselling psychologist a family systemic psychotherapist and supervisor.

23% REJECTION RATE FOR PRA 'FIRST REGISTRATION' APPLICATIONS

The Property Registration Authority (PRA) says that the rejection rate for applications for first registration cases lodged with it in 2019 was 23%. In addition, a significant number of further cases required rulings or queries to be raised, and re-raised – several times – before the application could proceed towards completion.

According to Michael Clarke (deputy registrar of the PRA), applications for first registration lodged with the authority, where title is not certified and examination of the title is required, can sometimes take a considerable time to complete.

Michael Clarke

Adverse possession cases

This can also be said of applications under section 49 of the *Registration of Title Act 1964* for adverse possession of registered land. "The primary reason for this is the general low standard of applications lodged," Clarke said.

Reducing the arrears of first-registration casework is a key strategic goal in the PRA's *Integrity and Innovation Statement of Strategy 2019-2021*, in support of its remit to extend title registration.

Following a restructuring of the examination-of-title process, and the dedication of increased resources to the area, 2019 saw a 28% increase in the number of cases completed on foot of an examination of title. An additional increase is expected in 2020.

Change of practice

In 2020, the authority aims to improve overall processing times by changing its practice on the rejection of first registration and section 49 cases that are not in order for registration.

Rather than retain and query these applications, as previously, from 1 February 2020, these applications will instead be rejected upon initial examination. Applications for first registration in Forms 1, 2 or 5 and section 49 applications in Form 6 of the *Land Registration Rules 2012*, will be given a full examination, and all rulings will be raised in the rejection letter. There will be no loss of priority for solicitors' clients, the PRA says, as the appropriate date of registration will be the date of settling, rather than the date of lodgement.

Re-lodging applications

Upon re-lodgement, an application will only be rejected again if the rulings originally raised have not been satisfied, or if rulings arise in respect of deeds or documents not lodged with the original application.

Michael Clarke says this will help improve the expected processing time for first registration and section 49 applications by:

- Freeing up the significant staff resources currently dealing with arrears maintenance, and
- The fact that the lodging solicitor will have all deeds and documents to hand when satisfying any rulings raised.

Many solicitors do not retain copies of documents lodged to the PRA, so the new practice means that having these documents returned to the solicitor will aid the process of satisfying rulings.

Full details of the change may be found at www.prai.ie. Also available on the website are instructional videos to assist in the preparation of Form 1 and Form 2 applications for the registration of documentary title.

To further aid practitioners in preparing applications, the following list sets out some of the most common errors in applications lodged:

- Affidavit in Form 1, 2, 5 or 6 incorrectly drafted and/or jurat incomplete,
- Form 17 is not properly completed and/or is not signed by an individual solicitor,
- Fees not lodged or insufficient fees lodged,
- Revenue Stamp Certificate (documentary title) or CAT certificate (possession cases) not lodged,
- Searches not lodged,
- No application map lodged or map lodged is not Land Registry compliant,
- Necessary deeds or documents required for registration have not been lodged (for example, original title deeds, deed of appointment of receiver, grant of administration),
- Deeds on title omitted/errors in deeds lodged,
- Supporting documents not lodged, for example, deed of appointment of receiver, and
- Insufficient detail provided in paragraph 2 (Form 5 or 6 possession cases).

SOCIETY STAFF ON THE CREST OF THE 'GREEN WAVE' WITH ECO TASK FORCE

Law Society staff are going green with the launch of an eco-friendly task force that aims to reduce waste, conserve energy and promote biodiversity. The development complements the Society's existing eco-friendly programme, but is specifically aimed at inspiring staff members and Law School trainees to play their part.

Interest has been growing significantly in improving waste management, biodiversity and sustainability in recent years, and staff have been keen to 'catch the green wave'.

The task force has been in place since May 2019 and follows on from the work of a previous task force (which came into existence in 2009). It has agreed a vision for what an eco-friendly workplace should look like. The task force has been investigating and implementing the removal of single-use plastics, offering loyalty incentives in the café for reusable cups, the provision of electric charging points for electric cars in the car park, and the installation of a greenhouse and apiary comprising two bee hives in the back garden.

The group has produced a green paper outlining its initial short, medium and long-term objectives, with the full backing of the Society's senior management team.

All departments are now represented on the task force, including a Law School representative, so that trainees can also take part. Currently, 10% of PPC trainees have indicated an interest in becoming active volunteers.

Some of its initial organisation-wide projects include:

- Tackling food waste through education and review of food orders for meetings,
- Wider use of compost and recycling bins,
- Printer default to double-sided, mono printing,

The eco-friendly task force: Emily Rockwood, Michelle Lynch, Fergal Mawe, Rosemarie Hayden, Carmel Kelly and Sandra Smith

- Education seminars on recycling – did you know that placing one non-recyclable item into a recycling bin can result in contamination of that bin's total contents?
- Planting native, bee-friendly flowers and bulbs to provide an improved habitat for native bees, birds and insects, which in turn positively impacts on biodiversity,
- Grey-water project in conjunction with Dublin City Council, and
- A book-swap area in Vanilla Café for staff and trainees.

The task force's medium-term projects include:

- Research into how the Society can further improve on biodiversity. This may include rewilding an area of the grounds, permaculture options, and offering allotments to complement the greenhouse.
- Green-event management, including review of materials, bottled water, food, packaging, and recycling so that they are more eco-friendly.
- Integrate environmental sustainability in the staff wellness programme.
- Devise a policy for increasing contributions to carbon offsetting.

In the long term, the task force is reviewing energy usage, with the aim of becoming carbon neutral in time. It is seeking to work with other representative and educational bodies to share experiences, lessons and ideas. As a third-level educational institution, the Society is also working with An Taisce to implement a 'green campus' programme – a seven-step initiative that will be driven by staff and students to raise awareness of environmental issues, implement improvements, and develop a Society green charter that will assist it in reducing its ecological footprint.

The aim is to lead by example in order to inspire staff, students, members and visitors to do likewise in their workplaces, at home, and in their local communities.

IS THERE A DOCTOR IN THE HOUSE?

Cork-based solicitor Shane McCarthy has been conferred with a Doctorate in Law. Shane took seven years to complete his research, which examines parole in Ireland. He balanced his studies with numerous other commitments, including being a member of the Law Society's Council, chair of the Society's Human Rights and Equality Committee (till November 2019), a member of the Parole Board, running a busy practice, not to mention his family responsibilities towards his wife Sinéad McNamara (who is a solicitor and Sheriff for County Cork) and their four children.

Dr Shane McCarthy and his wife Sinéad

The doctoral paper, entitled *Balancing Justice and Risk*, examined how parole decisions are reached, and how the views of various stakeholders, including offenders and victims, are considered in the process.

The thesis also included an overview of the sentencing process. The major focus, however, concerned risk – its meaning, how it is calculated, and the impact that the assessment of risk has on the parole process.

Shane described the work involved as all-consuming, but says he was lucky to have a huge interest in the topic.

"The biggest task was not in writing the thesis, but in applying the appropriate discipline required to keep the whole research project on track," he told the *Gazette*.

REPORTED MISTREATMENT OF SAUDI ARABIAN LAWYER WALEED ABU AL-KHAIR

Waleed Abu al-Khair (40) was featured as the first 'endangered lawyer' in the *Gazette* in September 2018, *writes Alma Clissmann*. Up till April 2014, when he was imprisoned, he was a leading advocate for many fellow citizens who transgressed the repressive regime in Saudi Arabia. He was also a reliable source of information on human rights issues in the country, writing and publishing locally and abroad.

He was sentenced to 15 years imprisonment for "terrorism related crimes", created by a new law during his trial, including:

- Disobeying the ruler and seeking to remove his legitimacy,
- Insulting the local judiciary and questioning the integrity of judges,
- Setting up an unlicensed organisation,
- Harming the reputation of the state by communicating with international organisations, and
- Preparing, storing and sending information that harms public order.

Further, a travel ban of 15 years following his imprisonment and a fine of around €48,000 were imposed.

Amnesty International reported that, on 26 November, he was moved to solitary confinement and deprived of books. In protest, he went on hunger strike. The Gulf Centre for Human Rights reported that, on 9 January, he was moved from the maximum security Dhaban prison to hospital in Jeddah because his health had deteriorated dramatically.

Waleed Abu al-Khair

This recent escalation in mistreatment is part of a pattern of pressure being exerted by the authorities to get Abu al-Khair to recant and agree to abstain from human rights activities. During his imprisonment, he has been subjected to additional punishments prohibited by international law, including mistreatment, denial of medical care and attention (including special diet), refusal of visits, and access to family members.

Waleed suffers from type-two diabetes and a chronic colon condition, both of which require special diets. Credible reports suggest that his sister is no longer permitted to bring him medication for his diabetes, or appropriate food, and that he is not getting the regular check-ups indicated by his condition.

His conviction has twice been the subject of an investigation by the UN Working Group on Arbitrary Detention (WGAD). The first was in 2015, when the WGAD directed Saudi Arabia to immediately release him, concluding that his arrest was unlawful, having been ordered without compliance with any law, and that his right to a fair trial had been so impaired by the detention and deprivation of counsel that release was the only option.

In 2018, the WGAD again directed Saudi Arabia to release him, this time after reviewing all aspects of the arrest, prosecution, charges, trial, sentencing and appeal. In a carefully reasoned opinion, dated 4 July 2018, the WGAD concluded that the charges were illegitimate, the specialised criminal court was not sufficiently independent to deliver a valid determination, and that his detention was in contravention of numerous articles of the *Universal Declaration of Human Rights*.

DO WE REALLY NEED 'DEAR SIRS'?

From: Michael Monahan, solicitor, 47 John Street, Sligo

City law firms in Britain are scrapping the use of 'dear sirs' in their letters in an effort to shake off the sector's fusty image.

Would it be time for us to do the same?

It appears that there may be suitable alternatives, such as 'dear colleague' or 'dear counsel'. In an era when there are more women than men practising as solicitors in Ireland and, indeed, in the year when we have a lady president, would this be the time to move on and drop this form of address, which comes from a previous century?

We have to ask: do we really need it at all, and does it simplify matters just to omit it from the start of a letter?

Perhaps our Council members would take this suggestion on, and give us some guidance going into the new decade.

CLIENT INSIGHT – THE BENEFITS OF AN IN-HOUSE SECONDMENT

From: Dan McNamara, McCann FitzGerald, Sir John Rogerson's Quay, Dublin 2

In August 2017, I was a newly qualified associate with McCann FitzGerald solicitors when I was offered the opportunity to spend three months on secondment with one of our clients. This turned out to be an invaluable experience for me, as I gained an understanding of what it was like to work as an in-house counsel in a large organisation, and to be on the receiving end of legal advice services from outside counsel. It also gave me a fresh perspective on client needs and expectations when engaging external counsel.

One of the aspects I enjoyed most about my secondment was the variety of the work that I was involved in. Like most lawyers in private practice, at the time I was developing my knowledge in a specific field (in my case, corporate transactional work). I knew that going on secondment would mean that my day-to-day work would now cover a variety of legal fields; however, I probably didn't fully appreciate at the time just how varied my secondment experience would be.

My work touched on a wide range of legal areas, including finance, employment law, company law, corporate governance and intellectual property. I feel like I left with a new set of skills in different legal areas and became used to moving between different areas of law during the course of my working day. I also gained a solid understanding of how legal advice and legal work is relevant to, and touches upon, every aspect of a business.

Gaining an insight into what a client expects from its outside counsel was probably the most valuable takeaway from my secondment. Understanding what the client requires and expects when they decide to engage external counsel was an important lesson I learned, and is something I keep in mind whenever I send an email or pick up the phone to a client.

I discovered that a significant part of providing quality legal services to clients means being responsive and being able to effectively communicate points of law in a concise and practical manner. Most of the time, the client is looking for a practical answer to what might be a complex problem. My secondment now informs every interaction I have with a client, and this fresh perspective should serve me well in my career. Understanding that legal advice is not a standalone product, but something that forms part of a business's wider performance and objectives is something I now always bear in mind.

As legal service providers, we often deal with only a small number of people within a client's organisation and, as a result, our knowledge of the detail, breadth and scale of a business organisation can sometimes be quite limited. One of the key benefits of my secondment was that I had the opportunity to meet and get to know people from all areas within the client's business – from investor relations to sales, manufacturing, finance, and IT. Apart from giving my role as in-house counsel in the business more context, it meant that, by the end of my secondment, I had a good overview of how the business operated and functioned, and meant that any legal advice I provided to the client in the future as external counsel would inevitably be more tailored and useful.

I would encourage any solicitor who is given a secondment opportunity to take it. It turned out to be an invaluable experience for me, and also benefited both my firm and the client, making it a win-win result for all. g

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Dan is currently participating in a 12-month foreign associate attorney programme with US law firm Cravath, Swaine and Moore LLP in New York.

A BOY NAMED SUE

If suing a hospital, it is now clear that a plaintiff must identify distinct negligence against the hospital, in addition to any findings against a private consultant. **Sarah Reid** takes your pulse

SARAH REID IS A PRACTISING BARRISTER, AUTHOR AND LECTURER IN MEDICAL LAW

PLAINTIFFS WHO CONTINUE TO ADOPT A SCATTERGUN APPROACH TO SELECTING DEFENDANTS WILL BE EXPOSED, NOT ONLY TO JUDICIAL CRITICISM, BUT POTENTIAL COSTS ORDERS AGAINST THEM

Plaintiffs in this jurisdiction are often criticised for suing 'everyone', presumably on the basis that their case only needs to stick to one party. However, two recent cases – *Hunt v Gormley & Ors* ([2019] IEHC 316) and *Mangan (a minor) v Dockery & Ors* ([2014] IEHC 477) – have condemned this practice. Indeed, plaintiffs who continue to adopt a scattergun approach to selecting defendants will be exposed, not only to judicial criticism, but potential costs orders against them.

Further, if suing a hospital, it is now clear that a plaintiff must identify, by way of expert report, distinct negligence as against the hospital, in addition to any findings in respect of a private consultant.

Considered pleadings

It is well established that, in order to instigate a claim in professional negligence against a medical practitioner, the plaintiff must possess confirmation – by way of an expert report – that the actions of the doctor constituted negligence and fell below the standard of care expected. This stems from the decision of Barr J inn *Reidy v The National Maternity Hospital* ([1997] IEHC 143), who held that it was irresponsible, and an abuse of process, for a plaintiff to instigate proceedings without first ascertaining that there were reasonable grounds for so doing.

This view was expanded on in *Mangan*, when the Court of Appeal upheld the decision to dismiss a medical negligence action against two of the three defendants in the case, on the basis that the plaintiff did not possess independent medical evidence supporting his claim against those defendants.

More recently, in *Hunt v Gormley & Ors*, Mr Justice Barrett held: "The court does not see that a defence can be entered by the second and third-named defendants where it is relevant to the substance of that defence whether there is a report which specifically criticises treatment provided by the second-/third-named defendant as opposed to the first-named defendant; the solution to this impasse is firmly in the plaintiff's hands."

The impact of these cases has meant that plaintiff solicitors and barristers must carefully consider their approach, and be satisfied that separate and distinct grounds of negligence lie against each defendant they are pursing.

In practical terms, this means ensuring that the expert commissioned to write a report is instructed to comment on the actions of each defendant and the care afforded to the plaintiff in that regard. Further, the pleadings that issue will have to reflect the distinct claims being made against each defendant if they are to be lawfully maintained against each party.

Having established that distinct allegations must lie against a hospital, as distinct from a doctor, and in circumstances where private consultants have been routinely regarded as independent contractors, recent developments in Britain are worth noting, where they have expanded the law on vicarious liability as it applies to doctors in private practice.

British developments

In 2017, Ian Paterson, a British surgeon, was convicted of criminally wounding patients and inducing them to undergo often unnecessary treatment for breast cancer, from which he derived personal profit.

Though his private patients ought not to have had a claim in law against the hospital, Spire UK nonetheless agreed to contribute Stg £27.2 million towards a compensation fund for his patients, on the basis that "better clinical governance in the private hospitals where Mr Paterson practised might have led to action being taken sooner". On 4 February 2020, the independent inquiry into his practises

PIC: SHUTTERSTOCK

found serious failings in clinical governance on the part of the private hospital, and "a culture of avoidance and denial", which pervaded the system.

Though the settlement neither admits nor establishes liability for hospitals in similar situations, it does raise the question of potential liability for medical staff who are, on the face of things, independent contractors.

This issue was recently considered in *Various Claimants v Barclays Bank Plc* ([2017] EWHC 1929; [2018] EWCA Civ 1670), where a doctor, engaged by the defendant to conduct pre-employment medical assessment of employees, sexually assaulted some employees, and those employees successfully sued Barclays for the actions of the doctor. It is a significant decision, and identifies five criteria held to be indicative of vicarious liability:

- The defendant is more likely to have the means to compensate the victim, and can be expected to have insured against that liability,
- The negligent activity had been committed as a result of activity taken by the tortfeasor on behalf of the employer,
- The tortfeasor's activity is likely to be part of the business activity of the defendant,
- By engaging the employee to carry on the activity, the employer will have created the risk of the tort being committed by the employee, and
- The employee will, to a greater or lesser degree, have been under the control of the employer.

On appeal to the Court of Appeal, Lord McCoombe affirmed the decision, adding: "It seems clear to me that, adopting the approach of the Supreme Court, there will indeed be cases of independent contractors where vicarious liability will be established. Changes in the structures

> IT IS PERHAPS NOTEWORTHY THAT THE PRIMARY INSURERS OF IRISH DOCTORS ARE BRITISH-BASED ORGANISATIONS, MEANING THAT BRITISH PRECEDENTS WILL LOOM LARGE IN THEIR MINDS

of employment, and of contracts for the provisions of services, are widespread. Operations intrinsic to a business enterprise are routinely performed by independent contractors, over long periods, accompanied by precise obligations and high levels of control…

"It is clearly understandable that a 'bright line' test, such as is said to be the status of independent contractor, would make easier the conduct of business for parties and their insurers. However, ease of business cannot displace or circumvent the principles now established by the Supreme Court … As has now become tolerably clear from the fields of employment and taxation law, establishing whether an individual is an employee or a self-employed independent contractor can be full of complexity and of evidential pitfalls."

What next?

While the argument can be made that the distinct setting of an occupational health referral is not comparable to the wider private consultant setting, there could be room within the above criteria to allege a close connection between the parties that would justify such a finding.

The Court of Appeal referenced the modern employment reality of independent contractors and, in the Irish healthcare setting, the commercial reality of the relationship between doctors and hospitals must fall to be considered. Specifically to be borne in mind is the fact that hospitals in this jurisdiction rely on, and benefit from, revenue streams generated by private clinicians working within their facility. Further, those same hospitals impose working conditions, of sorts, as well as in-house practices and policies, which must be adhered to by consultants.

Against this backdrop, a clinician's independence becomes less obvious, and one could argue that hospitals ought to be liable in any event, as they have a non-delegable duty to ensure patient safety once admitted to their facility.

What remains to be seen is whether the Irish courts will follow their British counterparts when presented with the opportunity to expand the law in this area. Moreover, in the medical context, it is perhaps noteworthy that the primary insurers of Irish doctors are British-based organisations, meaning that British precedents will loom large in their minds.

If the facts were right, a case could be made against a hospital for the actions of a private consultant, on the basis that it is illogical to maintain the distinction of private contractor when there exists a close connection and form of control between the parties rendering it 'akin to employment'. Equally, governance and oversight systems must fall to be considered if those very systems fail to spot clinical deficiencies, resulting in injury to patients. g

WAR OF INDEPENDENCE

The recent judgment of the ECJ in *Uniwersytet Wrocławski and Poland v REA* provides important clarification on the independence of in-house lawyers. **Patrick Ambrose** assesses its significance

PATRICK AMBROSE IS CHIEF LEGAL OFFICER AT DLL IRELAND

ALTHOUGH THE DECISION IN *UNIWERSYTET WROCŁAWSKI* IS STRICTLY ABOUT THE INTERPRETATION OF THE STATUTE, IT CLEARLY REBUTS THE VIEW THAT IN-HOUSE COUNSEL CAN NEVER BE INDEPENDENT

The concept of 'independence' in the context of in-house lawyers has caused much confusion, particularly in light of the decisions in *AM&S Europe* and *Akzo Nobel*, which are not always understood as applying only in the context of the European Commission's investigative powers in competition law proceedings. Thankfully, the Court of Justice of the European Union (CJEU) has provided some welcome clarity on the concept of independence in *Uniwersytet Wrocławski*.

By way of background, a Polish university brought a case against the EU's executive agency for research in a dispute over money owed to the agency (joined Cases C-515/17 P and C-561/17 P).

The lawyer representing the university had been an employee of the university for over 20 years but, some months before the case, he had left the employment of the university and established a professional practice, and it was through this professional practice that the university's case was submitted.

The lawyer continued to lecture at the university under a civil law contract and, although the contract implied no subordination of the lawyer to the dictates of the university when practising his profession through his own firm, the General Court found that, even if there was no formal employment relationship, the existence of the contract for lecturing services meant that the lawyer did not satisfy the condition of independence required by the statute of the Court of Justice of the European Union.

In the distance

In a judgment delivered on 4 February 2020, the CJEU set aside the order of the General Court. The CJEU specified that the objective of representation by a lawyer referred to in article 19 of the statute is, above all, to protect and defend the principal's interests acting in full independence "to ensure that legal persons are defended by a representative who is *sufficiently distant* from the legal person which he or she represents".

In that context, the lawyer's duty of independence is to be understood, not as the lack of any connection whatsoever between the lawyer and his or her client, but the lack of connections that have a manifestly detrimental effect on the capacity to carry out the task of defending the client, while acting in that client's interests to the greatest possible extent.

In that regard, the CJEU found that lawyers who would not be considered sufficiently independent were:

- Those who had been granted extensive administrative and financial powers that place his or her function at a high executive level within the legal person he or she is representing, such that his or her status as an independent third party is compromised,
- Those who hold a high-level management position within the legal person he or she is representing, or
- Those who hold shares in, or are the president of the board of administration of the company he or she is representing.

On the facts of the case before it, the CJEU expressed the view that, not only was the lawyer not defending the interests of the university in the context of a hierarchical relationship, he was simply connected to the university by a contract for the provision of lecturing services, which could not be regarded as having a manifestly

PIC: SHUTTERSTOCK/GAZETTE STUDIO

detrimental effect on his capacity to defend his client's interests.

While not legally binding, the opinion of the advocate general in this matter (delivered on 24 September 2019) includes some very interesting observations, not only in the context of article 19 of the statute, but also in the context of legal professional privilege and the concept of 'independent lawyer' generally.

- The concept of independence that was provided by the CJEU in the *AM&S Europe* and *Akzo Nobel* cases was only intended to define the scope of documents covered by legal professional privilege in the context of the European Commission's investigative powers in competition law proceedings and, in applying that interpretation to a broad array of other scenarios, the connection with the original rationale and purpose of the concept of independence was lost.
- While in *AM&S* and *AKZO*, the CJEU provided, invoking the common traditions of the member states, that the requirement of 'independence' is justified by the role of the lawyer "as a collaborator of the court, who is called upon to provide, *in the overriding interests of justice*, such legal assistance as the client needs", acting therefore primarily in the public, general interest of justice, with that interest prevailing over the private one, this premise is no longer true. In reality, legal representation is a service provided primarily, not in the overriding interests of justice, but in the interests of a particular client.
- For the purposes of article 19 of the statute, the issue of a lawyer being employed by a legal person should be assessed on the basis of whether they meet the criteria of a 'third-party', which is required for a lawyer to represent the client in front of the CJEU, rather than under the heading of 'independence', as, while an in-house lawyer is not a 'third party' for the purposes of representation in front of the CJEU, this does not mean that the in-house lawyer may not be independent. In particular, the advocate general acknowledges that certain in-house lawyers might enjoy a considerable degree of independence, such that they qualify as third parties in substantive terms, while some individuals that technically meet the criteria of third parties are actually dependent on the client in economic or other terms, such that they should be treated as part of that legal person.

Significance

Although the decision in *Uniwersytet Wrocławski* is strictly about the interpretation of the statute, it clearly rebuts the view that in-house counsel can never be independent. Instead, the CJEU has clearly expressed the view that challenges to the independence of a lawyer should be limited to certain relationships where conflicts of interest are more likely to arise, and should not be pre-emptively assumed by a court.

Separately, the opinion challenges the perception of a lawyer's role that was at the heart of CJEU decisions in *AM&S* and *Akzo*, and which may be persuasive in future CJEU cases regarding legal professional privilege in competition law.

The opinion also suggests that questions of independence may not be confined to in-house lawyers – and this is something that private practitioners should take note of where they rely solely, or mainly, on a single client. g

> THE OPINION ALSO SUGGESTS THAT QUESTIONS OF 'INDEPENDENCE' MAY NOT BE CONFINED TO IN-HOUSE LAWYERS, AND THIS IS SOMETHING THAT PRIVATE PRACTITIONERS SHOULD TAKE NOTE OF WHERE THEY RELY SOLELY, OR MAINLY, ON A SINGLE CLIENT

PIC: SHUTTERSTOCK

I DON'T WANT TO MISS A THING

How does the everyday use of video-recording sit with data protection legislation in both a personal and commercial context? **Eoin Cannon** has it under surveillance

EOIN CANNON IS A BARRISTER SPECIALISING IN DATA PROTECTION

Our modern society is subject to a huge amount of monitoring by video. This can be done by either CCTV systems or simply by someone taking a video on their phone.

Data protection law in this jurisdiction is regulated by the *General Data Protection Regulation* (GDPR), which is implemented in this jurisdiction by the *Data Protection Act 2018*. Article 4 of the GDPR defines personal data as any information related to an 'identified or identifiable natural person' so, in the context of CCTV, if you are identifiable from the images, then those images can be regarded as personal data and the GDPR and *Data Protection Act* will apply.

Dublin City Council, in seeking to dissuade illegal dumpers in Dublin city centre, used partially blocked-out images of people dumping rubbish in a particular area. The individuals were identifiable however and, while a stranger would not recognise the perpetrator, they would themselves, and most likely their neighbours would too. The Data Protection Commission contacted the council with their concerns in relation to the project.

A controller of personal data is regarded as the legal entity that controls the purposes and means of processing personal data. The data controller may take the form of an individual or a company. Data controllers are subject to a number of statutory obligations in relation to security, retention, minimisation, and so on.

For video information, the most pertinent obligations are transparency as to the nature of the processing, and the right to access of any individuals filmed. Where a type of video-recording is likely to result

AT A GLANCE

- **The increasingly high quality of affordable recording technologies leaves us with a more complex technical and legal environment**
- **Not all video-recording and CCTV falls within the parameters of what is legal**
- **Video-recording, even in a personal capacity, may now invoke certain obligations as a data controller – in a commercial context, this is a certainty**

PIC: SHUTTERSTOCK/GAZETTE STUDIO

> TECHNOLOGIES SUCH AS DRONES, DASHCAMS, AND THE EASE WITH WHICH FOOTAGE CAN BE SHARED MEANS THAT THE PARAMETERS OF 'PURELY PERSONAL OR HOUSEHOLD ACTIVITIES' WILL OFTEN BE DETERMINED ON A CASE-BY-CASE BASIS

in a high risk to the rights and freedoms of natural persons, it may be necessary to undertake a data-protection impact assessment.

Our house

There is a common misconception that GDPR applies to all personal data. This is not true. The 'domestic use exemption' applies to 'purely personal or household activities', meaning that GDPR does not apply to your private daily life.

The boundaries of the 'domestic-use exemption' are set out in what is known as the *Rynes* decision of the European Court of Justice.

This case related to an individual's home CCTV system, which recorded footage of his front garden. However, it also covered the path outside his home and some of his neighbour's property. The European Court of Justice found, given the latter coverage outside of the personal property of Mr Rynes, that the domestic-use exemption did not apply.

In this jurisdiction, gardaí have the right to capture personal data as evidence for the purpose of an investigation under section 70 of the *Data Protection Act 2018*, and a controller of personal data may hold or gather personal data for that purpose under section 41 of the same act.

The use of CCTV as evidence is increasingly a feature of criminal prosecutions in this jurisdiction. The recent prosecution of the murder of Patricia O'Connor is an example. The CCTV system of a neighbour covered part of the property of Mrs O'Connor and was used as evidence in the hearing. While a strict application of *Rynes* would indicate that such footage could be excluded from a case due to it having no legal basis, the Irish courts would appear to allow such footage in the criminal context.


PIC: SHUTTERSTOCK

FOCAL POINT

THE CAMERA EYE

Facial recognition

One of the features of CCTV footage in the future will be the use of facial-recognition technology. This is already widely used in certain countries, such as China. With facial-recognition technology, a CCTV system may be in a position to automatically ID an individual upon capturing their image. While, in a narrow sense, this may be regarded as quite useful for certain aspects of security, facial recognition technology constitutes biometric data and is, therefore, highly restricted under GDPR. Further, the broader implications of widespread use of this technology is part of an ongoing discussion. The EU is currently debating whether to ban its use in public places for a five-year period.

Data-subject requests

As a CCTV image may be regarded as a form of personal data, this means that a video image may be subject to a data-subject access request. In this instance, the data subject (that is, the individual in the video) may request a copy of the video in which they feature. To comply, the data controller must send back the video that features the individual requester, but which does not feature any other person.

Community CCTV schemes

Under the *Garda Síochána Act 2005*, applicants may apply to their local authority for approval of a community CCTV scheme. If this approval is attained, the Garda Commissioner may grant an authorisation. The scheme will then be operated by the local authority, with the gardaí given access to the video and some control as to the operation of the CCTV.

On the other hand, the continual recording of a neighbour's private property may constitute harassment, which may be subject to criminal prosecution.

Cars

The increasingly high quality of affordable technologies leaves us with a more complex technical environment to which the law is applied. Technologies such as drones, dashcams, and the ease with which footage can be shared means that the parameters of 'purely personal or household activities' will often be determined on a case-by-case basis.

The use of dashcams has been addressed by the Data Protection Commission. The commission suggests the 'potential implications' in relation to dashcams for individuals using them. Without being explicit, this would appear to suggest that, in light of *Rynes*, if your dashcam is facing out onto the road, even if this is for purely personal use, then you are likely a data controller as per GDPR, meaning that all statutory implications will apply.

In a commercial context, it is clearly the case that an owner of a dashcam system will definitely be regarded as a 'controller' of

> THE UPSHOT IS THAT THERE IS CLEARLY GOING TO BE A HUGE AMOUNT OF FUTURE LITIGATION REVOLVING AROUND THESE ISSUES AND THAT PEOPLE WHO CONTROL THE RECORDING NEED TO BE CLEARLY AWARE OF THE CONSEQUENCES

personal data. The European Data Protection Board has made the separate point that a dashcam should only be recording at relevant times – that is, when driving.

In any public spaces, shops, cafés or museums, it is now rare that CCTV is not in place, monitoring the individuals present. This is usually for the purposes of security, which is perfectly legal once the data controller complies with their obligations under GDPR – most importantly, that of transparency to the individual recorded. Once the individual knows of the recording, they may then invoke their right to access the video as a data subject.

It therefore must be reasonably clear to any individual that (a) recording is taking place, (b) the purpose of this recording, and (c) the identity of the 'data controller' and any contact information. The normal means of undertaking this is by the placement of appropriate signage in the locus of the recording.

Video killed the radio star

As things stand, it would appear that if a user of a dashcam is determined a controller, whether a private individual or a company vehicle, all obligations of a controller would apply to them, and that similar information should be made available to an individual potentially filmed. Where a dashcam is mounted on a car, this may be done by way of signage on the vehicle.

The practical application of such signage to drones or other smaller video-recording technology may be more complex. The obligation to undertake a data-protection impact assessment may be a factor also.

Outside of criminal investigations, there are other common examples where video footage is used for a purpose that it was not originally intended for.

CCTV may be used for the purposes of staff-monitoring. However, this must not be regarded as 'excessive processing', and staff must be informed of the possible uses prior to being recorded. In the Data Protection Commission's Case Study 7/2015, it was found that CCTV in an employee canteen in a retail store was 'excessive processing'. Further, the High Court has recently found that if CCTV is installed for the purposes of ensuring security and health and safety, footage from that system may not be used in the course of any subsequent disciplinary process involving employees. If planning to install CCTV in such a context, it would be advisable to look into the necessity of undertaking a data-protection impact assessment before doing so.

It has been a recent feature that certain information that has been held or shared for the purposes of litigation has been leaked to the press and published during or after proceedings. It must be clear that the legal basis for handling the personal data in many cases is the fact of the proceedings. Any publishing or processing outside of that function would constitute a possible breach of the data-protection rights of the individual involved. This may attach to video footage – but similar rules apply to all personal data attained in this process.

Sharing of video can also cause problems – the clear issue being that, once a video is shared on a media platform, it is no longer private. However, there are other concerns also.

Recently, a woman was prosecuted for possession of child pornography in a situation where she had been sent a video on WhatsApp by a person she did not know well, watched it in part, turned it off after seeing that it was inappropriate content, and asked the sender why he had sent it. However, the video automatically downloaded, and the recipient was later prosecuted for 'possession' of child pornography. It is suggested that this would constitute a worrying precedent if followed in the future.

Every breath you take

There is a huge amount of video-recording and CCTV in place that we encounter on a daily basis. Not all of it falls within the parameters of what is legal. To undertake video-recording, even in a personal capacity, may now invoke certain obligations as a data controller; in a commercial context, this is a certainty.

The upshot is that there is clearly going to be a significant amount of future litigation revolving around these issues, and people who control the recordings need to be clearly aware of the consequences that their actions (or, indeed, inactions) have in the context of their legal obligations.

LOOK IT UP

CASES:

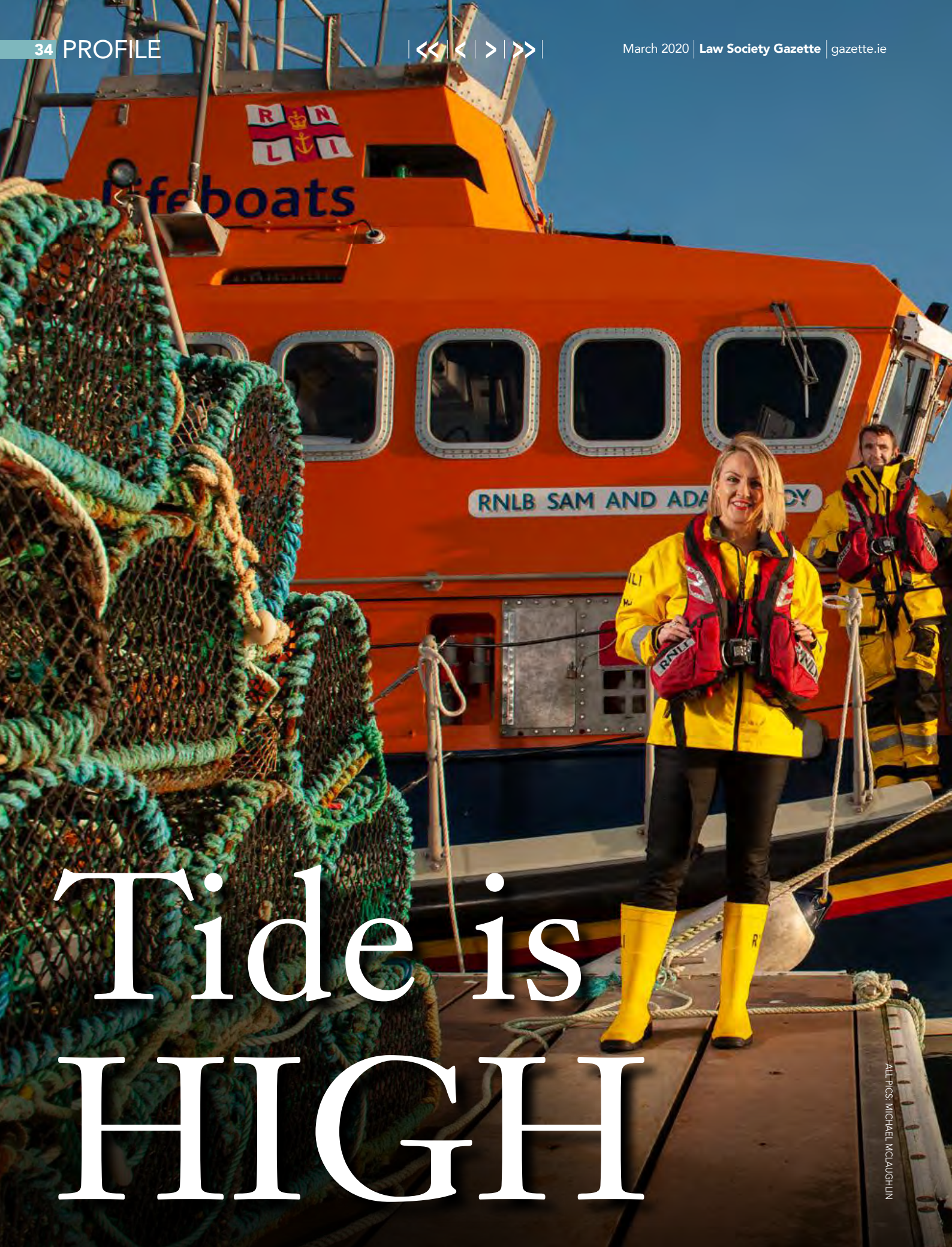
- *František Ryneš v Úřad pro ochranu osobních údajů* (ECJ, 11 December 2014, case C-212/13)

LEGISLATION:

- *Data Protection Act 2018*
- *Garda Síochána Act 2005*
- *General Data Protection Regulation*

LITERATURE:

- Data Protection Commission, Case Study 7/2015



Tide is HIGH

ALL PICS: MICHAEL MCLAUGHLIN

Mayo solicitor Katie Cadden describes the roller-coaster ride of her legal career, which has taken her from the fashion houses of Paris to membership of a State board and a seat on the RNLI Council. **Mark McDermott** pushes the boat out

MARK MCDERMOTT IS EDITOR OF THE *LAW SOCIETY GAZETTE*

When Katie Cadden was carefully arranging her school study notes in their folders, gearing up for the Leaving Cert back in in 1998, she had absolutely no notion that, just five years later, she would be landing her dream job alongside the general counsel for one of the top fashion houses in Europe.

Push on the clock 16 years after Paris, and the fashionista would be handing in her Louis Vuitton handbag and Manolo Blahnik shoes, exchanging them for a Helly Hansen Hi-Vis jacket and wellie boots. Such is the roller-coaster ride of a legal career.

The Castlebar-based solicitor had no background in law. "Absolutely,

> SUCCESS NOW STARTED TO LOOK A LITTLE BIT DIFFERENT TO ME, RATHER THAN STAYING ON THE TRADITIONAL LINEAR PATH WITHIN A LEGAL PRACTICE IN THE WEST OF IRELAND. MY HEAD HAD BEEN TURNED. I BECAME UTTERLY IMMERSED IN THE THEORY OF REGULATION AND CORPORATE GOVERNANCE

unequivocally none," she says. "My mum is an entrepreneur, my father was in hospitality, so there was no link to law at all. I went to school in St Joseph's Convent in Castlebar from 1993 to '98. I'd had a little bit of work experience with a family friend who's a legal practitioner in Castlebar. Of course, everybody had the heady images of Ally McBeal, but I was very practical. I was 'very applied'."

She admits to being one of those girls whose work was carefully organised into separate folders, complete with coloured dividers and 'yellow stickies'.

"Yes, I love lists, I thrive on lists. I think most lawyers do. Some have other strengths. But the majority that I know would tend to be pretty organised – and it can be the difference between being a good and a great lawyer sometimes, in terms of how you approach your work."

As soon as she finished her Leaving Cert, she visited all of the law schools in Galway, Dublin, Cork and Limerick to help her decide where she would go.

Love affair

"I could not get Galway out of my head. I was particularly drawn to the corporate law degree at the time, because you had the option of taking business subjects, while being able to specialise in legal French."

Why the love affair with French?

"I am particularly good at languages, and French in particular. I took French and German to Leaving Cert honours standard and did very well in them."

Galway gave her the opportunity to try different subjects in first year, including economics and accounting alongside the traditional law subjects. She studied the French legal system and European law, through French. "It was a challenge, but it was incredible," she says.

She dropped many of the business-related subjects in second year, deciding to focus on French and on contract and commercial law. France beckoned during her Erasmus year, where she opted to study law in Poitiers in the southwest of France.

"They've a fantastic law faculty there. I knew, for me, it was going to be the best in terms of my subjects. So I continued with European law and French constitutional law. When I finished in Poitier, I resolved that I would work in France at some stage."

Back in Galway, she completed her corporate law degree, alongside the LLB, leaving Galway with two degrees after four years.

The deal with Charlize

"At the end of my LLB year, NUI Galway had a very active placement programme," says Katie. "Professor Denis Driscoll worked very closely with a number of high-profile multinationals to place NUI Galway students. Coming into my last term, he invited Madeleine Vendeuil-Denise, the General Counsel for Louis Vuitton Moet Hennessy (LVMH), to give a lecture in Galway. She was contemplating taking on her first Irish intern."

A number of students were shortlisted to meet with Vendeuil-Denise for a possible placement of three months.

"When we spoke, Madeleine was particularly fond of the University of Poitiers, and was very interested in the subject range I'd selected when I was in Poitiers. She needed somebody who was proficient in French. I was selected, so I packed my bags and headed for Paris."

The luxury goods company has over 75 houses, with one alone focusing on luxury and fashion goods. Katie was selected to work in perfume and cosmetics, and worked closely with the general counsel and another partner on "some incredibly interesting projects". For instance, she was involved in the negotiations for Christian Dior's sponsorship deal with actress Charlize Theron. A number of high-value commercial distribution agreements followed.

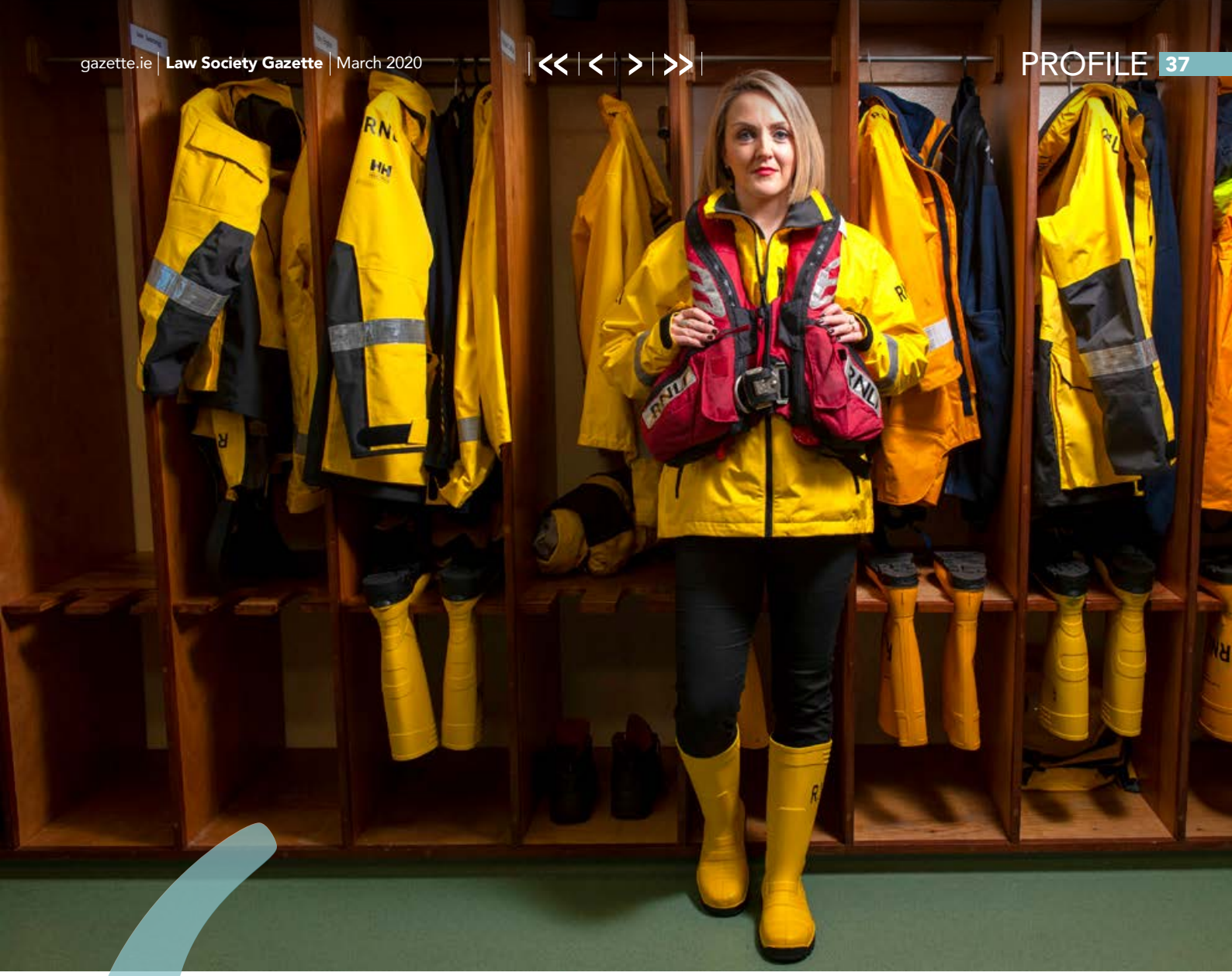
"This was the first time I had seen corporate governance in practice, and to see codes of conduct developed," says Katie. "I would have studied the theory in Galway, but I'd never before been involved in drafting reports that factored in corporate governance issues. To see this first-hand was excellent experience."

While she didn't get to meet Charlize in person, she was delighted to have some input into the successful negotiation of the high-value commercial agreement, which led to the actress being the face of Christian Dior's *J'Adore* fragrance.

"It taught me how you needed to be able to adapt and react, and to ensure that you were protecting the house's interests, as well as ensuring that everything was above board in terms of the agreement," Katie says.

Her term with LVMH was initially for three months – she ended up staying for a year. "They were keen for me to remain, but Blackhall Place called!" she jokes. "The door was left open for me if I changed my mind and decided to return.

"I felt drawn, however, to Blackhall Place.



> I WANTED TO KNOW MORE ABOUT THIS ORGANISATION THAT INSTILLED SUCH A SENSE OF ENTHUSIASM AND PASSION. I VERY MUCH WANTED TO BE PART OF THIS ORGANISATION, AND TO HELP IN WHATEVER WAY I COULD

It was the 'done thing' at the time. I was following the traditional linear path that I had concluded was the way to go. So I completed my PPC1 and my traineeship."

Apocalypse now

She qualified as a solicitor in 2008 – "the apocalyptic 2008, when the world as we know it ended".

"I was once asked what my main accomplishment was following my training period and replied that it was being offered a job with Lavelle Coleman in Dublin. Sadly, that didn't happen for others of my colleagues, who left law and never returned after their training contract. That's just the way it was at the time."

Katie worked in the law firm's litigation department, specifically on multiparty litigation. Most of her time was taken up with representing home-owners in North Dublin, whose homes had been affected by the presence of pyrite in the infill beneath their homes. She acted for hundreds of affected homeowners.

"That was a particularly complex case, not necessarily in terms of the technical aspects of law, but more in terms of the people skills, the emotional intelligence, and the communication skills required to deal with clients in a particularly devastating and vulnerable position. That was a steep learning curve for me."

Was she happy with the outcome of the case?

"The case ran for about 166 days at the time so, as part of that settlement, a trust fund of €25.5 million was established for the homeowners. That saw their homes repaired, but with a limited contribution towards floor coverings, accommodation and legal costs. Their homes, however, were going to be repaired and properly certified. In the circumstances, in the economic climate, I think it was the best outcome."

Into the west

She stayed with Lavelle Coleman until the end of 2010. A major life change followed with her marriage to Mark Cadden. "We had been going out for nine years and were newly married. I was living in Dublin. He was living in Mayo, and it was very difficult to ignore the draw of wanting to return and start a new life there. We agreed that the best decision would be for me to move west.

"My preference was to remain in practice, but I had underestimated how devastating the crash had been on the local legal economy, in terms of opportunities and roles. It didn't deter me, however, because I was quickly taken on as a project manager for a legal conference being hosted by Mayo County Council. I worked with them and the Western Development Commission for a year. It was an inaugural legal event in Westport, which was organised with the Brehon Law Society in the US.

"My role as project manager was to attract the right speakers, to have the right themes, the right sponsors, and ensure attendance. And it was a great success."

A trip back to Galway led to a chance conversation about the university's LLM (Public Law) course. "I don't know why, but all of sudden my ears pricked up. It was a no-brainer for me. I applied that evening to pursue it, full-time. I was very resolute that if the opportunities weren't presenting themselves in terms of getting back into a practice, then I would use the time to further my knowledge.

"I was looking for some way to contribute to or advance particular policies or agendas in a meaningful way that would be fulfilling for me. That, possibly, was the start of the change in my perception of the meaning of success. Success now started to look a little bit different to me, rather than staying on the traditional linear path within a legal practice in the West of Ireland. My head had been turned. I became utterly immersed in the theory of regulation and corporate governance, and the critical thinking on these core subjects."

Where her new skillset would take her, she wasn't quite sure. She had received a number of offers around 2013, but these would have meant relocating to Dublin – just at the time when she was expecting her first child.

Epiphany

"Baby Reuben arrived, and I still hadn't completely shaken the notion of traditional success. I joked with a friend recently: 'God, aren't we like recovering solicitors!' You think that there's nothing else. You really don't believe there's anything else you can do – and that's a fallacy. It's just not true."

Despite her epiphany, she returned to general practice in Swinford in Co Mayo, with P O'Connor & Son, solicitors. "I very much enjoyed working with Pat and the team. They're a super, super bunch of people. I really enjoyed working in litigation and in charity law, and ended up advising charities on a wide range of issues. I had been interested in some volunteering activity previously, but not at this level, and not in the space where I could give practical advice, or advise on forthcoming legal issues. At this time, in 2014, I was also appointed by the Government as a board member of the Charities Regulatory Authority, so there was a lot going on."

Following the birth of her daughter Willow in 2015, after an eight-month hiatus, she went back to work in 2016. Life was busy between a young family, legal practice and honouring board commitments. Katie found herself again questioning what success looked like, and whether the linear path was for her. Following a great degree of reflection, she took the brave decision to step off the career travellator to take time out.

"The significant decision for me was whether I was brave enough to stop and reflect on what I truly wanted. My education through undergraduate and postgraduate levels, and throughout my career, had been a constant hive of activity and intense studying, examinations and working. This was the first time that I had stopped or was about to stop."

She describes it as "terrifying, but I was

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confident in my abilities" – so that the terror was fleeting. She 'downed tools' for 12 months, though continued to serve on the board of the Charities Regulator and to lecture. "During that time, I identified the issues that were important to me, in order to optimise my sabbatical and my time." She realised that she was looking at a career that would encompass multiple interests.

"I would encourage everyone to step back, insofar as they can within their current day-to-day situation, to think about these things. Sit down and be very honest with yourself about what your interests might be – where you see yourself in five years. Start having conversations with other people in your areas of interest. A conversation stimulates change, but it doesn't have to be as dramatic as pressing the 'stop' button!"

The call of the sea

How did she go from serving on the board of the Charities Regulator to joining the council of the RNLI for Ireland and Britain?

"An individual who knew of my strengths in governance and my regulatory background approached me to see if would consider joining the Irish council. I subsequently met with RNLI trustee David Delamer. I couldn't believe his passion for the organisation – I've never encountered anything like it, and I've worked with quite a number of charitable organisations!"

> "He really piqued my interest. I wanted to know more about the organisation that saves lives at sea and instills such a sense of enthusiasm and passion. I very much wanted to be part of this unique organisation, and to help in whatever way I could.

"I hadn't envisaged participating on the RNLI Council (UK), but I was requested to strongly consider it. There was a desire for the diversity of thought and the skillset I could offer.

"I feel that I've joined the RNLI at a very important time. It will celebrate 200 years of saving lives at sea in in 2024. In this time, RNLI crews and lifeguards have saved countless lives, while influencing, supervising and educating communities. RNLI international teams are doing great work with like-minded organisations to help tackle drowning in communities at risk all around the world."

Is she enjoying her legal career at present?

"I'm very, very happy. Look at the opportunities that I've had. I am now developing my own specialist offering, and collaborating on some very interesting projects. Many organisations want to be better governed and go from good to great – and I can help with that. And I would say to all female solicitors to think seriously about getting involved on boards of directors. It's proven that diverse boards make better decisions. That's the reality. I would encourage female solicitors to register with StateBoards.ie, and to look to their professional networks and other organisations that are non-legal in nature, such as the Institute of Directors.

"I've learned from my involvement with the Charities Regulator and the RNLI that it's vitally important to be confident in your skills, particularly in your communication skills – and especially your ability to listen and to challenge an executive when that is required."

Does she find that tough?

"No, not personally, because I've had time to practise it. That wouldn't come naturally to a lot of solicitors – female or male. Confidence in your ability is very important. And don't be afraid of complex problems, because there's always a solution to every problem." g

SLICE OF LIFE

■ Current book
Exit West, by Mohsin Hamid.

■ Current earworm
Emma Gannon's *Ctrl Alt Delete* and a podcast by executive coach, Marie Forleo. I'm bereft after finishing *Slow Burn: Watergate*, and *Slow Burn: The Clinton Impeachment*.

■ Favourite band
U2

■ Most influential person
My mother – she's a business entrepreneur, extremely astute, and has great emotional intelligence.

■ Top of your bucket list
A trip to St Petersburg – I just want to see it.

■ Favourite alternative job?
Editor of *Vogue* magazine – Anna Wintour's job.

AT A GLANCE

- A 2019 audit analysed and dissected 680 vocational assessments of PI cases
- It evaluated medical and psychological factors, educational backgrounds, social behaviours, attitudes, values, work skills and abilities
- It has unearthed rich data about those who pursue claims for loss of earnings and the types of injuries involved

An audit of vocational assessments is revealing about those who bring claims for loss of earnings in Irish personal injury cases. **Elva Breen** processes the data

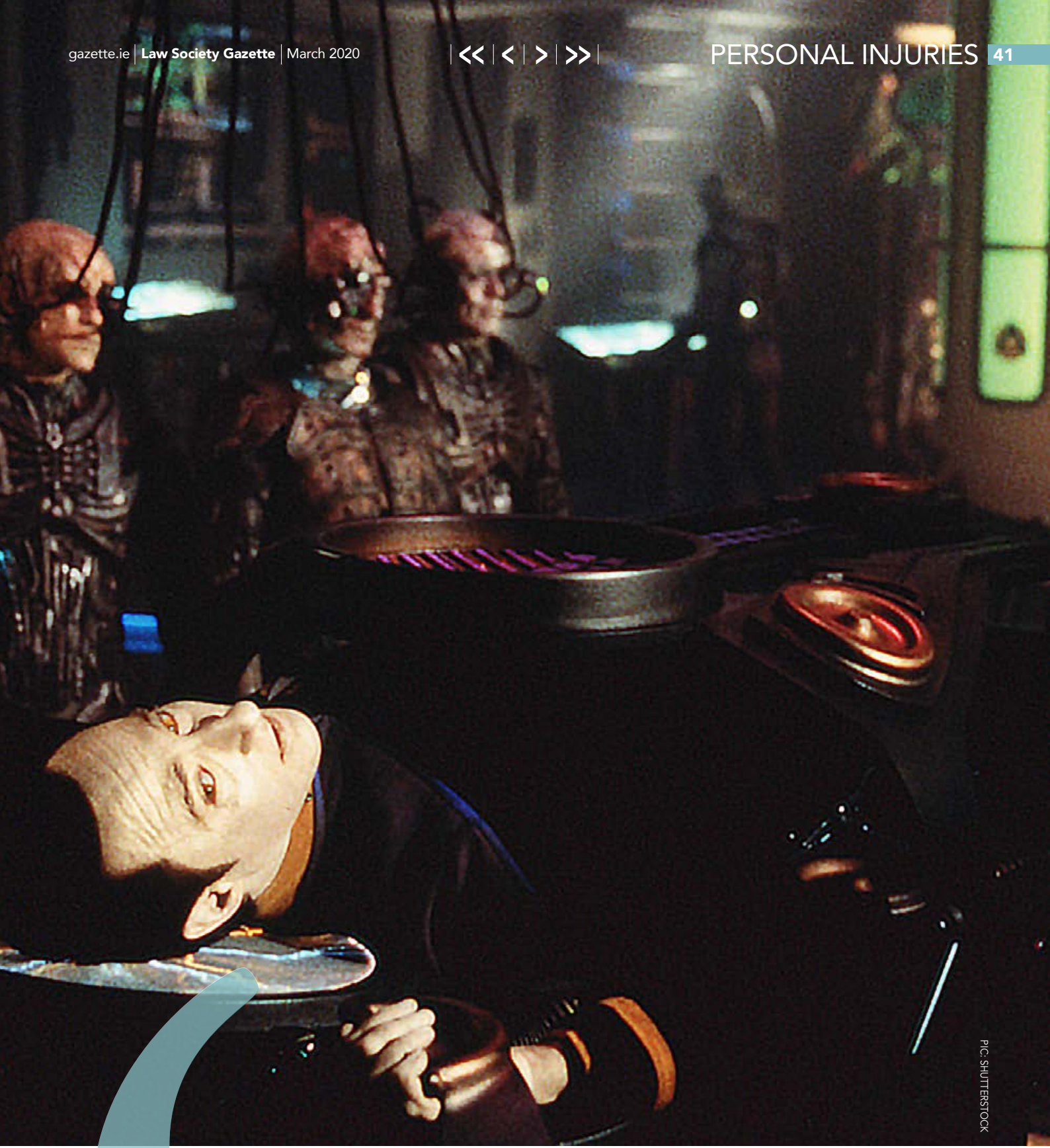
ELVA BREEN IS A STATE REGISTERED OCCUPATIONAL THERAPIST WITH AN MSC IN NEUROREHABILITATION

DATA CAPTURE

The recently published book *A Guide to Expert Witness Evidence* (Tottenham *et al*, 2019) is an excellent guide for expert witnesses. It clearly defines an expert as "a person who has a special skill or knowledge in a particular field. A reliable expert must both acquire the special skill or knowledge and be able to demonstrate it" (p5).

Vocational assessors are expert witnesses who play a vital role in personal injury (PI) cases, ensuring that claimants receive a proper hearing with regard to the impact of their injuries on their livelihoods and quality of life.

Only claimants who are pursuing a claim for loss of earnings or vocational opportunity will meet with a vocational assessor. The role of the vocational assessor is to perform a comprehensive assessment and to identify whether the claimant is fit to return to their pre-injury occupation following their personal injury. This assessment involves an evaluation of medical and psychological factors, educational background, social behaviours, attitudes, values, work skills and abilities.



PIC: SHUTTERSTOCK

VOCATIONAL ASSESSORS ARE EXPERT WITNESSES WHO PLAY A VITAL ROLE IN PERSONAL INJURY CASES, ENSURING THAT CLAIMANTS RECEIVE A PROPER HEARING

If a return to their former job is not possible, then it is the vocational assessor's role to identify alternative jobs or further training that will be appropriate for the claimant. The vocational assessor also establishes the claimant's post-injury earning potential – a vital determining factor in the resulting report.

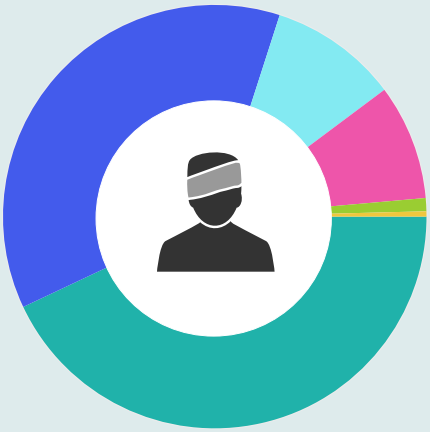
A practising vocational assessor should hold professional qualifications in the area of rehabilitation and should have experience working directly with individuals who have acquired physical, cognitive and psychological disabilities.

High standards

It is advisable that a vocational assessor be a qualified occupational therapist registered with CORU, the State's multi-profession health regulator. CORU's role is to protect the public by promoting high standards of professional conduct, education, training and competence through statutory registration.

When briefing a vocational assessor, it is important that solicitors are fully aware of the qualifications the assessor holds. Solicitors should satisfy themselves that their expert is regulated and answerable to a governing body.

CAUSES OF PERSONAL INJURY CLAIMS



Type of injury

Workplace injury (including fall, accident and harassment)	42.9%
Road-traffic accident	36.9%
Medical negligence	9.8%
Fall or injury in a public place	8.8%
Assault	1.0%
Not reported	0.4%

ALL GRAPHICS: PAUL HIGGINS

In 2019, PIAB's annual conference reported that an estimated 50,000 personal injury claims are made annually in Ireland. Approximately 1,800 claims are settled through the courts, but the majority are settled directly. There is lack of transparency in relation to the overall number of claims, compensation values, and associated costs.

USING THE ICD AS A GUIDELINE, WHAT ARE THE MOST COMMON INJURIES?

- **70.7%** 481 of claimants had injuries that fell under the M classification: diseases of the musculoskeletal system and connective tissue, for example, back and neck pain
- **6.2%** Under category: injury to head
- **18.5%** **M25** (other joint disorder)
- **40.7%** **M54** (dorsalgia/back pain)
- **15.7%** **M54.4** (lumbago with sciatica)
- **9.4%** **M54.5** (low back pain)
- **17.2%** **M25.5** (pain in joint)
- **9.6%** **M79** (soft tissue disorder)

Research carried out by the Personal Injuries Commission (PIC) and independent consultants has highlighted a lack of consistent and detailed industry-wide coding of injury data. Accordingly, the PIC recommends that insurers and other relevant parties consider adopting the same internationally recognised injury coding system. It is suggested that the appropriate system to be used is the World Health Organisation's ICD-10 system. ICD-10 codes are alphanumeric codes used by doctors, health insurance companies, and public health agencies across the world to represent diagnoses. Every disease, disorder, injury, infection, and symptom has its own ICD-10 code.

Medication at time of assessment

Pain management	51.9%
Anti-depressants/anti-anxiety /sleeping tablets	14.0%
Both	8.7%
Diagnosed with PTSD	4.6%

Has injury impacted on leisure?

Yes	83.5%
No	1.8%
Not reported	14.7%

WHO IS MAKING A CLAIM?

- The mean age of claimants is 40 years
- 59% are male and 41% are female
- 53.5% are married
- 82.8% of claimants were Irish, 8.4% were Polish, and 14% were English

> APPROXIMATELY 1,800 CLAIMS ARE SETTLED THROUGH THE COURTS, BUT THE MAJORITY ARE SETTLED DIRECTLY. THERE IS LACK OF TRANSPARENCY IN RELATION TO THE OVERALL NUMBER OF CLAIMS, COMPENSATION VALUES, AND ASSOCIATED COSTS

In over a decade of performing vocational assessments as an expert occupational therapist, I have met hundreds of claimants. The purpose of this article is to share the statistical findings of a rigorous clinical audit I completed in 2019. For this audit, I analysed and dissected 680 vocational assessments. The findings provide rich data about the individuals pursuing claims for loss of earnings through the High Court, and the types of injuries involved.

Summary of results

The mean age of claimants is 40 years, and the majority suffer from musculoskeletal injuries, such as dorsalgia (back pain) and/or back pain that radiates into their legs (lumbago with sciatica). Post-traumatic stress disorder was diagnosed in 4.6% of individuals.

The data below shows that the most common type of injury is workplace related, with road-traffic accidents the second most frequent cause of injury.

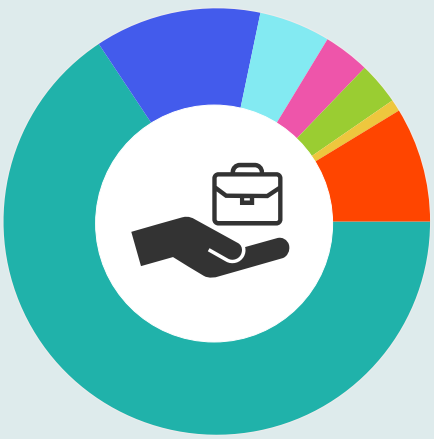
Do claimants work?

The following graphs demonstrate that more than 75% of people worked before their injury (either full or part-time), whereas over 50% are unemployed post injury.

Do 'educated' people take claims?

The 2016 census reported that 42% of people in Ireland had a third-level qualification (that is, levels 6-10 in the National Framework of Qualifications). My audit demonstrates that individuals with a lower level of education are more

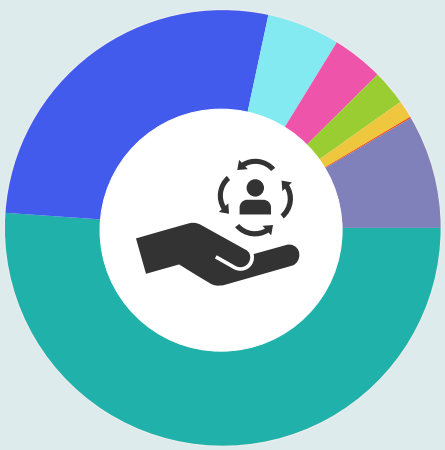
DID CLAIMANTS WORK BEFORE THEIR INJURY AND WHAT KIND OF WORK DID THEY DO?



Pre-injury employment status

Full-time	65.6%
Part-time	12.6%
Unemployed	5.4%
Student	3.5%
N/A (minor)	3.2%
Retired	0.9%
Not reported	8.7%

HOW MANY CLAIMANTS RETURN TO WORK FOLLOWING THEIR PERSONAL INJURY?



Current employment status

Unemployed	51.0%
In employment	27.2%
Sick leave/unfit for work	5.4%
In education	3.8%
Retired	2.6%
Completing CE/FÁS/ JobBridge Scheme	1.3%
On maternity leave	0.1%
Not reported	8.4%

Length of time out of work post-injury *

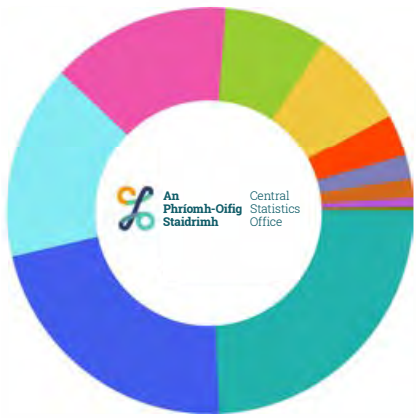
Average amount of time spent out of work post-injury	2.3 yrs (1.87%)
Overall range	0-9 yrs

* based on data from 468 subjects (69%)

EDUCATION LEVEL OF CLAIMANTS

Highest level of education	
Technical or vocational (NFQ Level 4 or 5)	19.9%
Advanced certificate/completed apprenticeship (NFQ Level 6)	16.9%
Leaving Certificate or equivalent (upper secondary)	12.9%
Junior Certificate or equivalent (lower secondary)	12.5%
Primary education	9.8%
Ordinary bachelor degree or national diploma (NFQ Level 7)	8.2%
Honours bachelor degree/ professional qualification (NFQ Level 8)	5.4%
Postgraduate diploma or degree (NFQ Level 9)	4.1%
Doctorate or higher (NFQ Level 10)	0.1%
Not reported	10.0%

SOCIO-ECONOMIC CLASSIFICATION OF CLAIMANTS



Non-manual (For example, administrators, cashiers, security guards, sales assistants, bank clerks)	24.3%
Manual skilled (For example, builders, welders ,toolmakers, printers, chefs, forklift drivers, mechanics)	22.1%
Semi-skilled (For example, prison service officers, care assistants, postal workers, machine operatives)	15.6%
N/A	14.3%
Unskilled (For example, cleaners, domestics, labourers, refuse collectors, driver's mate)	8.2%
Lower professional (For example, teachers, nurses, journalists)	7.8%
Employers and managers	3.4%
Higher professional (For example, barristers, lawyers, clergy, doctors)	1.9%
Own account worker	1.5%
Farmer	0.7%
Not reported	0.3%

likely to pursue a claim for loss of earnings. Over 55% of claimants I met did not hold a third-level qualification.

What socio-economic group is most likely to pursue claims?

The census looks at socio-economic groups and classifies the population into one of ten categories, based on the skill and educational attainment of their current or former occupation. According to the census, non-manual workers are the largest socio-economic group in Ireland, accounting for 20.9% of the population. This correlates with my findings, which demonstrate that non-manual workers are the largest cohort of individuals pursuing a claim for loss of earnings (24.3%).

According to the census, the next largest socio-economic group is 'employers and managers', accounting for 15.44% of the population. However, the audit shows that only 3.4% of this group make personal-injury claims.

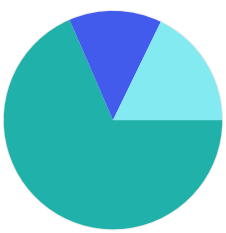
Lower professionals, making up 13.1% of the population, only gave rise to 7.8% of the claims I dealt with. Higher professionals account for 7.12% of the Irish population, but only accounted for 1.9% of the claims in this audit. What is striking is that only 7.55% of the Irish population are manual skilled workers, yet they accounted for 22% of all individuals that I met who are pursuing a claim for loss of earnings.

Early intervention

The conclusion to be drawn from this audit is that workers in the professional and employer/managerial categories are less likely to pursue claims for loss of earnings.

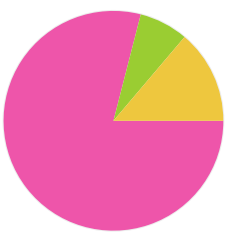
How much time has elapsed from the date of the injury to date of vocational assessment?

Average time elapsed from date of injury to date of assessment	3.8 yrs (2.22%)
Overall range	0 – 22.1 yrs



How many claimants incurred a loss of earnings because of the injury?

Yes	68.5%
No	13.7%
Not reported	17.8%



How many claimants have experienced a loss of job opportunity?

Yes	79.0%
No	7.2%
Not reported	13.8%

PIC: SHUTTERSTOCK

Over 50% of claimants are in receipt of a formal disability payment from the Department of Employment and Social Protection when they present for their vocational assessment. Research shows that fear of losing entitlements and not re-qualifying for benefit payments can deter people from seeking employment (NESC, 2014).

The most striking fact that the audit demonstrates is that more than 75% of people worked before their injury (either full or part-time), whereas over 50% are unemployed post-injury. The likelihood of a return to work after a musculoskeletal injury is greatest in the first month, and becomes less likely with the passage of time, and least likely once the person has lost their job. The vocational assessment is completed on average 3.8 years after the injury, which is far too late to have a positive impact on a claimant's future employment status.

It is abundantly clear that the sooner solicitors engage the services of vocational assessors in the legal process, the better the outcome for claimants. The expert intervention of a qualified vocational assessor at an earlier stage provides these individuals with advice and guidance to assist with a return to work in a much more meaningful way.

> THE SOONER SOLICITORS ENGAGE THE SERVICES OF VOCATIONAL ASSESSORS IN THE LEGAL PROCESS, THE BETTER THE OUTCOME FOR CLAIMANTS

LOOK IT UP

- National Economic and Social Council (2014), *Jobless Households: An Exploration of the Issues*, no 137, June 2014 (Dublin: National Economic and Social Development Office)
- Stephen Watkins, *Insights into the Personal Injury Environment*, PIAB Conference, 10 April 2019
- Tottenham et al (2019), *A Guide to Expert Witness Evidence* (Bloomsbury Professional, Ireland)

AT A GLANCE

- The *Children and Family Relationships Act 2015* provides for the power of a court to make directions for the purpose of procuring an expert report on any question affecting the welfare of the child
- The Family Law Courts Development Committee set about drafting guidelines in relation to the conduct of assessment and preparation of reports
- The guidelines are quite onerous in terms of putting obligations on the parties and/or their legal representatives to undertake detailed steps by way of engagement with any potential assessor in advance of an application for appointment to the court

PIC: SHUTTERSTOCK

SWINGS AND ROUNDABOUTS

The 2012 children's rights referendum represented a profound change to the constitutional rights of children, although its true impact may not yet be fully recognised. In the first of a two-part article, **Donagh McGowan** assesses the swings and roundabouts

DONAGH MCGOWAN IS A MEMBER OF THE LAW SOCIETY'S FAMILY AND CHILD LAW COMMITTEE

One of the prime pieces of legislation stemming from the 2012 children's rights referendum was the *Children and Family Relationships Act 2015*. That act brought about very significant changes in the area of family law, including substantial amendments to the *Guardianship of Infants Act 1964*.

One of the significant changes to the 1964 act was the insertion of a new part V by section 63 of the 2015 act. The new part V consists of two new sections, 31 and 32. The new section 31 provides guidance to the courts in determining, for the purposes of proceedings

THE GUIDELINES PROVIDE A REQUIREMENT FOR THE PARTIES TO DETERMINE THE NATURE AND EXTENT OF THE ISSUES TO BE ADDRESSED IN THE CONTEXT OF THE ASSESSMENT

under the 1964 act, what is in the 'best interests' of a child, and lists factors and circumstances to be considered by a court in making such a determination.

Section 32 provides for the power of a court to make directions for the purpose of procuring an expert report on any question affecting the welfare of the child, or to appoint an expert to determine and convey a child's views. This provision stems from the children's rights referendum and the insertion of article 42A(4)2, which provides that "provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1 of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child".

The 2015 act gave the courts the power to make orders for the procurement of two types of reports.

Reports under section 32(1)(b) of the 1964 act, which relate to an expert determining and conveying a child's views, are essentially limited in nature and largely do not come within the scope of this article. A court may also order an expert to procure a report on any question affecting the welfare of a child on foot of section 32(1)(a). That section is very much akin to the long-established power in section 47(1) of the *Family Law Act 1995* that provides "in proceedings to which the section applies, the court may, of its own motion or on application to it in that behalf by a party to the proceedings, by order give such directions as it thinks proper for the purpose of procuring a report in writing on any question affecting the welfare of a party to the proceedings or any other person to whom they relate". These are described as 'social reports' in the notes to the 1995 act.

Subsection 6 of section 47 states that subsection 1 applies to proceedings "under the act of 1964" and "under the act of 1989" – that is, in relation to judicial separation proceedings, later extended to include divorce proceedings.

Orders under section 47(1) are most commonly made in divorce and judicial separation proceedings. However, it is important to note that, in the context of any such proceedings, orders relating to children are generally made on foot of the miscellaneous ancillary orders provisions of the 1995 act and the *Family Law Divorce Act 1996*. In particular, section 10(f) of the 1995 act and section 15(f) of the 1996 ac, allow the court to make ancillary orders in judicial separation or divorce proceedings, respectively, "under section 11 of the act of 1964". In essence, orders relating to children in such proceedings are effectively made on foot of the 1964 act. As a consequence, an order made by the court under section 47 of the 1995 act necessarily involves compliance with the new provisions of section 31 of the 1964 act when an assessment and report are undertaken. By extension, it could be argued that it is now appropriate that any order under section 47 should be made in conjunction with, or be replaced by, an order under section 32(1)(a) of the 1964 act.

There is one note of caution in relation to the new section 32 provisions. As the section provides for two different types of reports, it might be argued that the separate reporting provisions of section 32(1)(b) limit the scope of an assessor appointed under section 32(1)(a). Specifically, if an assessor is only appointed under section 32(1)(a), can it be argued that the assessor's function does not then extend to "determine and convey the child's views"?

No such limitation ever existed in practice in assessments carried out on foot of section 47 of the 1995 act, nor was it probably intended that one section would limit the other. However, in light of the necessity in appropriate cases to 'hear the voice of the child', it may be prudent that an assessor would, in fact, be appointed under both sections, if it is intended that the assessor would undertake a 'full assessment' as would be the norm under a section 47 appointment, including hearing the voice of the child. This also points to the importance of the parties and/or their legal representatives turning their minds at the outset as to what exactly the assessor is being asked to undertake, which is one of the requirements of the new guidelines.

Sparse provision

Section 47 of the 1995 act is a sparse provision that does not set out any guidance as to what factors should be considered by the assessor in making recommendations as to, or the court in determining, the best interests of a child. The provisions of sections 31 and 32 of the 1964 act are far more detailed. Section 31(2) sets out factors and circumstances that the court shall have regard to in determining the best interests of the child. Subsection 3 also mandates the court to consider the impact of 'household violence', while subsection 4 provides that a parent's conduct may be considered to the extent that it is relevant to the child's welfare and best interests only.

Section 32 of the 1964 act sets out detailed provisions in relation to the power of the court to appoint experts to undertake reports. It includes subsections 10 and 11, allowing the minister to make regulations specifying the qualifications and minimum level of experience of an expert to be appointed, the fees and expenses chargeable by such experts, the minimum standards that shall apply in the performance by an expert of his/her functions under the section, and such other matters as the minister considers necessary to ensure that experts are capable of performing their functions under the section.

These provisions highlight the absence of similar provisions in section 47 of the 1995 act. Perhaps as a consequence, there has never

> THERE HAS NEVER BEEN ANY REGULATION IN RELATION TO THE CONDUCT OF ASSESSMENTS AND REPORTS PREPARED UNDER SECTION 47 OF THE 1995 ACT

been any regulation in relation to the conduct of assessments and reports prepared under section 47 of the 1995 act.

Guidelines

In recognition of the lack of such regulation, and in view also of the inevitable increase in reports relating to children arising from the passing of the 2015 act, the Family Law Courts Development Committee set about drafting guidelines in relation to the conduct of assessment and preparation of reports under section 47 of the 1995 act and section 32(1)(a) of the 1964 act. In drafting those guidelines, the committee engaged with a number of stakeholders – in particular, representatives of a group of assessors experienced in carrying out such assessments and reports.

The guidelines apply to reports under section 47 of the 1995 act and section 32(1)(a) of the 1964 act. The guidelines are not intended for reports under section 32(1)(b) of the 1964 act, which relate solely to an expert determining and conveying a child's views.

The guidelines firstly highlight an important issue, which sometimes can be overlooked by practitioners, but in particular by parties to proceedings – namely, that the recommendations in such reports are not binding on a court. The guidelines quote Denham J in *JMcD v PL and BM* where she stated that "the learned trial judge erred in determining that the section 47 report should be accepted, as a mandatory matter, save for grave reasons, which the court clearly set out". Denham J indicated that this was an incorrect approach, as it would alter the role of the court being the decision-maker. She indicated that the court is required to consider all the circumstances and evidence of a case, and that the section 47 report is simply part of the evidence to be considered by the court. It is therefore clear that a court can and should, where appropriate, depart from the recommendations in a report, in whole or in part.

In practice, there would appear, anecdotally, to be a significant disparity in how judges deal with the recommendations in such reports. While some judges might be very slow to depart from recommendations, it is nonetheless important for both parties and practitioners, and assessors themselves, to be aware of their respective roles and functions in the conduct of such assessments and the preparation of reports.


PIC: SHUTTERSTOCK

Very often, the practice of the parties (and indeed of the courts) has been somewhat lax in terms of ordering section 47 and/or section 32(1)(a) assessments, although that practice appears to be changing. The guidelines provide a structure for intended applications to court seeking orders on foot of section 47 and/or section 32(1)(a), the conduct of any such assessment, the preparation of the subsequent report, and its release to the parties by the court.

Specifically, the guidelines provide the following:

- Obligations of the parties and/or their legal representatives,
- Obligations on the assessor,
- General matters,
- Matters for consideration by the court.

Obligations

The guidelines are quite onerous in terms of putting obligations on the parties and/or their legal representatives to undertake detailed steps by way of engagement with any potential assessor in advance of an application for appointment to the court.

That includes:

- An obligation to make enquiries as to the availability of an assessor,
- Bringing to the attention of the assessor any particular urgency in the matter,
- Bringing to the attention of the assessor any difficulties in relation to the parties' availability, so that the assessor can determine a timeframe within which the assessment can be concluded, and
- Provision of relevant information to the assessor once the appointment is made.

In addition, the guidelines provide a requirement for the parties to determine the nature and extent of the issues to be addressed in the context of the assessment. In cases where the appointment of the assessor is agreed by the parties, it is routinely the case that little effort is made to determine the extent of the issues to be addressed by the assessor and to determine how the process shall be conducted.

The guidelines therefore provide as follows: "The parties, shall, where practicable, not less than one week prior to the hearing date of the application, and in any event prior to the matter coming before the court, identify and exchange in writing the issues to be addressed in the assessment, a draft letter of instruction to the assessor and orders which it is proposed the court may be asked to make. Any such agreed issues/proposed orders (or the respective positions of the parties where no agreement has been reached) shall be provided to the court in writing at the commencement of the hearing of the application." g

LOOK IT UP

CASES:

- *JMcD v PL and BM* [2009] IESC 81

LEGISLATION:

- *Family Law Act 1995*
- *Children and Family Relationships Act 2015*
- *Family Law Divorce Act 1996*
- *Guardianship of Infants Act 1964*

DIGITAL DUMMIES

AT A GLANCE

- To understand the attraction of technology, we must return to our earliest relationships
- Two of our most formative skills – how to relate and regulate – are learned in the first 1,000 days of our lives
- Both skills are powerfully reactivated by technology
- Technology works best when there is mutual respect, and clear and reasonable boundaries have been set

Our relationship with technology – whether email, messaging or social media – at once contributes to, and diminishes, our sense of wellbeing. **Antoinette Moriarty** goes in search of a soother

ANTOINETTE MORIARTY IS A PSYCHOTHERAPIST AND MANAGER OF THE LAW SCHOOL'S PSYCHOLOGICAL SERVICES

Decades ago, in my primary school years, the most important line of communication to the outside world lay in the least suitable place – the cold hall of our house. A private chat with a best friend was continually interrupted by various family members' regular forays into that space, and it was, naturally, the favoured location for my much younger, and thus intensely curious, sister's handstand practice.

Later, in my boarding school years, calls were made once weekly on a public phone, housed bewilderingly inside a converted confessional box, within easy earshot of the principal – and in full view of the orderly queue outside. Little wonder I was an early convertor to the joy of a personal mobile phone,

PIC: SHUTTERSTOCK

THE COMPLEX TRUTH IS, HOWEVER, THAT AS SUBSTITUTES GO, TECHNOLOGY IS THE PERFECT STORM, DANGLING A HEADY COCKTAIL OF SEDUCTIVE INGREDIENTS IN FRONT OF OUR UNSUSPECTING BRAINS AND SENSITIVE ATTACHMENT SYSTEMS

promising as it did that most satisfying of all human experiences – connection on demand.

We reach for our phones upwards of 60 times per day, and spend an average of three hours and 15 minutes scrolling, reading, chatting or gaming – with 20% of smartphone users spending upwards of a staggering four-and-a-half hours gazing at their screens daily. Over a single year, that exceeds even a generous annual leave allocation – and then some!

It is all too easy, and perhaps simply downright reductive, to say we are 'addicted' to our devices – as if they hold hypnotic powers that bypass all resistance. The truth, of course, as with everything in life, is far more complex and far less awful. To understand the grip technology has on us, we must return to our earliest relationships and consider how the dynamics of attachment with our parents and caregivers are recreated, and mirrored in the attachment we form with our devices.

First 1,000 days

Our first 1,000 days – from conception to around the time of our second birthday – determine much of our future lives. During these crucial early days, our brains undergo their most rapid period of growth, and enjoy their highest levels of 'plasticity' or responsiveness.

The quality of our care, nutrition, and our environment lay down physiological, neurological and emotional markers that remain with us throughout our lives, influencing the architecture and hard-wiring of our brains. It is also in these tender months that we learn two of our most formative skills – skills that, interestingly, are both powerfully reactivated by technology: to relate and to regulate. In order to feel well (wellbeing) and to be well (mental health), we need to be in 'good enough' relationships with others, and we also need to be able to regulate our emotions.

Relating, while it remains a lifelong need, is never more important than in those early days of life. If all goes well, we form powerful attachments to the people who literally light up our neural systems – and we continue to enjoy and seek out connections as a source of wellbeing throughout our lives.

Emotional regulation, or soothing, is the skill of navigating big feelings, like rage, grief, envy and loss, and surviving the inevitable ruptures we have, from time to time, with people in our lives; without losing our own equilibrium, their goodwill, or indeed the relationship.

We learn this complex capacity by repeatedly experiencing the calming and containing efforts of our parents or care-givers. If they are able to tolerate our distress and outbursts of big feelings – anyone who has spent anything longer than an hour with a toddler or a teenager knows the score here – while remaining calm and connected, we gradually internalise their acceptance and soothing; offering it to ourselves and others as we grow up and away from them.

> REPORTED LEVELS OF ANXIETY HAVE NEVER BEEN HIGHER, PARTICULARLY IN CHILDREN AND YOUNG PEOPLE

Meet 'Ted'

Where relating and regulating become complicated is when our valued people are not reliably or readily available to us. As babies, many of us had a pretty smart workaround for this lack – a favourite teddy, blanket or even a scrap of a parent's clothing. The brilliant, late, child psychoanalyst Donald Winnicott termed these favoured and beloved bits our 'transitional objects' – substituting when required for the presence of our mothers or fathers. I know of at least one hugely clever lawyer who settled her sister's tiny children to bed wearing their mother's dressing gown when they were in her charge. It is not hard to spot the extension of this practice into our beloved devices, which we pick up on average every four minutes, and lay within easy reach of us, even as we sleep. That reported levels of anxiety have never been higher, particularly in children and young people, however, would seem to indicate it's neither as effective, nor as benign, as 'Ted' or, more importantly, the valued people it seeks to replace.

Bells of anxiety

Canadian trauma psychotherapist Gabor Mate considers anxiety to be a powerful 'attachment alarm'. This also seems an apt term to describe the experience of so many people who become temporarily separated from their phones, and whose attachment systems are literally 'alarmed' and in need of the familiar soothing promised by this small gadget – our imagined gateway to relief.

The urgency and dread of separation, of which we all know something, arises, of course, from our very ability to temporarily invest the calming powers, usually held by parents and other loved ones, into our substitute 'soother' of choice.

As substitutes go, technology is the perfect storm, dangling a heady cocktail of seductive ingredients in front of us.

The multimillion-dollar technology industry backing this way of communicating ensures it hooks us on every level of our being – from sensory to rational, intellectual to emotional. Our habits, tastes, wishes, preferences, movements and desires are meticulously recorded before we ourselves have even consciously registered them.

It is this data that informs the next generation of even more covetable devices, and even more individually bespoke streams of information flowing into them – and so the cycle continues.

Shadow side

Humans have two basic needs – connection and authenticity. The need for connection will always trump authenticity, making life messy and leading us, at times, to abandon ourselves in favour of a sense of belonging. We have all witnessed just how quickly online relating can move from generating belonging to stirring up a gang mentality.

PIC: SHUTTERSTOCK

> IT IS ALL TOO EASY, AND PERHAPS SIMPLY DOWNRIGHT REDUCTIVE, TO SAY WE ARE 'ADDICTED' TO OUR DEVICES – AS IF THEY HOLD HYPNOTIC POWERS THAT BYPASS ALL RESISTANCE. THE TRUTH, OF COURSE, IS FAR MORE COMPLEX AND FAR LESS AWFUL

This virtual powerbase allows us, on occasion, to bypass our natural human empathy with, at times, tragic consequences.

Carl Jung maintained we all have within us a light side and a shadow side. Our shadow is the darker side of our personality, usually firmly repressed and not easily acknowledged. It seems, however, to find its way more easily into the virtual world, emboldened perhaps by the facelessness, timelessness and lack of boundaries. We do know, however, that technology itself is not the creator of this darkness. It is simply the platform, the vessel, the megaphone. It is up to each of us to set the terms for our own engagement and, as with any abusive behaviour, to remain vigilant to our own part in the growing appetite for, and tolerance of, hate.

We are still in the infancy of one of the biggest social experiments of our society. The emergence of a fully connected world, in which the thoughts, ideas and actions of the individual can, in a moment, become the property of the world.

While technology is a loyal companion, it is also a jealous thief of time. As with all healthy and happy relationships, it works best when there is mutual respect, and clear and reasonable boundaries.

And while it may convincingly mimic the soothing and energising aspects of relating, it must never replace them. But it has, undoubtedly, earned and secured its place in the hearts – and pockets – of many of us. I look forward to the next stage with the excitement of what might be possible. g

SMALL IS BEAUTIFUL

A study of sole practitioners and smaller practices from the Society's Small Practice Support Project says that networking is significant to success. **Louise Farrell** reports

LOUISE FARRELL IS SENIOR MANAGER (CONSULTING) AT CROWE

THERE ARE A LARGE NUMBER OF BENEFITS ASSOCIATED WITH THE GROWTH OF YOUR PROFESSIONAL NETWORK. CAREFUL PLANNING MAKES THESE MORE LIKELY TO HAVE A POSITIVE EFFECT ON YOUR PRACTICE AND ITS GROWTH

The Law Society-commissioned report (tasked to Crowe) has revealed a number of key insights in relation to sole practitioners and smaller legal practices, which have led to 11 recommendations.

Of particular relevance are recommendations 1 and 5:

- *Recommendation 1 – diversifying business development practices:* smaller practices need to diversify their business development activities and move beyond a reliance on their existing client base and referrals.
- *Recommendation 5 – building networks/strategic collaborations:* smaller practices need to build greater networks within the sector and with external bodies. This recommendation is also connected with furthering business development opportunities and marketing efforts.

Take five

Both of these relate to the future-proofing and sustainability of smaller practices.

Recommendation 1 identifies the need for practices to move away from a reliance on referrals for generating business and introduce a more diverse set of business development activities.

Recommendation 5 advises that a method of increasing business development is for small practices to build greater networks, both within the legal sector and externally.

Joining new networks and expanding a practice's current network will enable small practices to gain insights from like-minded individuals and other small practice/business owners, all of whom will likely be facing similar challenges and opportunities.

It is also a cost-effective form of marketing and a great way of promoting your practice and your service offerings to potential clients.

There are a large number of benefits associated with joining networks and membership organisations. These benefits can assist smaller practices in successfully meeting growth goals and can help them overcome the challenges associated with running a smaller practice. Benefits can include:

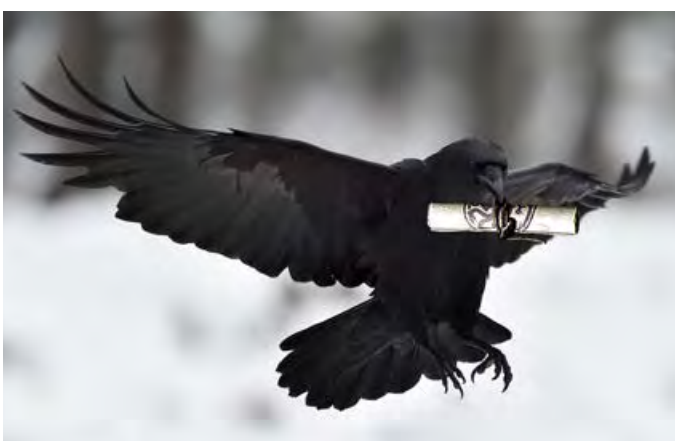
- Collective problem solving – many practices will face similar problems and will also share problems that SMEs in other sectors face,
- Financial benefits (cost savings, cost sharing),
- Business referrals and new business opportunities.

The report outlines methods of ensuring that you make the most of your current networks, as well as deciding factors on which organisations are the best fit for expanding your network. These methods include setting targets, following up on initial introductions, ensuring the right fit between your practice and the network, and implementing a planned approach.

Planning ahead

As with all business activities, networking should be approached in a planned way. Key considerations should be:

- What is your aim?



Crows: good at networking

PIC: SHUTTERSTOCK

PIC: SHUTTERSTOCK

- Who are your ideal connections (people)?
- What can I do for these members?
- What can they do for me?
- What are my targets/expectations?
- What is my 'elevator pitch' to this group?

Answering such questions will enable a greater understanding of the benefits of membership of each individual network/organisation. The report also lists potential networks and organisations that smaller practices can join, as well as outlining a number of alternative networking methods:

- Becoming a member of a board,
- Sharing office space,
- Sponsorship opportunities,
- Awards and competitions,
- Speaking engagements/providing expert opinion.

Giant steps

The report finishes by summarising the next steps for practices looking to increase their networking activities. The report also contains an appendix, listing a significant number of networks and membership organisations from all over Ireland.

There are a large number of benefits associated with the growth of your professional network. Careful planning makes these more likely to have a positive effect on your practice and its growth. Referencing the small practice network report and, in particular, the networking planner within that report, will provide you with a guide to approaching networking activities – and, in particular, the planning phase of these activities.

The report is part of an overall programme of supports being provided to smaller legal practices by the Law Society. Your networking activities can be assisted through the use of additional supports available to small practices on the Small Practice Support Hub (launched in July 2019), and relevant online and on-site training resources, including www.lawsociety.ie/businesshub. g

YOUR NETWORKING ACTIVITIES CAN BE ASSISTED THROUGH THE USE OF ADDITIONAL SUPPORTS AVAILABLE TO SMALL PRACTICES ON THE SMALL PRACTICE SUPPORT HUB

DPC WARNING ON 'QUICK-FIX' SOLUTIONS

The Data Protection Commissioner Helen Dixon says that 'mass-produced' data privacy decisions will be overturned. **Mary Hallissey** reports

MARY HALLISSEY IS A JOURNALIST WITH THE *LAW SOCIETY GAZETTE*

Data protection is now an established fixture of public consciousness, the Data Protection Commissioner Helen Dixon says in the Data Protection Commission's (DPC) Annual Report 2019. However, a new legal framework with very significant penalties and legal novelty in terms of cooperation and consistency provisions will take time to bed in.

"As we have consistently said, there would be little benefit in mass-producing decisions, only to have them overturned by the courts," the commissioner says.

"When EU competition-law rules were first introduced in 1962, it was a further number of years before the first significant decision in the *Grinding* case issued, and a number of years beyond that again before the first fine was issued.

"Equally, EU competition investigations [the fining regime in the GDPR is based on EU competition law], on average, take a number of years to complete," Dixon says.

"As a responsible regulatory body, we are wary of demands for quick-fix solutions and calls for the summary imposition of heavy penalties on organisations for data-protection infringements, at least some of which may be based on the application of principles on which there is not always consensus," the data protection commissioner says.

"While acknowledging that the administrative fines' mechanism represents an important element of the drive toward the kind of meaningful accountability heralded by the GDPR, we must also recognise that, like any other part of our laws, data-protection principles operate within a broader

> AS A RESPONSIBLE REGULATORY BODY, WE ARE WARY OF DEMANDS FOR QUICK-FIX SOLUTIONS AND CALLS FOR THE SUMMARY IMPOSITION OF HEAVY PENALTIES ON ORGANISATIONS FOR DATA-PROTECTION INFRINGEMENTS

PIC: ROLLINGNEWS.IE

Data Protection Commissioner Helen Dixon

PIC: SHUTTERSTOCK

legal context and so, for example, the application and enforcement of such principles by a statutory regulator will always be subject to the due process requirements mandated by our constitutional laws and by EU law," Helen Dixon says.

"These are constraints that cannot (and should not) be set to one side in some arbitrary fashion or for the sake of expediency."

The report details a range of important EU developments, including instructive CJEU judgments (such as Fashion ID and Planet49), the Advocate General's opinion on the SCCs data-transfer litigation, and the world's largest data-privacy financial penalty (the $5bn imposed by the Federal Trade Commission on Facebook).

1,500 DPOs notified

In Ireland, 1,500 data protection officers (DPOs) were notified to the DPC in 2019, all within public-sector and large data-processing organisations, ensuring that data subjects' rights are considered in all projects.

The DPC says that, across Europe, smaller SMEs are asking for more help to identify reasonable and appropriate implementation measures, and for a stronger sectoral focus on the guidance issued.

At least 40% of DPC resources are devoted to the handling of individual complaints rather than on large-scale, more systemic investigations.

Disputes between employees and employers or former employers are a significant theme of complaints lodged with the DPC, often around a disputed access request.

Litigation by individuals against DPC decisions that their data-protection rights were not, in fact, breached at all make up a significant proportion of the litigation the DPC is subject to in the courts today, the annual report states.

This is driven by the fact that neither the Workplace Relations Commission nor the Labour Court can order discovery in employment claims, which makes reliance on access requests as adjudicated by the DPC central to many of these cases.

Most complaints

Telcos and banks remain among the most complained-about sectors to the DPC, with complaints essentially focussing on account administration and charges.

Given that these sectors are heavily regulated in Ireland, the DPC says that it is disappointing that core consumer-protection issues cannot be sorted out internally, without the need for consumers to lodge complaints with the DPC.

Complaints against internet platforms have also grown in volume, mainly about management of individuals' accounts and, in particular, their rights to data erasure when they leave a platform.

Dixon says that many people feel confused about their rights with regard to their personal data. The DPC intends to increase its efforts to produce more case studies, and to draw out the lessons from a consumer point of view, but the commissioner says that she is encouraged that people are broadly aware of their rights under GDPR, and keen to know how to exercise them.

The DPC is also engaged heavily with expert stakeholders in the area of children's digital rights, and will continue to encourage big-tech platforms to sign up to a code of conduct on children's data processing.

"We aim by the end of 2020 to have facilitated the progression of big tech towards a code of conduct to better protect children online," the DPC says.

"The drive in the US to implement more and more privacy legislation is a sign that 'enough is now enough' in terms of tolerating unnecessarily invasive data-privacy practices and technologies," the commission warns.

Revealing

The annual report reveals the following:

- 7,215 complaints were received, representing a 75% increase on the total number of complaints (4,113) received in 2018,
- 5,496 complaints in total were concluded in 2019,

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PIC: SHUTTERSTOCK

- 6,069 valid data security breaches were notified, representing a 71% increase on the total number of valid data security breaches (3,542) recorded in 2018,
- Almost 48,500 contacts with the DPC included 22,200 telephone calls and 22,300 emails,
- By year-end 2019, the DPC had 70 statutory inquiries in hand, including 49 domestic inquiries,
- Six statutory inquiries were opened in relation to multinational technology companies' compliance with the GDPR, bringing the total number of cross-border inquiries to 21,
- 165 new complaints were investigated under statutory instrument no 336 of 2011, in respect of various forms of electronic direct marketing: 77 related to email marketing; 81 to text-message marketing; and seven to telephone marketing. Prosecutions were concluded against four entities in respect of nine offences under the *ePrivacy Regulations*.
- 6,904 complaints were dealt with under GDPR, and 311 complaints under the *Data Protection Acts 1988 and 2003*,
- The DPC issued 29 'section 10' statutory decisions under the *Data Protection Acts 1988 and 2003*. Of these, 13 decisions fully upheld the complaint, seven rejected the complaint, and nine partially upheld the complaint,
- 207 data-breach complaints were handled by the DPC from affected individuals, and
- 6,069 valid data security breaches were recorded, with the largest single category being 'unauthorised disclosures'.

The DPC dealt with concerns relating to the role and use of the Public Services Card, the use of CCTV, particularly in the context of neighbour disputes and the application of the domestic exemption (see this month's cover story), and access requests on behalf of children.

Some requests related to closed medical practices (often due to the death of a practitioner), with patients unable to establish who was now in control of their personal data.

Disputes

HR/employment disputes, specifically workplace surveillance, but also concerns about the sharing of information in the context of disputes, and the redaction of third-party data in response to employee-access requests, were also received.

The DPC also dealt with concerns about exam information — in particular queries relating to examiner's notes and photography consent, publication, and artistic exemptions.

Access requests accounted for 1,971 cases (or 29%), disclosure for 1,320 (19%), fair processing 1,074 (16%), marketing complaints 532 (8%), and the right to erasure 353 (5%).

In 2019, the DPC was consulted on, among other matters:

- The *Adoption (Information and Tracing) Bill 2016*,
- Future funding of public service broadcasting,
- Body-worn cameras for An Garda Síochána,
- Amendments to the *Electoral Act 1992*, to allow for the establishment of the Citizens Assembly 2019 and the Dublin Citizens Assembly,
- The *Civil Registration Bill* and the *Defence Forces (Evidence) Bill 2019*,
- Disabled drivers and disabled passengers' fuel grant,
- Registrar of Beneficial Ownership of Companies and Industrial and Provident Societies,
- *Gender Pay Gap Information Bill 2019*,
- *Housing (Regulation of Approved Housing Bodies) Bill 2019*,
- *Judicial Council Act 2019*, and
- Microchipping of dogs regulations.

In August 2019, the DPC did a sweep of the use of cookies and similar technologies on a selection of websites across a range of sectors, including media and publishing, retail, restaurants and food-ordering services, insurance, sport and leisure, and the public sector.

"Given the pervasive nature and scope of online tracking, and the inextricable links between such tracking and cookie technologies and ad-tech, we will place a strong focus on compliance in this area," the annual report says. gs

> THE ADMINISTRATIVE FINES' MECHANISM REPRESENTS AN IMPORTANT ELEMENT OF THE DRIVE TOWARD THE KIND OF MEANINGFUL ACCOUNTABILITY HERALDED BY THE GDPR, BUT WE MUST ALSO RECOGNISE THAT, LIKE ANY OTHER PART OF OUR LAWS, DATA-PROTECTION PRINCIPLES OPERATE WITHIN A BROADER LEGAL CONTEXT

IN THE BAG!

Mr Justice MacMenamin has criticised the plastic-bag levy legislation for being 'overly complex' and 'capable of a much clearer definition'. **Martin Phelan** and **Trish McGrath** unwrap the package

MARTIN PHELAN IS HEAD OF TAX AND TRISH McGRATH IS A TRAINEE SOLICITOR AT WILLIAM FRY TAX ADVISORS

IT IS CLEAR FROM THE JUDGMENT THAT MR JUSTICE MACMENAMIN WAS GREATLY CONCERNED ABOUT THE QUALITY OF LEGISLATIVE DRAFTING AND, AS SUCH, THE COMMENTS SHOULD BE READ BY THE LEGISLATURE WITH GREAT CARE

In *Dunnes Stores v Revenue Commissioners & Others* ([2019] IESC 50), Mr Justice MacMenamin considered the plastic-bag levy provisions contained in the *Waste Management Act 1996* (as amended by the *Waste Management (Amendment) Act 2001*), the *Waste Management (Environmental Levy) (Plastic Bag) Regulation 2001*, and related legislation.

The judge observed that "the meaning of a legal provision must, insofar as is practicable, be clear and discernible". By way of background, the High Court delivered judgment in *Dunnes Stores* in December 2011. Dunnes Stores challenged the 2001 regulation imposing the plastic-bag levy after the Revenue Commissioners served the supermarket chain with tax assessments of €36.5 million in levies on plastic bags used in Dunnes Stores' supermarkets.

The High Court held that the 2001 regulation included flimsy plastic bags (often used for fruit, vegetables and bread), as well as more robust plastic carrier bags.

Dunnes contended that:

- The levy only related to larger plastic bags given to customers at the 'point of sale', which were suitable for carrying groceries and other goods,
- The definition for plastic bag included in the 2001 regulation was so unclear as to render the regulation unenforceable, and
- The Revenue Commissioners failed to provide them with any direction as to how the money due should be calculated.

'Overly complex' legislation

While there is an exemption under the legislation for bags of a certain size or smaller (250mm wide by 345mm deep by 450mm long), the bags in Dunnes were larger than these dimensions. Mr Justice Hedigan of the High Court ruled against Dunnes and found that "it would be most improbable that the legislature would exempt plastic bags that are supplied anywhere other than the point of sale. Such a provision would miss large numbers of plastic bags and diminish greatly the impact of the act." The High Court further held that procedures taken by the Revenue Commissioners were not unfair.

Dunnes appealed the decision to the Supreme Court. In dismissing the appeal, the court was very critical of the "overly complex" legislation. Mr Justice MacMenamin gave particular time and consideration to the need for clearly drafted statutory provisions.

His observations deserve to be given appropriate weight by the legislative draftsman, particularly in circumstances where Mr Justice MacMenamin took particular time to bring issues surrounding the quality of drafting to the attention of the legislature.

The Supreme Court judge not only expressed views on the lack of clarity in the drafting of the legislation, but also suggested that provisions in future hearings by the courts might be deemed unconstitutional, and ultimately unenforceable, if they were not "clear and discernible".

Clearer definition

Mr Justice MacMenamin agreed with Mr Justice McKechnie's finding that the legislative intent of the plastic-bag levy provisions was discernible – but he criticised the lengthy considerations required by the court to get to this point. The judge also suggested that, if a statutory provision is very ambiguous in its wording or includes confusing cross-references to other statutory provisions, it may "not possess the defining *indicia* of the law itself".

Mr Justice MacMenamin also looked at article 40.3.1 of the Constitution, which provides that "the State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights

of the citizen", and article 40.3.2, which provides that "the State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen".

He contended that the "constitutional and legal protections should apply as much to entities as they do to ordinary citizens", and the guarantees provided in the Constitution are grounded on the rule of law and, as such, the rule of law must be "clear and discernible".

The fundamental protections set out in the Constitution not only operate to protect persons subject to a particular law, but also their advisors when assessing whether their conduct is lawful. While the complexity of the legislation had not resulted in an abuse in *Dunnes*, Mr Justice MacMenamin also opined that the Government and people responsible for drafting laws must keep in mind that ambiguous legislation can lend itself to abuse and that he provisions involved in this appeal are "surely capable of a much clearer definition".

Good faith

In assessing the conduct of both sides, he considered whether the same course of action would have been taken by the Revenue Commissioners if the matter involved a small rural shopkeeper running a supermarket, and held that "the conduct on one side has begotten a reaction from the other", emphasising the need for good faith and fair dealing between citizens, corporate entities, and the State.

The use of the words "or otherwise" and "point of sale", according to Mr Justice MacMenamin, were unnecessarily ambiguous when "it would not have been difficult to define the intended scope of the legislation". For instance, "the method of estimation, assessment and collection could have been directly defined" by the statutory instrument introduced by the minister.

While the legislation presents an "entirely laudable" purpose, being the reduction of the use of plastic bags, which pose a risk to the environment, Mr Justice MacMenamin concluded that "neither public policy, nor benign purposes should stand in the way of legislative clarity".

It is clear from the judgment that Mr Justice MacMenamin was greatly concerned about the quality of legislative drafting and, as such, the comments should be read by the legislature with great care.

The judgment is of particular interest in relation to tax legislation, where recent trends suggest a leaning towards an ambiguous approach, arguably using widely undiscernible language, especially in relation to tax structures.

This judgment raises the issue of whether some aspects of our tax legislation are unnecessarily complicated and ambiguous in an aim to avoid abuse. g

DUNNES STORES CHALLENGED THE 2001 REGULATION IMPOSING THE PLASTIC-BAG LEVY AFTER THE REVENUE COMMISSIONERS SERVED THE SUPERMARKET CHAIN WITH TAX ASSESSMENTS OF €36.5 MILLION IN LEVIES ON PLASTIC BAGS USED IN DUNNES STORES' SUPERMARKETS

THE EUROPEAN GREEN DEAL

The EU's 'Green Deal' has an ambitious target of transforming the EU into a fair and prosperous society. **Diane Balding** reports

DIANE BALDING IS CHAIR OF THE EU AND INTERNATIONAL AFFAIRS COMMITTEE

ALL EU POLICIES ARE EXPECTED TO CONTRIBUTE TO PRESERVING AND RESTORING EUROPE'S 'NATURAL' CAPITAL

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

On 11 December 2019, the European Commission published its communication outlining what it calls the *European Green Deal* (COM (2019) 640 final) for the EU and its citizens. The 'Green Deal' is a response to ongoing climate and environmental-related challenges, resetting the commission's commitment to tackling them.

As a new growth strategy, the Green Deal has an ambitious target of transforming the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy, having no net emissions of greenhouse gases (GHG) in 2050. Economic growth is to be decoupled from resource use. In parallel, the Green Deal aims to protect, conserve, and enhance the EU's natural capital, and protect the health and wellbeing of citizens from environment-related risks and impacts.

All the while, this transition is to be just and inclusive, putting people first, and each EU initiative is to live up to a green oath to 'do no harm'. It is recognised that the Green Deal will not be achieved by Europe acting alone; the EU is to use its influence, expertise and financial resources to mobilise neighbours and partners to join it on a sustainable path. At the same time, it is recognised that there is a need to maintain the EU's security of supply and competitiveness when others are unwilling to act.

What is to be done?

All EU actions and policies are expected to contribute to the Green Deal objectives, with intense coordination across all policy areas. To transform the EU's economy for a sustainable future, consistent use of all policy levers will prevail: regulation and standardisation, investment and innovation, national reforms, dialogue with social partners, and international cooperation.

The European Pillar of Social Rights will be used as a guide to ensure no one is left behind. In addition, current legislation and policies relevant to the Green Deal are to be enforced and effectively implemented. The actions and policies proposed are broad sweeping:

To enshrine the 2050 climate neutrality objective in legislation, the commission will propose the first European 'climate law' by March 2020. This law is to ensure that all EU policies contribute to the climate neutrality objective and that all sectors play their part. For example, by summer 2020, the commission will issue an impact-assessed plan to increase the EU's GHG reductions for 2030 to at least 50% and towards 55% compared with 1990 levels. An extension of the European emissions trading to new sectors is mooted. Policy reforms are to help ensure effective carbon pricing across the economy, with the knock-on effect of encouraging change in consumer and business behaviour. An increase in sustainable public and private investment is also to be facilitated. Aligning taxation with climate objectives is crucial. Consequently, the commission is to propose a revision of the *Energy Taxation Directive* (2003/96/EC).

It is acknowledged that, if international partners do not share the EU's ambition, carbon leakage is a risk. An example would be transfer of production from the EU to other countries with lower ambitions for emission reduction. Should this pan out, the commission is expected to propose a carbon border-adjustment mechanism for selected sectors, so the price of imports more accurately reflect their carbon content. This will be designed to comply with WTO rules.

Clean and secure

To reach climate objectives in 2030 and 2050, increased decarbonisation of the energy system

is a must. The production and use of energy across economic sectors accounts for more than 75% of EU GHG emissions. The power sector will have to be largely based on renewable sources, complemented by a rapid phase-out of coal and the decarbonisation of gas. Offshore wind energy is to be increased. Smart integration of renewables, energy efficiency, and other sustainable solutions are a focus. Energy poverty will be addressed. Increased cross-border and regional cooperation are expected. The commission will ensure that all relevant legislation is rigorously enforced.

Full mobilisation of industry is critical to achieve a climate-neutral and circular economy. Transformation of an industrial sector takes 25 years so, to be ready for 2050, decisions and actions need to be made in the next five years. In March 2020, the commission will launch an EU industrial strategy to address the twin challenge of green and digital transformation. A key aim is to stimulate the development of lead markets for climate neutral and circular products. New business models centred on renting and sharing goods and services are expected to emerge. The commission is also expected to increase regulatory and non-regulatory mechanisms to tackle false green claims. Further legislation and guidance on green public purchasing is to be proposed, with public authorities expected to take a lead role. Measures to tackle over-packaging and waste generation are also on the cards. In addition, the need for the supply of sustainable raw materials is recognised, as well as 'climate and resource frontrunners' to develop the first commercial applications of breakthrough technologies in key industrial sectors by 2030.

The commission is set to rigorously enforce the legislation

> FULL MOBILISATION OF INDUSTRY IS CRITICAL TO ACHIEVE A CLIMATE-NEUTRAL AND CIRCULAR ECONOMY

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Speakers:	**Michelle Ní Longáin,** *Partner, Byrne Wallace Solicitors, Dublin*
	Kate Kidd, *Human Resources Director for Workhuman, Dublin*
	Guy Setford, *CEO, Setfords Solicitors, England*
	Kayleigh Leonie, *Trustee of LawCare/Author of the Guidance on Supporting Wellbeing in the Workplace, England*
	Richard Martin, *Director, Byrne Dean, England*
	Katie da Gama, *Business & Executive Coach and Leadership Development Consultant, Dublin*

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related to the energy performance of buildings. This starts with an assessment in 2020 of member states' national long-term renovation strategies. The commission will also explore the possibility of including emissions from buildings in European emissions trading and will review the *Construction Products Regulation* (305/2011), as well as start a new initiative on renovation in 2020.

A 90% reduction in transport emissions is required by 2050 if climate neutrality is to be achieved. A strategy for sustainable and smart mobility is due to be launched by the commission in 2020. Aspects expected to form part of this strategy include multimodal transport, automated and connected multimodal mobility, with price of transport to reflect its impact on the environment and health. A ramp-up of production and deployment of sustainable alternative transport fuels is anticipated.

Wind turbine blades, ironically, aren't recyclable – they go into landfill

Farm to fork

The new 'farm to fork' strategy to be presented by the commission in spring 2020 is aimed at establishing European food as the global standard for sustainability. New opportunities for all operators in the food value chain are foreseen. European farmers and fishermen will be key to managing this transition. Member states' national strategic plans for agriculture are predicted to fully reflect this strategy, expecting to lead to use of sustainable practices, such as precision agriculture, organic farming, agro-ecology, agro-forestry and stricter animal welfare standards.

Essential services such as food, fresh water, clear air, and shelter are provided by ecosystems. Helping to regulate the climate, they also mitigate natural disasters, pests and diseases. By March 2020, the commission will publish a biodiversity strategy. All EU policies are expected to contribute to preserving and restoring Europe's 'natural' capital. For example, 'Farm to Fork' will address pesticide and fertiliser use. With oceans increasingly recognised in mitigating and adapting to climate change, a sustainable 'blue economy' will play a central role in alleviating demands on land resources and tackling climate change.

In 2021, the commission will also adopt a zero-pollution action plan for air, water and soil. It is accepted that the EU needs to better monitor, report, prevent and remedy pollution from air, water, soil and consumer products.

Funding

To achieve the ambitions of the Green Deal, significant investment is needed. Various mechanisms are proposed to address this, including specific revenue streams from the EU budget, an allocation of at least 30% of the Invest EU Fund, and development of a Sustainable Europe Investment Plan. National budgets and tax reforms will also play a key role, with State aid guidelines to be revised by 2021. Research and innovation will be supported by the Horizon Europe programme. Education and training is also on the funding schedule.

The EU aims to develop a stronger 'green deal diplomacy', focused on convincing and supporting others to promote more sustainable development, and it plans to mobilise all diplomatic channels to this end. At the same time, it recognises that game-changing policies only work if citizens are fully involved in designing them. Consequently, EU citizens are seen to be and remain a driving force of the transition that is unfolding. By March 2020, the commission will launch a European climate pact to focus on ways to engage with the public on climate action. g

> TO TRANSFORM THE EU'S ECONOMY FOR A SUSTAINABLE FUTURE, CONSISTENT USE OF ALL POLICY LEVERS WILL PREVAIL

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REPORT OF LAW SOCIETY COUNCIL MEETING

6 DECEMBER 2019

Motion: professional indemnity insurance

"That this Council approves the Solicitors Professional Indemnity Insurance (Amendment) Regulations 2019."

Proposed: Barry MacCarthy
Seconded: Bill Holohan

The Council considered and approved draft PII regulations required to deal with issues arising following on the introduction of LLPs and legal partnerships. The regulations would exclude legal partnerships from the assigned risks pool and the run-off fund, as these would be covered by the Legal Services Regulatory Authority regulations, and provide a system that allowed LLPs to be able to avail of the assigned risks pool and the run-off fund, while maintaining the fund's viability and integrity.

Motions: delegated functions

"*That this Council approves the amendment of Council regulations 44, 45 and 46 to delegate appropriate powers, arising from the commencement on 7 October 2019 of provisions of the* Legal Services Regulation Act 2015, *to the Regulation of Practice Committee under regulations 44 and 45 and to a senior designated officer of the Society under regulation 46.*"

Proposed: Imelda Reynolds
Seconded: Martin Crotty

The Council noted that the proposed additions to Council regulations 44, 45 and 46 reflected the new powers and functions conferred upon the Society by the commencement of provisions of the *Legal Services Regulation Act* and approved the proposal that those powers and functions be delegated to the Regulation of Practice Committee and the Registrar of Solicitors.

"*That this Council approves the amendment of Council regulation 37 by the addition of the Money-Laundering Reporting Committee to the list of regulatory committees on which the president, senior vice-president and junior vice-president are in.*

Proposed: Martin Crotty
Seconded: Christopher Callan

The Council agreed that it was appropriate to add the Money-Laundering Reporting Committee to the list of standing committees that the president, the senior vice-president and the junior vice-president should not be *ex-officio* members of, in view of the regulatory nature of the functions of the Money-Laundering Reporting Committee, which were comparable to the functions of the other standing committees provided for in Council regulation 37.

"That this Council approves the amendment of Council regulation 52 to delegate the authority for signing and sealing of contracts of employment to the administrative subcommittee of the Finance Committee by the insertion of an additional subsection:
(6) Signing and sealing of contracts of employment."

Proposed: Christopher Callan
Seconded: Paul Keane

The Council approved the delegation of authority to sign and seal contracts of employment in the administrative subcommittee of the Finance Committee.

Motion: Environmental and Sustainability in Practice Task Force

"That this Council agrees that the Law Directory *shall transition to 'digital by default' by the 2021 practising certificate renewal. A prominent notice shall go with the 2020 renewal advising members of the proposed change to the effect that members shall have the option to 'opt-out' of receiving the hard copy directory in 2020 and shall be required to 'opt-in' to continue receiving a hard copy directory from 2021 onwards. The Society shall develop a digital version of the directory with all of the information in the current directory for electronic delivery to all members by the 2021 renewal. The president shall appoint an Environmental and Sustainability in Practice Task Force to develop a policy and strategy on environmental sustainability for the Society (and review, update and consolidate any existing policies and strategies in this area) and in particular to consider and decide whether and, as appropriate, how best the Society should:*

- *Highlight and promote the existing work being done by the Society in the area of environmental sustainability and to coordinate, support and enhance this,*
- *Provide leadership and visibility on the issue of environmental sustainability for the profession and the wider community in which the profession and its members play an influential role,*
- *Provide guidance and practical support to members of the profession and to firms in enabling them to take action on environmental sustainability,*
- *Identify, support and develop the practice areas and professional opportunities for members in the areas of the environment and sustainability,*
- *Promote best practice in the area of environmental sustainability within the Society, its Council, committees and other bodies and the profession as a whole and to consider and make recommendations that would encourage and enable positive action in the area,*
- *Consider the need for a permanent committee of the Society in the area of environment and sustainability in practice.*
- *Report back to the Council with recommendations periodically."*

Proposed: Flor McCarthy
Seconded: Keith Walsh

Following a detailed presentation by Flor McCarthy, the Council unanimously approved the main elements of the motion, with a substantial majority also in favour of a transition to a 'digital by default' version of the *Law Directory* by the 2021 practising certificate renewal, preceded by a prominent notice issuing with the 2020 renewal advising members that they would have the option to opt-out of receiving the hard-copy directory in 2020 and would be required to opt-in to continue receiving a hardcopy directory from 2021 onwards.

Motion: *Practising Certificate Regulations 2019*

"That this Council approves the Solicitors' Practising Certificate Regulations 2019 *and the* Registered European Lawyers Qualifying Certificate Regulations 2019."

Proposed: Imelda Reynolds
Seconded: Christopher Callan

Following a presentation from Imelda Reynolds, the Council approved the regulations, which contained a number of amendments that were intended to make the regulations simpler and clearer, to remove the SMDF contribution from the fees, and to deal with the already-commenced provisions and the anticipated commencement of provisions of the *Legal Services Regulation Act 2015*. Following a presentation from Mr Callan, the Council approved the practising certificate fee for 2020, which was maintained at the 2019 rate of €2,650.

PII renewal period

Barry MacCarthy reported on a number of aspects of the PII

renewal process. He noted that 94.43% of firms had complied with the requirement to provide confirmation of PII cover through the Law Society's online portal. He noted also that the market had been affected by the loss of Axis in 2019 and no new insurers had joined the market for the 2019/2020 indemnity period. The Society had conducted an extensive communications programme connected with PII, had published a PII guide to renewal 2019/2020, and had responded to a significant number of calls to the PII helpline. Two particular issues had arisen that were the principal features of calls to the helpline – increased premiums and cybersecurity. Mr MacCarthy also outlined a number of initiatives that were planned for 2020, in particular to try to increase the number of providers in the market.

For the coming year, Council members urged that the Society would place an increased focus on the obstacles to attracting new insurers into the market, improving competition in the market, particularly for sole practitioners, the level of broker commission being charged, and addressing the proposition being advanced by the insurers that conveyancing was high risk.

LSRA 2015

As required under section 69 of the 2015 act, the Council approved a list of proposed nominations to the Complaints Committee of the Legal Services Regulatory Authority.

2019 numbers

Christopher Callan reported that it was expected that the final practising certificate numbers for 2019 would be just short of 12,000 (1,000 or 10% more than 2018), with Brexit practising certificates accounting for 550 of these. Membership subscriptions would finish the year at 13,000 and followed the same trend as the practising certificate numbers. Final expected admissions for the year would be 2,400, including 2,000 Brexit admissions.

REPORT OF LAW SOCIETY COUNCIL MEETING

24 JANUARY 2020

Law Reform Commission issues paper

The Council discussed the Law Reform Commission's issues paper on capping damages in personal injuries actions, which was published on 10 December 2019 with a response date of 31 January 2020. The paper identified four possible legislative models for capping damages, each of which would be considered in detail by a working group established by the Society for this purpose, and a submission would be made before the deadline.

LSRA report on admission policies

Paul Keane noted the contents of a request from the LSRA for information in relation to its annual report on admission policies of the legal professions. He confirmed that the statistical information was currently being collated, and the 9% increase in practising certificates arising from Brexit would be included, which certainly demonstrated an openness by the Society and the profession to increase the numbers within the profession.

In addition, entry to the profession did not require a law degree and was open to all who achieved a certain standard. The Council also noted that the Society had recently introduced a new Hybrid Professional Practice Course in order to facilitate the qualification of an increased number of solicitors.

Insurance and injuries claims

The Council noted the press release issued by the Society in response to the publication of private motor insurance data by the Central Bank, which welcomed the fact that the data stripped away the insurance-industry propaganda to reveal that most insurance premiums had risen by 42%, even though, in the same period, claims had fallen by 2.5%. In addition, the data revealed that the industry was generating an operating profit of 9%, while the average level of profit in Britain was 5%.

The Society had urged that the Government would switch its strategy from pressurising the Judicial Council to reduce awards to the victims of accidents and, instead, focus on using the data to attract international competition into Ireland's uncompetitive and dysfunctional motor-insurance market.

Admissions and students

Carol Plunkett reported that there had been 2,381 admissions during 2019, of which 1,934 were foreign lawyers, 1,836 of those being English solicitors. There were 501 students attending the current PPC, the highest number for more than a decade. The Hybrid PPC was up-and-running, with 46 students on the course. The profile of the participants was interesting – the gender breakdown was 65% female and 35% male, while the bulk of students were aged over 30, with 50% coming from outside Dublin. g

CONVEYANCING COMMITTEE

MAPPING SEARCH PRIOR TO CONTRACT

Practitioners are encountering problems when an application for first registration of an unregistered title is lodged with the PRA, and it then transpires that the property is already registered or that the boundaries of adjoining property already registered encroach on the property that is the subject of the first registration application.

These difficulties can be identified in advance of contracting to purchase if the vendor (when instructing their surveyor to prepare the map for first registration) and the purchaser (when instructing their surveyor to approve the map produced by the vendor) also asks the surveyor to check:

- That the title is not already registered, and
- Whether the boundaries conflict with registered boundaries of adjoining property.

In many cases, it is anticipated that the position may be confirmed by the surveyor, by checking the Land Registry's digital map on landdirect.ie.

GUIDANCE AND ETHICS COMMITTEE

CHARGING CLIENTS SEEKING THEIR FILES

Charging where a firm is still trading

A Guide to Good Professional Conduct for Solicitors (3rd edition) provides as follows at para 10.8: "Where a solicitor is required to make a search for papers and documents, or to schedule documents of a former client, he may charge a reasonable administration fee for the work involved" and "when a file is being transferred, if the solicitor wishes to copy the file to comply with the *Solicitors Accounts Regulations*, or for other administrative purposes, this must be done at the solicitor's own expense."

If a former client of a firm wishes to take up their file, an administration fee may be charged by the firm where there are costs incurred by the firm in the transfer of the file. The client has chosen to leave the solicitor. The solicitor incurs administration costs as a result of this decision by the client.

Charging where a firm closes

When a firm closes, and the goodwill in the firm, or in various parts of the firm (batches of files), is sold or transferred to another firm, there is no basis on which it would be appropriate for a fee to be charged when clients look for their files at the time of the closure. The firm had entered into a contract for legal services with the client and the firm is now withdrawing from that contract and closing the firm. In other words, the solicitor has left the client, the client has not left the solicitor.

Transfer of files to a new firm

The files and client moneys are transferred to the new firm(s), simply to be held until that firm receives confirmation of instructions from each individual client. The retiring solicitor should notify all clients of the closure and advise clients of their options. The retiring solicitor has no authority to instruct the second firm in any clients' affairs.

If the client of the former practice does not want to instruct that firm, their files must be released to them. The files do not belong to the second firm until the client instructs that firm. The client should not be charged a fee to get back their own file/client money.

Wind-ups

If a practice is not sold or transferred, it must be wound up. This involves the principal/partners writing to the current clients of the practice, informing them of the closure and asking them to take up their file and client moneys or to nominate a new solicitor to do so. No fee should be charged at that time. The solicitor is withdrawing from the contract for legal services, not the client.

Charging clients who do not respond to invitation to take up files

If a client who has received an invitation to take up their files or instruct the new firm does not respond within a reasonable period, but subsequently contacts either the retiring solicitor or the new firm looking for the file, a fee for dealing with this request may be then be charged.

It is recommended that solicitors should notify clients, at the time of the closure of the firm, that if they do not take up their files or instruct the new firm within a specified period (six months being a reasonable period), a charge for storing/distributing the file will be incurred.

Liens

Irrespective of whether the files are transferred to a new firm or the retiring solicitor winds up the practice him/herself, the exercise of a lien on the client's file is not usually appropriate. This issue should be decided on a case-by-case basis. A solicitor's lien on files is limited to the solicitor's right to have possession. Once a solicitor ceases to practise, or is suspended from practice, the basis on which the solicitor had possession of the files no longer exists and the solicitor must divest himself of all practice material immediately. Fees for work properly done can be billed by the solicitor, and the debts due can be collected by the solicitor, or on his behalf, in the normal way.

This practice note applies both to practices closed following regulatory action taken by the Law Society and to practices closed following a decision to close made by the principal or partners of the firm. g

GUIDANCE AND ETHICS COMMITTEE

RIGHT OF SOLICITOR TO EXERCISE A LIEN

The Guidance and Ethics Committee wishes to draw the profession's attention to the *ex tempore* judgement of the President of the High Court in the case of *Aderonke Adenekan and Another v Ashimedua Okonkwo* ([2019] 25 SA). This case concerned the right of a solicitor to exercise a lien over a passport.

The president did not make a determination as to whether or not a passport can be the subject of a retaining lien, as that question did not come before him. He did, however, make it clear that there are circumstances in which the exercise of a retaining lien may be unreasonable and, in such circumstances, he had no hesitation in ordering the return of the passport forthwith.

TECHNOLOGY COMMITTEE

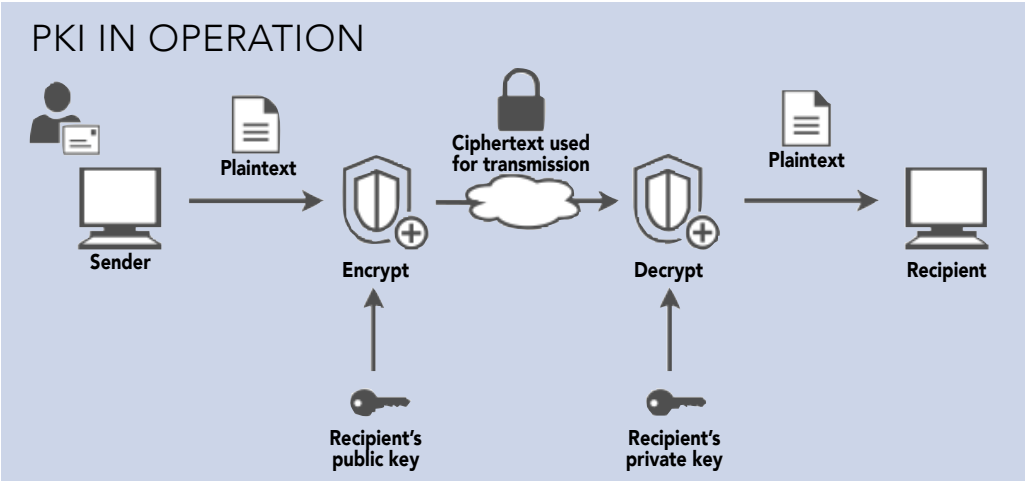
SECURE EMAIL SYSTEMS/ENCRYPTION

Reports of cyber-attacks on firms countrywide are becoming all too frequent. The source of cyber-attacks is predominately through email 'phishing'.

Phishing occurs where the recipient firm receives fraudulent communications that appear to come from a reputable source. The purpose of these emails is to obtain sensitive data, such as credit-card and login information, or to install malware on the recipient's system.

These attacks can result in financial loss for firms and serious data breaches.

There are a number of solutions to protect email data. In this note, we briefly discuss two solutions: secure email systems, and encrypting email attachments.



Secure email systems

Secure email systems require the sender and recipient to install the same end-to-end encryption software product. Encryption software prevents the email from being intercepted. Encryption is a security method of protecting data sent between parties. Keys are used to encode or lock data (encrypt). Encoded data can only be unlocked or decoded by the encryption key.

A secure email service is the easiest way to keep emails private. Not only do they guarantee secure and encrypted email, they protect anonymity. If even more anonymity is required, the email account should be set up behind a free anonymous web proxy server, or a virtual private network.

'Public key infrastructure' (PKI) works by using two different cryptographic keys: a public key and a private key. The keys lock (encrypt or decrypt) the data that is transmitted. The public key is available to any user that connects with the website. The private key is a unique key generated when a connection is made, and it is kept secret. When communicating, the client uses the public key to encrypt and decrypt, and the server uses the private key.

Due diligence

Secure email software tends to be cumbersome to download, and both parties need to be on board to download the same system.

To assist practitioners, we have set out *(below)* a non-exhaustive list of secure email suppliers, plus the key features of each supplier. These are not recommendations, and we suggest that practitioners carry out their own due diligence in respect of these and other suppliers.

Encrypted attachments

Sending encrypted attachments may be the easier of the two solutions for practitioners. However, this system is totally pointless if the password encrypting the email is disclosed in the same email, or in a later email.

There are different methods of encrypting *Word*, depending on which version you are using. With *Word 2010/2013*, you encrypt a *Word* document by following these steps:

1) Click 'file',
2) Click 'info',
3) Click 'protect document',
4) Encrypt with password.

SECURITY SUPPLIERS	KEYS FEATURES
Barracuda	Provides a range of products, including all-in-one security backup and archiving, AI protection from spear-phishing, and secure archiving
Smart Lockr	Offers a secure mailing option. It permits the emails to be encrypted and tracked. Pricing for the above two is user dependent, and they insist on an evaluation before quoting
Sprambrella	An anti-phishing and anti-impersonation piece of software that filters all inbound emails for spam viruses, malware, phishing attacks, and more. It examines hundreds of thousands of attributes in every email to accurately detect text, image, and attachment-based spam or phishing emails
Tutanota	Describes itself as the world's most secure email service. It claims to have end-to-end encryption with complete encryption – that is, subject, body and all attachments. It is an open-source software based in Germany. Business use starts at €12 per year, and ranges up to €60, depending on requirements
Proton Mail	Offers secure email, based in Switzerland. It boasts status security and neutrality, and also end-to-end encryption. Proton Mail is also open source.

Practitioners should keep the following in mind when encrypting attachments:

- Follow the steps to encrypt the email attachment on your *Word* document,
- Use a strong password with at least eight characters,
- Passwords should contains at least one uppercase letter (A-Z), at least one lowercase letter (a-z), at least one number (0-9), and at least one symbol (such as !@#$%^&*_-+=),
- Call the recipients directly and give them the password, or
- Text the password to the recipients' mobile phones, or
- Snail-mail the password to your recipients, and
- Never include the password in the email containing the attachment.

Summary

Both email sender and recipient need to install the same secure email system. It requires buy-in from both parties.

At the very least, practitioners should consider encrypting attachments containing sensitive data. Passwords should be treated as sacred. Never send passwords out with documents.

ALTERNATIVE DISPUTE RESOLUTION COMMITTEE

BINDING NATURE OF THE COURT OBLIGATION TO REFER A DISPUTE TO ARBITRATION

The recent judgment of Barniville J in *XPL Engineering Limited v K & J Townmore Construction Limited* ([2019] IEHC 665) provides guidance as to the binding nature of the court obligation to refer a dispute to arbitration under the *Arbitration Act 2010*.

K&J Townmore Construction Limited engaged XPL Engineering Limited as a subcontractor on two projects under two separate contracts (namely, the 'Stanhope' and the 'St Etchen School' contracts), both of which contained arbitration clauses.

XPL contended that it was owed money from Townmore under both contracts and issued a summary summons. Townmore applied to have the matter referred to arbitration under article 8(1) of the *UNCITRAL Model Law on International Commercial Arbitration* (as incorporated into Irish law by section 6 of the *Arbitration Act 2010*), pursuant to which the court has a mandatory obligation to refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed.

As XPL did not contend that the St Etchen arbitration agreement was "null and void, inoperable or incapable of being performed" within the meaning of article 8(1), the main issue for the determination of the court was whether there was a dispute between the parties under the arbitration agreement.

Applicable principles

Barnville J set out the principles to be applied in that regard.

First, it is necessary to look at the provision of the arbitration agreement in which the term 'dispute' is to be found and to construe that term in the context of the arbitration agreement as a whole.

Second, a broad meaning should be given to the term 'dispute', having regard to the fact that the parties have chosen to use that term in the context of a dispute-resolution provision in their agreement.

Third, the court should interpret 'dispute' in accordance with the principles set out in *Investor Compensation Scheme Ltd v West Bromwich Building Society* ([1998] 1 WLR 896), as approved by the Supreme Court in (among other things) *Analog Devices BV v Zurich Insurance Company* ([2005] 1 IR 274), and in accordance with the further principles applicable to the interpretation of arbitration agreements set out by the House of Lords in *Fiona Trust & Holding Corporation & ors v Privalov & ors* ([2007] 4 All ER 951), and the Irish decisions which have cited that case with approval (which were referred to and summarised by Barniville J in *K&J Townmore Construction Ltd v Kildare and Wicklow Education and Training Board* ([2018] IEHC 770).

Fourth, the burden rests on the party seeking the reference to arbitration to provide some basis for the court to hold that a 'dispute' is in existence between the parties. If that party does so, then the burden shifts to the party opposing the reference on the grounds of the alleged absence of a dispute to persuade the court that no dispute exists.

Fifth, in the context of an arbitration agreement, the court should be willing readily to infer that a dispute exists, and should readily find or infer that such a dispute exists in the absence of an acceptance of liability in respect of the relevant claim. A dispute should readily be found to exist where it is reasonable to infer that the claim is not admitted.

Sixth, the court should lean in favour of finding that a 'dispute' exists in circumstances where the parties disagree as to whether a dispute exists at all.

Seventh, in determining whether a dispute exists for the purposes of an arbitration agreement and a reference to arbitration under article 8(1) of the model law, the court should not get involved in the exercise of deciding whether the position of one party is statable, credible or tenable.

Findings

The court found that, in respect of that part of its claim that XPL had sought to pursue in the proceedings, a dispute between the parties exists, which is the subject of an arbitration agreement to which Townmore and XPL are parties and, as a consequence, the court is bound to accede to Townmore's application and make an order under article 8(1) of the model law referring the parties to arbitration in respect of that part of XPL's claim. As regards the balance of the claims that XPL initially sought to maintain in the proceedings, the court found that article 8(1) of the model law also requires that they should be referred to arbitration, having regard to the terms of the relevant arbitration agreements. While XPL had not formally consented to those claims being referred to arbitration under the relevant agreements, and had raised the possibility of the parties mediating in respect of those claims, the court concluded that article 8(1) of the model law requires the parties to be referred to arbitration in respect of them.

Barniville J observed, however, that he would discuss with counsel the terms of any order that might be made in that regard. The court also made clear that it was in no way precluding the parties from seeking to mediate those claims or, indeed, any of XPL's claims. On the contrary, it would positively encourage mediation. g

LAW SOCIETY OF IRELAND

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Certificate in Advanced Negotiation	13 March 2020	€1,550
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Professional Doctorate in Law	15 May 2020	€5,000

CONTACT DETAILS

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All lectures are webcast, allowing participants to catch up on course work at a time suitable to their own needs. Please note that the Law Society of Ireland's Diploma Centre reserves the right to change the courses that may be offered and course prices may be subject to change.

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 Eamonn Moloney, solicitor, formerly practising as Eamonn Moloney & Co, Solicitors, 1/2 Anglesea Street, Cork, and in the matter of an application by the Law Society of Ireland to the Solicitors Disciplinary Tribunal and in the matter of the *Solicitors Acts 1954-2015* [2018/DT79; 2019/DT23; and High Court record 2019/135 SA]
Law Society of Ireland (applicant)
Eamonn Moloney (respondent solicitor)

2019/DT 23

On 24 October 2019, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he failed to ensure that there was furnished to the Society an accountant's report for the year ended 31 July 2018 within six months of that date, in breach of regulation 26(1) of the *Solicitors Accounts Regulations 2014* (SI 516 of 2014).

2018/DT 79

On 31 October 2019, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in his practice as a solicitor in that he failed to ensure that there was furnished to the Society an accountant's report for the year ended 31 July 2017 within six months of that date, in breach of regulation 26(1) of the *Solicitors Accounts Regulations 2014*.

The tribunal ordered that the matters go forward to the High Court and, on 13 January 2020, the High Court ordered that:

- The respondent solicitor be suspended from practice as a solicitor with immediate effect until such time as he has fully complied with the provisions of the Solicitors Accounts Regulations 2014 by furnishing to the Law Society his accountant's reports for financial years ended 31 July 2017 and 31 July 2018 respectively,
- The respondent solicitor pay the measured costs of the Solicitors Disciplinary Tribunal proceedings and the High Court proceedings in the total amount of €5,874.36.

In the matter of Mark Edmund Doyle, Mark Newman, and Michael Doyle, formerly practising under the style of Actons Newman, Newmount House, 22-24 Lower Mount Street, Dublin 2, and in the matter of the *Solicitors Acts 1954-2015* [2018/DT94]
Law Society of Ireland (applicant)
Mark Edmund Doyle (first-named respondent solicitor)
Mark Newman (second-named respondent solicitor)
Michael Doyle (third-named respondent solicitor)

On 13 November 2019, the Solicitors Disciplinary Tribunal found the respondent solicitors guilty of professional misconduct in that they failed to ensure that there was furnished to the Law Society a final reporting accountant's report, in breach of regulation 33(2) of the *Solicitors Accounts Regulations 2014* (SI 516 of 2014).

The tribunal ordered that the respondent solicitors:

- Stand advised and admonished,
- That the first-named respondent solicitor pay a sum of €606 as a contribution towards the whole of the costs of the applicant,
- That the second-named respondent solicitor and the third-named respondent solicitor each pay a sum of €303 as a contribution towards the whole of the costs of the applicant.

WILLS

Boylan, Anton, (deceased), late of 25 St Cronin's (otherwise St Cronan's) Court, Swords, Co Dublin, and formerly of The Cottage, Burrow Road, Portrane, Co Dublin. Would any person having knowledge of a will executed by the above-named deceased, who died on 25 May 2018, please contact Nora Collier, Tallans Solicitors, The Haymarket, Drogheda, Co Louth; DX 23009; tel: 041 983 8708/9, fax: 041 983 9111, email: nora@tallans.ie

Buckley, Mary Veronica (otherwise Ronnie), late of Buckley's Bar, Lower Road, Crosshaven, Co Cork, who died on 15 December 2019. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Killian O'Mullane, Murphy English & Co, Solicitors, 'Sunville', Cork Road, Carrigaline, Co Cork; tel: 021 437 2425, email: killian@murphyenglish.ie

Burnham, Kathleen (deceased), late of Sunset View, Gold Coast Road, Dungarvan, Co Waterford, and formerly of 7 Otter Close, Bletchley, Milton Keynes, MK3 7QP, in the county of Buckingham, who died on 31 January 2019. Would any person having knowledge of a will made by the above-named deceased please contact Frank Halley, MM Halley & Son, Solicitors, Presentation House, Slievekeale Road, Waterford; DX 44013; tel: 051 874 073, email: fhalley@mmhalley.com

Corry, Jane (deceased), late of 4 Riverwood, Carleysbridge, Enniscorthy, Co Wexford. Would any person having knowledge of any will made by the above-named deceased, who died on 21 December 2019, please contact Niamh Moriarty & Co, Solicitors, Parnell Road, Enniscorthy, Co Wexford; ref: 20/C.2/NM/SD; tel: 053 923 7666, email: suzanne@niamhmoriarty.ie

D'Arcy, Pauline (deceased), late of 19 Weavers Court, Cork Street, Dublin 8, and of Bloomfield Nursing Home, Stocking Lane, Rathfarnham, Dublin 16, who died on 18 November 2018. Would any person having knowledge of a will made by the above-named deceased please contact Patrick P O'Sullivan and Co, Solicitors, 8 Herbert Street, Dublin 2; tel: 01 679 3539, email: info@pposullivansolicitors.ie

Davison, Mary Eleanor (deceased), late of Catherinestown, Leixlip, Co Kildare who died on 7 January 2020. Would any person having knowledge of the whereabouts of a will made by the above-named deceased please contact Patrick Ward & Co, Solicitors, Equity House, Upper Ormond Quay, Dublin 7; tel: 01 873 2499, email: legal@patrickward.ie

Dillon, Edel (née Earle) (deceased), late of 58 Chapelgate, St Alphonsus Road, Drumcondra, Dublin 9. Would any person having knowledge of the whereabouts of any will made by the above-named deceased, who died on 27 November 2019, please contact FH O'Reilly and Company, Solicitors, The Red Church, Phibsborough, Dublin 7; tel: 01 830 3122, email: koreilly@fhoreillyandco.com

Flynn, Laurence (orse Larry) (deceased), late of 19 Millhill Lawns, Manorhamilton, Co Leitrim, and formerly of 171 New Cabra Road, Dublin 7, who died on 21 December 2019. Would any person having knowledge of the whereabouts of a will made by the above-named deceased please contact Kelly & Ryan Solicitors, Manorhamilton, Co Leitrim; tel: 071 985 5034, email: kieran.ryan@kellyryanmanor.com

Fox, Teresa (deceased), late of Ferndene Nursing Home, Deansgrange Road, Blackrock, Co Dublin, who died on 1 March 2018. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Dillon Solicitors, Unit 1A Nutgrove Office Park, Rathfarnham, Dublin 14; tel: 01 296 0666; DX 272001 Nutgrove; email: paulinehorkan@dillon.ie

Griffin, Hannah (deceased), late of Skenakilla, Castletownroche, Mallow, Co Cork, who died on 11 November 2019. Would any person having knowledge of a will made by the above-named deceased please contact Fiona O'Sullivan, David J O'Meara & Sons, Solicitors, Bank Place, Mallow, Co Cork; tel: 022 21539, email: fiona.osullivan@djomeara.ie

Hyland, Liam (otherwise William) (deceased), late of Lisheen Nursing Home, Stoney Lane, Rathcoole, Co Dublin, and formerly of 105 Lanndale Lawns, Tallaght, Dublin 24. Would any person having knowledge of a will made by the above-named deceased, who died on 21 June 2019, or knowledge of any title deeds relating to the deceased's

RATES

PROFESSIONAL NOTICE RATES

RATES IN THE PROFESSIONAL NOTICES SECTION ARE AS FOLLOWS:

- **Wills** – €155 (incl VAT at 23%)
- **Title deeds** – €310 per deed (incl VAT at 23%)
- **Employment/miscellaneous** – €155 (incl VAT at 23%)

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ALL NOTICES MUST BE PAID FOR PRIOR TO PUBLICATION. CHEQUES SHOULD BE MADE PAYABLE TO **LAW SOCIETY OF IRELAND.** Send your small advert details, with payment, to: *Gazette* Office, Blackhall Place, Dublin 7, tel: 01 672 4828, or email: catherine.kearney@lawsociety.ie. **Deadline for April 2020 *Gazette*: 13 March 2020.** For further information, contact the *Gazette* office on tel: 01 672 4828.

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

EU & INTERNATIONAL AFFAIRS COMMITTEE

STAGE INTERNATIONAL A PARIS 2020

OCTOBER – NOVEMBER 2020

LAW SOCIETY OF IRELAND

ORDRE DES AVOCATS DE PARIS

Every year, the Paris Bar organises an International Stage in Paris, and invites a limited number of lawyers from each jurisdiction to participate. The stage is a fantastic opportunity for lawyers to discover and practice French law in the heart of Paris.

The stage takes place during the months of October and November, and entails: one month attending classes at the l'Ecole de Formation du Barreau and one month of work experience in a law firm in Paris. The programme also includes a visit to Brussels to the European institutions.

The Irish participant will be selected by the EU & International Affairs Committee of the Law Society of Ireland.

Candidates must:

- Be qualified in Ireland and registered in the Law Society
- Have a good knowledge of French
- Be under 40 years of age
- Have insurance cover (for accidents and damages).

Tuition is fully covered by the Paris Bar; candidates must be willing to cover other expenses (travel, accommodation, meals)[1]

Interested?

To apply, please send your CV and a letter explaining your interest in the stage (in both English and French) to Suzanne Crilly (s.crilly@lawsociety.ie).

Application deadline: Friday, 13 April 2020.

[1] The EU & IA Committee will sponsor the participant with €3,500.

property both at 105 Lanndale Lawns, Tallaght, Dublin 24, and Harristown, Deece Upper, Rodanstown, Co Meath, please contact Messrs G Jones & Co, Solicitors, Main Street, Carrickmacross, Co Monaghan; tel: 042 966 1822, email: jdoherty@gjones.ie

McHugh, William (deceased), late of 4 St Brendan's Terrace, Coolock, Dublin 5, who died on 13 January 1983. Would any person having knowledge of the whereabouts of any will made by the above-named deceased – in particular, a will dated July 1977 and witnessed by Margaret Morgan, law clerk, and Alice Leonard, typist, of 6 Grafton Street, Dublin 2 – please contact John O'Connor, Solicitors, 168 Pembroke Road, Ballsbridge, Dublin 4; tel: 01 668 4366, email: info@johnoconnorsolicitors.ie

Maguire, Jacqueline (deceased), late of 2 St Brigid's Terrace, Kells, Co Meath, who died on 27 September 2019. Would any person having knowledge of the whereabouts of a will made by the above-named deceased please contact Thea Carolan, Nathaniel Lacy & Partners, Solicitors, Kenlis Place, Kells, Co Meath; tel: 046 928 0718, email: tcarolan@nlacy.ie, law@nlacy.ie

Moore, Martin (Buddy) deceased, late of 36 Ballinteer Avenue, Dublin 16, who died on 27 October 2019. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Dillon Solicitors, Unit 1A Nutgrove Office Park, Rathfarnham, Dublin 14; DX 272001 Nutgrove; tel: 01 296 0666, email: paulinehorkan@dillon.ie

O'Regan, Patricia (deceased), late of Glen Road, Monkstown, Co Cork, who died on 30 April 2016. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Killian O'Mullane, Murphy English & Co, Solicitors, 'Sunville' Cork Road, Carrigaline, Co Cork; tel: 021 437 2425, email: killian@murphyenglish.ie

Quinn, Marian (née Conlan) (deceased), late of The Limes, 128A Merrion Road, Ballsbridge, Dublin 4, and formerly of Sutton, Dublin 13, who died on 13 July 2019. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Robert Plunkett, Plunkett Kirwan & Co, Solicitors, 175 Howth Road, Killester, Dublin 3; tel: 01 833 8254, email: rob@plunkettkirwan.ie

Young, Matthew (deceased), late of Esker Rí Nursing Home, Clara, Co Offaly, and formerly of 33 The Priory, Kilcormac, Co Offaly, who died on 30 December 2019. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact O'Donovan Mahon Cowen Solicitors, William Street, Tullamore, Co Offaly; tel: 057 934 1866, email: info@odmcsolicitors.ie

Law Society Finuas

Skillnet

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DATE	EVENT	CPD HOURS	DISCOUNTED FEE*	FULL FEE
11 March	**Growth Strategy Workshop** A Blueprint to Sustain and Grow your Practice	6 M & PD Skills (by Group Study)	€210	€255
20 March	**Employment Law Masterclass** Practical Solutions to Common Problems	6.5 General (by Group Study)	€210	€255
25 March	**Healthcare Regulation in Ireland 2020** Complying with Regulation - Where are we now?	3 M & PD Skills (by Group Study)	€160	€186
23 April	**The Business of Wellbeing Summit 2020**	6 M & PD Skills (by Group Study)	€160	€186
24/25 April	**Planning & Environmental Law Masterclass**	8 General plus 2 M & PD Skills (by Group Study)	€350	€425
24/25 April	**General & Commercial Litigation Masterclass**	10 CPD hours incl. 1 Regulatory Matters (by Group Study)	€350	€425
29 April	**Acting for the Older Client in collaboration with Solicitors for the Elderly**	3 General (by Group Study)	€160	€186
30 April	**The Litigator and the Mediation Act, 2017**	2 General (by Group Study)	€135	
7/8 May	**Essential Solicitor Update Part I & II** Landmark Hotel, Carrick on Shannon, Co Leitrim	7 May - 4 Hours & 8 May - 6 Hours Total 10 Hours (by Group Study)*	7 May - €100 8 May - €135 7 & 8 May - €190 *Hot lunch and networking drinks included in price*	
22/23 May	**Fundamentals of Clinical Negligence** Radisson Blu, Golden Lane Dublin 8	10 CPD hours including 1 Hour Regulatory Matters (by Group Study)	€350	€425
28 May	**Inhouse Panel Discussion** in partnership with the In-house and Public Sector	3 M & PD Skills (by Group Study)	€65	
28 May	**Midlands General Practice Update** Midlands Park Hotel, Portlaoise, Co Laois	Total 6 CPD Hours	€135 *Hot lunch and networking drinks included in price*	

Please note our Finuas Skillnet Cluster Events are a combination of General, Management & Professional Development Skills and Regulatory Matters CPD Hours (by Group Study). Unless otherwise stated, events will run in the Law Society at Blackhall Place, Dublin 7

For a complete listing of upcoming events including online GDPR, Fintech, Regulatory Matters and Social Media Courses, visit **www.lawsociety.ie/CPD** or contact a member of the Law Society Professional Training team on

P 01 881 5727 **E** Lspt@lawsociety.ie **F** 01 672 4890 **Applicable to Law Society Finuas Skillnet members*

MISCELLANEOUS

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TITLE DEEDS

In the matter of the *Landlord and Tenant Acts 1967-1994* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Acts 1978-2005* and in the matter of an application by Midsal Homes Limited and in the matter of 82 Meath Street, Dublin 8

Take notice that any person having an interest in the freehold estate or any intermediate interests of that part of the property known as 82 Meath Street, Dublin 8, together with the right of way referred to in an indenture of sublease made on 16 May 1930 between (1) Peter Killane, (2) the Munster and Leinster Bank Limited, and (3) Francis Hoey ('the 1930 sublease'), held under the said sublease for the term of 150 years from 25 March 1930, at an annual rent of £37.10s, and subject to the covenants and conditions therein contained.

Take notice that Midsal Homes Limited intends to submit an application to the county registrar for the county of Dublin at Áras Uí Dhálaigh, Inns Quay, Dublin 7, for the acquisition of the freehold interest and all intermediate interests in the aforesaid property, and that any party asserting that they hold the fee simple or any intermediate interest in the aforesaid property are called upon to furnish evidence of title to the said property to the below-named solicitors within 21 days from the date of this notice. In default of any such notice being received, Midsal Homes Ltd intends to proceed with the application before the county registrar at the end of 21 days from the date of this notice and will apply to the county registrar for the city of Dublin for directions as may be appropriate that the person or persons beneficially entitled to the intermediate interests including the fee simple in the aforesaid property are unknown or unascertained.

Date: 6 March 2020

Signed: HOS Partners (solicitors for the applicant), 46 Fitzwilliam Square, Dublin 2

PRO BONOBO

'NUN' ON THE RUN

A convicted fraudster convinced nuns that she was a kind sister in need of help during two years on the run, according to Italian police.

The 47-year-old woman, who has not been named, fled Sicily after she was convicted of fraud, impersonation, and theft. She was sentenced, *in absentia*, to two years and four months in prison in late 2017, thetimes.co.uk reports.

Police claim that she made her way to northern Italy, showing up at convents posing as an ill nun.

At one convent, she claimed to be the niece of a sister, where she stayed for several days. At a convent in Cuneo, she claimed to be a mother superior.

It was a real mother superior with "excellent investigative skills" who ultimately discovered the ruse. The nun, a member of the Benedictine Nuns of Perpetual Adoration of the Blessed Sacrament near Milan, noticed that the fugitive's stories were "full of contradictions."

Suspicious of the woman's identity, she called the police, who interviewed the suspect. Though cooperative, she was found in possession of a stolen ID card and appeared confused about the most basic details of her life story.

Police later confirmed her true identity at a police station and are to lay new false-identity charges against her.

SWEET SMELL OF SUCCESS FOR COPS

He just didn't smell right. German police say they nabbed a drunk driver who tried to flee a traffic checkpoint, finding him hiding behind a hedge "in a cloud of perfume", msn.com reports.

Police in the town of Speyer, some 110km south of Frankfurt, said that officers saw the 26-year-old man pass them at high speed with his car lights off, and gave chase.

The suspect pulled over and ran away, but officers noted a strong smell of perfume in the car. They followed the trail until they found the man hiding behind a hedge.

"Due to the cloud of perfume that was detected inside the car and on the man, it was possible to identify him as the driver," police said.

A breath test showed that the suspect was well over the legal alcohol limit for driving.

STRANGE FRUIT COULD LEAD TO SMELLY ARREST

And in another odorous story, these are thieves you should be able to smell coming. Police in Hawaii are investigating the theft of fruit worth around $1,000, usnews.com reports. The haul included durian – known for its powerful odour.

The Hawaiian Police Department said that two men entered a property in Hilo on Big Island and removed 18 durian and other types of fruit on the night of 1 February.

The police released surveillance footage of the two suspects, and asked the public for additional information that could lead to the capture of the fruit bandits.

Durian is known for its pale yellow flesh and its sweet taste – but its smell has been compared to mouldy cheese, rotten onions and dead fish. The fruit is popular across south-east Asia, but hotels and public transportation commonly ban it.

The smell of rotting durian in a cupboard was mistaken for a gas leak and prompted an evacuation of a library at the Royal Melbourne Institute of Technology in Australia in April 2018.

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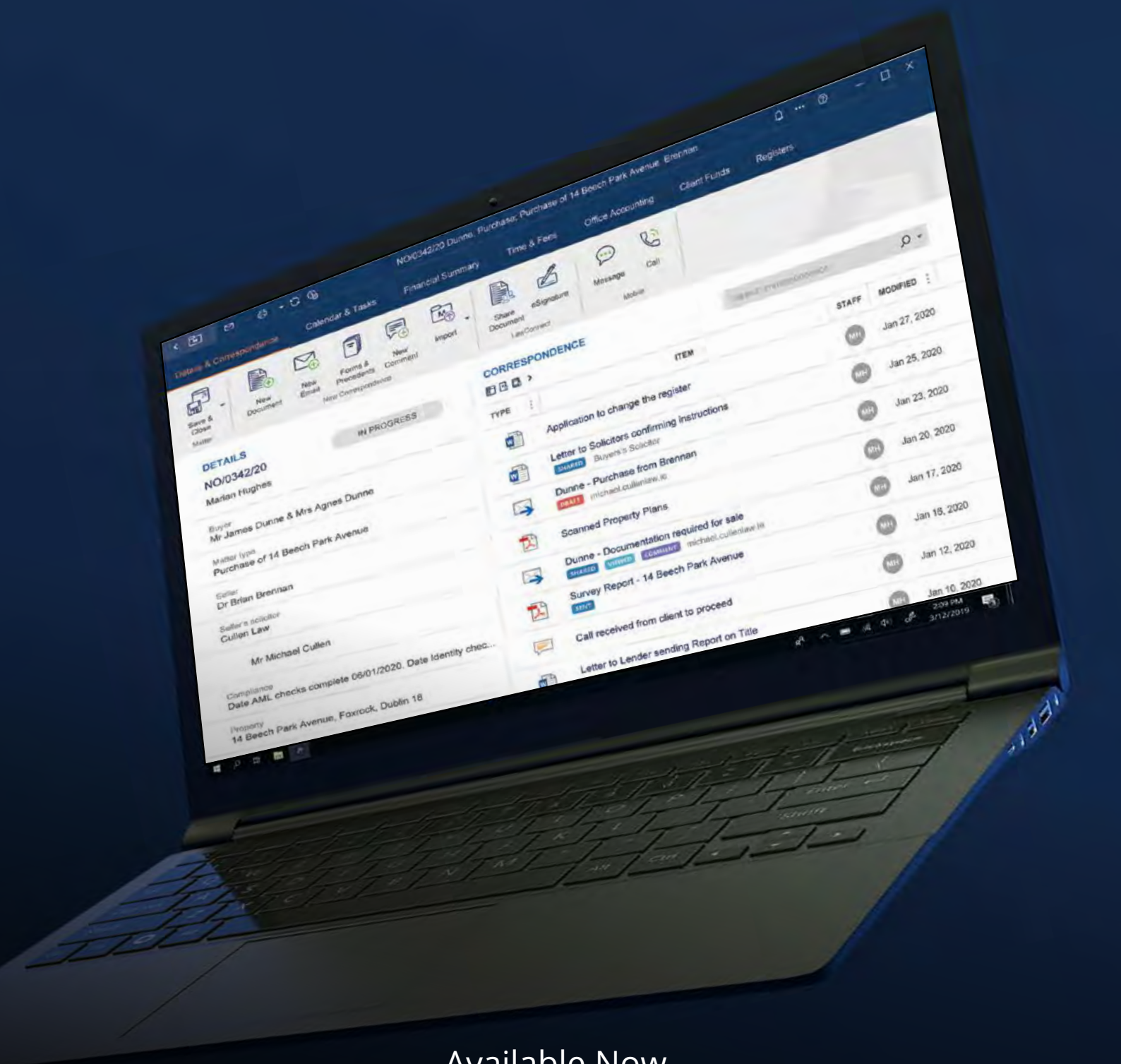

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