These are far away
Parties must be able to stand over all pleas contained in pleadings

Lone rangers
Loneliness is personal and hard to discuss, but it's good to talk

Ducks in a row
There have been a number of recent applications to dismiss proceedings for delay

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New rules for costs orders

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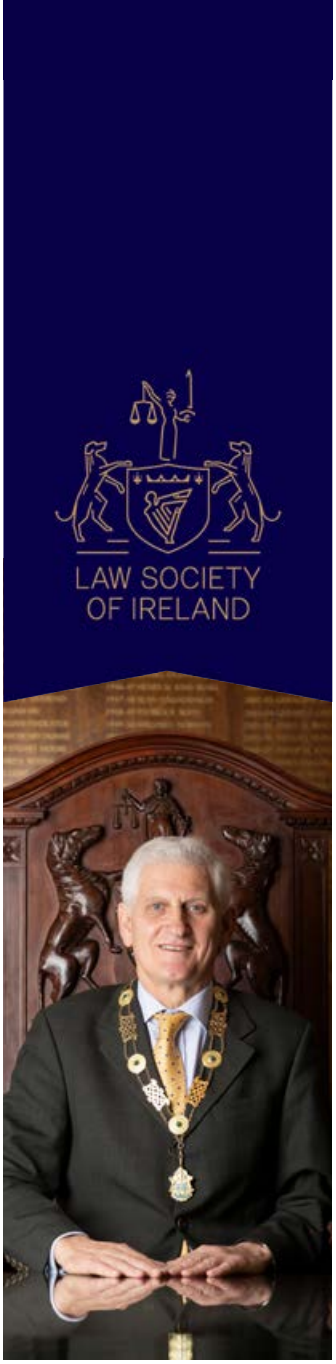
PRESIDENT'S MESSAGE

VULNERABLE TARGETS



Cybercrime has become an enormous issue for solicitors' firms holding client funds. We are incredibly vulnerable targets for cyber-thieves. I cannot overemphasise how careful we must be to ensure that our accounts are not compromised.

Unlike large firms, small firms typically have contractual arrangements with IT experts to fix problems. A successful attack is likely to have been perpetrated before it is identified, and the solicitor then contacts their IT expert – but it is now too late.

Steps that can be taken to mitigate cyberattacks include staff training, educating clients and, most importantly, always verifying bank-account details by telephone.

Cyberattacks are often as a result of basic procedural errors. Law Society investigating accountant Rory O'Neill has been sounding the alarm bells on cyberattacks for a number of years in the Society's webinars. The Society has been trying to address this issue on the cybersecurity section of its website, in the *Gazette*, and through its other outlets.

I have requested the chair of the Regulation of Practice Committee to establish a subcommittee composed of an expert IT solicitor, IT technician, an accountant, and practising solicitors to urgently identify additional steps that can be taken to reduce the number of successful attacks. Their advice will be vigorously promoted to members.

Business recovery survey

The Law Society has appointed Crowe consultants to conduct a business recovery survey. We need to understand how the COVID crisis is affecting firms and what assistance they need for sustainability through the anticipated economic recovery. The survey was sent to managing partners and firm principals on 11 March.

All information gathered will be treated strictly confidentially by Crowe, and no Law Society staff will have access to the data in its disaggregated form. For more information, see this *Gazette* (page 11) and the *eZine* (23 March, issue 139).

Good news on CPD

There is now no charge for the CPD course on negative interest-rate charges. Skillnet funding is 50% grant aided, and so, normally, the other 50% would be charged to those attending. The Society is also providing training for staff in solicitors' offices, and I believe that this will be an excellent offering as it evolves. See also page 11 of the *Gazette* for further developments.

> WE ARE INCREDIBLY VULNERABLE TARGETS FOR CYBER-THIEVES

Finally, the Regulation of Practice Committee, under the stewardship of its chair, Imelda Reynolds, has been requested to review certain aspects of the implementation of the regulatory regime, including the effects of GDPR, a greater degree of openness in this area for members of the Law Society, and a preliminary report to be considered at the Council meeting in July.

JAMES CAHILL,
PRESIDENT

PIC: ALAMY

Volume 115, number 3

Subscriptions: €65 (€95 overseas)

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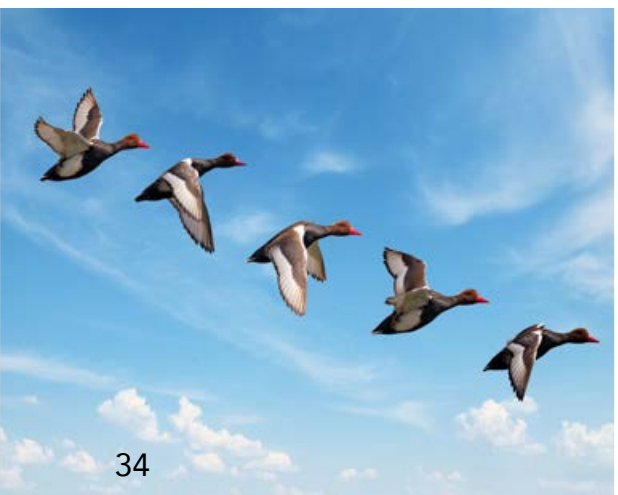
HAVE YOU MOVED? Members of the profession should send change-of-address details to: IT Section, Blackhall Place, Dublin 7, or to: customerservice@lawsociety.ie

FEATURES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REGULARS

THE BIG PICTURE

FLOWER POWER

Cherry blossoms in full bloom cascade over a river in Tokyo, Japan. The Japan Weather Association declared full bloom for cherry blossoms in the Japanese capital on 22 March, the day after the Japanese government lifted a COVID-19 state of emergency in Tokyo and three neighbouring prefectures

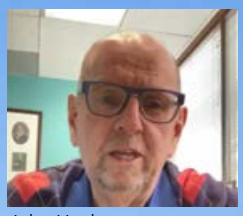
EPA-EFE/KIMIMASA MAYAMA

MURPHY – VIRTUALLY RETIRED

Ken Murphy celebrated his retirement, after 26 years as director general, via a Zoom webinar on Friday 19 March. Mary Keane presented a *This Is Your Life* style programme, while Law Society staff watched from their homes

Staff gave Ken the gift of a one-off *Gazette* full of memories of his time with the Law Society

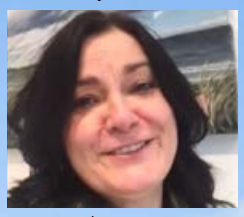
MANY FRIENDS AND COLLEAGUES SENT VIDEO MESSAGES TO KEN


John Hoyles


Brendan Ryan


Miriam O'Callaghan


Bobby Kerr


Lorna Jack


Charlie Flanagan


Donald Binchy


Merete Smith


Michael Peart

MAIN PIC: CIAN REDMOND

DG STEPS DOWN AFTER 26 YEARS

Ken Murphy has retired as the Law Society's director general. He served 26 years in the role and had almost 40 years of service in total, including his 12 years on Council prior to his appointment as DG in 1995.

Murphy has long been the public face of the solicitors' profession in Ireland and was, by far, the longest-serving CEO of any national bar or law society in the world. A gifted communicator, he has been invariably regarded as the 'defender of the profession'.

President James Cahill and then director general Ken Murphy with the engraved silver salver presented to him by the Law Society Council

'Enormous honour'

When he announced his intention to retire last October, Murphy commented that he was profoundly grateful for the "enormous honour and opportunities" that the Law Society had given him.

"Most importantly, my various roles have enabled me to serve the solicitors' profession, which I love and of which I am so very proud to be a member, and through this, the public interest. I have worked with wonderful colleagues, and I often remarked that I knew no one who enjoyed their job as much as I enjoyed mine," he said.

Murphy guided the Society through a period of great change and expansion, from approximately 5,000 solicitors on the Roll of Solicitors when he took up office in 1995, to over 22,000 today. In addition, the profession not only reached parity in terms of gender balance during his time in office, but now boasts a female majority.

The Law Society's Council paid tribute to him at his final meeting on 19 March, presenting him with a silver salver bearing the signatures of all the presidents who had served during his term of office.

Law Society President James Cahill described him as "a forward-looking, yet lateral thinker" who was "fiercely, fearlessly and clinically defensive of the profession in his endless meetings, discussions, negotiations, and media appearances over the years.

"He has had to be a shrewd persuader and weaver of words, a cultivator of relationships, and has had to tread a fine line in his dealings with such a wide variety of individuals and groups in furtherance of his mission as our director general."

On behalf of the Council and the profession, President Cahill thanked Murphy for his "wonderful legacy as director general", and wished him a happy and fulfilling retirement.

This Is Your Life

The Society's staff had their chance to bid farewell to their departing leader at a virtual retirement party the same evening. Deputy director general Mary Keane hosted a *This Is Your Life* style webinar, during which Ken was presented with a special issue of the *Gazette* that marked many of his most significant career events, a painting of Blackhall Place, and a Blue Book voucher, among other gifts.

There were warm video tributes, too, from luminaries of the legal, political and broadcasting world, including Miriam O'Callaghan, former Minister for Justice Charlie Flanagan, and retired Court of Appeal judge Michael Peart.

We wish Ken, his wife Yvonne, and their children Gavin, Charlotte and Rebecca health and happiness for the future.

CITIZEN KEANE – FIRST WOMAN LAW SOCIETY DG

Mary Keane is the Law Society's director general on an interim basis. She was formally appointed by the Council at its meeting on 19 March.

Keane takes over from Ken Murphy, who has departed the role after 26 years. She makes history by becoming the Society's first-ever female DG.

From Swinford, Co Mayo, Keane was educated at the Convent of Mercy in Claremorris, completed her BCL at UCD in 1985, and qualified as a barrister in1989.

PIC: BRYAN MEADE

Her working life began in the Department of Industry and Commerce (1980-1982), taking time out to do her law degree. She moved to the Companies Registration Office at Dublin Castle (1985-1990) and entered the private sector when she joined the tax department of Craig Gardner/Price Waterhouse (1990-1992).

Keane joined the Law Society in 1992 as policy development executive, working alongside the then director general Noel Ryan. At the age of 34, she was appointed deputy director general in December 1996, breaking her first glass ceiling by becoming the first woman to be appointed to a director's role in the Society's history. She was appointed director of the Policy, Communication and Member Services department in December 1997. Currently, she is the director of the Policy and Public Affairs Department, and continues to serve in that role.

Keane is also chair of the National Gallery of Ireland, serving on the 17-member board since 2014 and taking the chair in March 2020. She lives in Carne, Co Wexford, where she is restoring a mediaeval property and "discovering the rhythm of old things".

BETWEEN THE COVERS – CRISIS COMMUNICATION!

The onset of COVID-19 hit many libraries around the world, with major disruption to both services and collection management. This led to a significant shift in how libraries could continue to operate and meet their users' requirements, *writes Mary Gaynor (head of library and information services)*.

Librarians had to reimagine how they could maintain their services and significantly boost the electronic delivery of content, as quickly as possible.

The Law Society Library closed to visitors on 18 March 2020 and, following Government advice, the library team switched to remote working and providing online services only. This was to continue until 8 June.

Switching to online services was relatively easy, with a strong technology infrastructure already in place. Members and students had access to our online library catalogue (which has been cloud-based since 2010 and includes records for books and journals, as well as our judgments' database that includes records for our entire collection of judgments from the 1950s to date, with links to PDFs).

'Library Chat'

Our mobile app catalogue provides similar access for solicitors and students. More recently, a new 'Library Chat' feature has been activated on the Law Society's website, giving members and students yet another channel for communicating with us.

The library team has direct access to the key online databases, including LexisNexis, Westlaw IE and UK, Justis and Bloomsbury Professional, among others, and delivering content from these databases was possible regardless of the location of members of the library team.

A great strength was the team itself. We have many years of experience carrying out legal research and providing library services, and the team got into its 'working-from-home' stride very quickly. Communication and sharing knowledge was somewhat more cumbersome than normal, but we quickly adapted.

Main casualties

The main casualties in the March to May 2020 period were the book-loan service and access to on-site study facilities. We negotiated with Irish publishers to enhance our e-book collection, which the library staff are licensed to access and deliver to members. We also purchased more e-book titles on the Browns Books platform, to which we can give members and students direct login access.

A small collection of key Irish legal textbooks that are not available electronically were taken home in order to scan some extracts, which helped to answer some enquiries.

We started lending printed books again in June 2020 and, with a small staff presence on-site, have managed to ensure that

books go out on a daily basis by An Post and DX.

Since many solicitors are working from home, we are posting to home addresses where this is preferred. We also have an 'order-and-collect' service, where books can be picked up from the main reception at Blackhall Place.

Online extracts

Many members ask for a book loan but, when offered, opt to have relevant extracts/chapters delivered to them by email instead, with the obvious advantages of speed, efficiency and a lower carbon footprint. As part of the Law Society's initiatives to support members during COVID-19, library charges for the delivery of electronic documents have been significantly reduced, and the cost for posting printed books is currently being waived.

In line with Government guidelines, access to study space has been curtailed, with access by appointment only, and for curtailed periods.

In support of the Society's initiatives on wellbeing, the library continues to purchase and make available for lending key textbooks on wellbeing, as well as specific books on managing stress in the law-firm environment. A list is available at https://bit.ly/380epGp.

Move to digital

Transitioning to the online environment has been on the library's agenda for many years. The current model provides continuity in the delivery of services.

Understandably during 2020, there was a decrease in book loans compared with previous years, but the demand for electronic documents, such as precedents, law reports, articles and extracts increased by as much as 90% on 2019, which reflects the strong move to digital during the pandemic. The stats show the popularity of the library's services to small practices – over 75% of enquiries come from practices with between one and five partners.

While we look forward to the end of the coronavirus, the crisis has given us valuable insights into how the library's services can operate even more efficiently, and it has provided us with opportunities to explore new avenues for meeting readers' requirements.

Members can contact us at libraryenquire@lawsociety.ie, tel: 01 672 4843, or Library Chat at www.lawsociety.ie.

ENDANGERED LAWYERS

KHIN MAUNG ZAW, MYANMAR

Khin Maung Zaw (73) was appointed as legal counsel by Aung San Suu Kyi's National League for Democracy in Myanmar, which won a landslide election in November 2020. He is defending the State Counsellor and ousted President Win Myin against (in Suu Kyi's case) charges of possessing unlicensed walkie-talkies, violating COVID restrictions, breaching telecommunications laws, accepting illegal payments, and intent to cause public unrest.

Their government was overthrown by a military junta in early February, ten years after democracy was restored. There have been widespread ongoing protests, which have led to the deaths of over 120 people at the hands of the military.

The military has taken steps to purge the higher courts of judges suspected of being pro-democracy sympathisers. Khin Maung Zaw is not living at home for security reasons, and moves every day. Over 2,000 protestors have been detained.

Khin Maung Zaw last came to prominence for defending two Reuters journalists who spent nearly 18 months in prison for reporting on atrocities against the Rohingya minority. This did him no favours with the administration of the then-government, led by Suu Kyi, who defended the army's persecution of that people.

However, he says that the "personal aspects" of Suu Kyi's case are unimportant in the light of the illegitimate return to military rule. "I'm not representing Aung San Suu Kyi as a person – I am representing a publicly elected person under attack by the military forces," he says. "That is all in defence of democracy."

Khin Maung Zaw is familiar with the cost of political resistance, having spent nine years in prison during the course of his life. He was imprisoned at the age of 17 by a previous regime for distributing the *Universal Declaration of Human Rights* at his university in Mandalay, was released in 1972, but arrested three years later for joining student protests.

The trial of Suu Kyi could last from six to 12 months or more. Her lawyer has had difficulty in meeting her in person, initially because she was still under investigation, and then allegedly because of COVID restrictions.

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

CALCUTTA RUNS TOWARDS SEPTEMBER

The Virtual Calcutta Run garnered fantastic support from its 1,000 participants last October, raising €280,000 for those experiencing homelessness in Dublin and Kolkata, India.

In 2021, the initial hope was that the event might resume during the traditional month of May from Blackhall Place. This is looking increasingly less likely, due to the continuing Government restrictions and social-distancing guidelines.

It is anticipated that the event will now take place in September – hopefully physically, or at least in hybrid form. The exact date and format will be confirmed in due course. See the *Gazette* and *Gazette.ie* for updates. The organisers wish to thank you for your ongoing support for the Calcutta Run.

EFFECTIVE MEDIATION WEBINAR

The Law Society's Litigation and Alternative Dispute Resolution Committees are hosting a webinar on effective mediation on 22 April from 3-5pm.

The session will explore how mediation is evolving and focus on emerging trends and developments, exploring what solicitors need to know to best serve their clients' interests.

Liam Kennedy SC (partner, A&L Goodbody, and former chair of the Litigation Committee) will chair a panel that includes Michael Peart (formerly Court of Appeal), Helen Kilroy (partner, McCann FitzGerald), Alison Kelleher (partner, Comyn Kelleher Tobin; and chair of the ADR Committee), William Aylmer (consultant, Compton Solicitors), and Lisa Broderick (partner, DAC Beachcroft).

The seminar (which will provide two CPD points) will consider whether the *Mediation Act 2017* has achieved its aim, and the scope for further reform.

It will explore practical strategic issues – the optimum timing of mediation, the choice of mediator, and overcoming obstacles to mediation – and will highlight the tools available (including the Law Society's mediation precedents) to help solicitors engage in, or advise on, mediation.

FIRMS' SURVEY ON PANDEMIC IMPACT

The Law Society has undertaken research to assess the impact of the COVID pandemic on law firms.

The business recovery survey, which is being conducted with the help of consultants Crowe, was sent to managing partners and firm principals. It is hoped that the results will provide an understanding of what supports firms will need from the Society and the State over the next 12-18 months.

The data gathered will be used to represent the profession at all levels, including interactions with Government. It will also inform the new supports that the Society will introduce to help firms to emerge from the current crisis.

For further information, contact Justin Purcell at j.purcell@lawsociety.ie.

BUILDING A CAREER

Construction law is an area of practice that is experiencing increased growth in the current environment. Demand for legal services is expected to increase in the months ahead.

The 'Construction Law Masterclass' is a comprehensive course, delivered online and on-demand through a practical series of lectures and case studies by leading experts. The course will introduce, update and develop practitioners' knowledge, skills and competencies in the area of construction law, including project finance and project security.

The course includes a knowledge resource hub with materials and relevant legislation. All resources, including the online lectures and case studies, will be hosted on an easily accessible learning-management system. Further details about this Finuas Skillnet masterclass can be found at www.lawsociety.ie/cpdcourses.

IRLI IN IRELAND

COVID-19, MALAWI AND THE RULE OF LAW

Alfred Munika, Nellie Msowoya and Alex Nkunika work with one of IRLI's local partners in Malawi, the Paralegal Advisory Service Institute

Upon the advent of COVID-19, Irish Rule of Law International (IRLI) in Malawi decided to focus much-needed efforts towards advocating for the urgent decongestion of Malawi's severely overcrowded prisons, considering the particular threat posed to incarcerated people.

IRLI reached out to other non-governmental organisations that operated access-to-justice programmes within Malawi to propose the idea of collaboration and devising joint advocacy strategies. The Centre for Human Rights Education, Advice and Assistance; the South African Litigation Centre; Reprieve; and the Paralegal Advisory Service Institute agreed to come together with us. We created advocacy briefs, which highlighted the plight of prisoners and contained our various recommendations on prison decongestion and prisoner health, and we shared these with various stakeholders, including the government and the judiciary.

The initiative proved so successful that IRLI decided to use this effective collaboration at an international level to advocate for broader human-rights and rule-of-law issues within Malawi.

IRLI contacted the International Bar Association's Human Rights Initiative (IBAHRI), which offered to use its extensive network and expertise to map potential advocacy avenues and to support joint advocacy initiatives with IRLI and the other Malawi-based NGOs.

In October 2020, IRLI spearheaded the drafting of a joint shadow report to submit to the Human Rights Committee, the UN body that monitors countries' adherence to the *International Covenant on Civil and Political Rights*. The report focused on the use of torture, forced confessions, prison conditions, pre-trial detention, the death penalty, extrajudicial killings, and LGBTQI rights in Malawi, with a particular focus on how COVID-19 has exacerbated these issues.

Currently, IRLI is working with IBAHRI and the other NGOs to develop a joint oral statement to present to the committee, and will continue to advocate for human rights, both nationally and internationally.

Susie Kiely is IRLI judiciary programme lawyer in Malawi.

NEW RULES TO ALLOW FOR REMOTE WITNESSING OF AFFIDAVITS

New court rules that allow for the remote witnessing of affidavits in the superior courts came into effect on 31 March, *write Liam Kennedy SC and Nadia Skelton.*

The *Rules of the Superior Courts (Affidavits) 2021* were signed by the Minister for Justice on 10 March and have been welcomed by the Law Society, which has been advocating for reforms to allow the remote execution of affidavits, arguing that this was both consistent with the relevant legislation and also with developments in other common-law jurisdictions.

In brief, the rules permit the remote swearing of affidavits where, for reasons stated briefly in the affidavit, it is not practicable for the deponent to attend in the physical presence of a solicitor. The rules impose safeguards to ensure the integrity of the remote swearing.

Rule 9(3) outlines how affidavits may be executed by videoconference:

- The solicitor must be provided in advance with a copy of the affidavit and exhibits,
- The solicitor must be satisfied of the deponent's identity and also that the videoconferencing platform allows the deponent to see and hear the solicitor,
- The appropriate sacred text must be available to the deponent,
- During the videoconference, the deponent must identify each page of the affidavit and exhibits,
- After the videoconference, the signed affidavit and exhibits are sent to the solicitor, who, having confirmed that the documents are those identified during the videoconference, will complete the jurat. The jurat will indicate the date the affidavit was sworn by the deponent, where the solicitor was when witnessing the affidavit, and the fact that it was sworn by videoconference.

Unfortunately, the rules only apply to affidavits. Statutory declarations cannot yet be witnessed remotely. This distinction is due to the legislation governing statutory declarations, which requires statutory declarations to be signed *in the presence of* the person witnessing them.

Successful advocacy

Many solicitors will have found it difficult to arrange for affidavits to be executed during the pandemic, especially if the deponent was vulnerable, elderly, or unable to travel during lockdown

The Law Society successfully submitted to the High Court Rules Committee that statutory provisions requiring affidavits to be sworn *before* a solicitor would be satisfied by the new videoconferencing procedure. However, audio-visual swearing would be inconsistent with the statutory requirement that statutory declarations be made *in the presence of* a solicitor. Accordingly, the rules only apply to the swearing of affidavits.

The Society is also advocating for the introduction of corresponding rules in the District and Circuit Courts as soon as possible.

In practice, it may often be simplest for practitioners to have affidavits executed in the traditional manner. However, this is a welcome alternative, both during the COVID-19 restrictions and in other circumstances, including where clients are overseas or otherwise unable to attend in person.

A fuller analysis of the rules will be published in a forthcoming *Gazette*.

DIGNITY MATTERS: LAW SOCIETY LAUNCHES SURVEY ON BULLYING AND HARASSMENT

As we go to press, the Law Society will be inviting everyone on the Roll of Solicitors, as well as trainees, to participate in the 'Dignity Matters' survey at the end of March.

The survey will ask about respondents' subjective experience of previous/current work environments, specifically as it relates to bullying, harassment and sexual harassment. It is part of an evidence-based programme to address these issues in the profession and support a culture of dignity, respect, and inclusivity.

The consultancy firm Crowe has been appointed to deliver the survey, which is independent of the Law Society. Crowe will adhere to ethical research guidelines and protect participants' anonymity and confidentiality, and participants will not be bound in any way by their answers.

Recommendations will be determined by the results of this study, as well as the findings of the IBA's *Us Too?* report. A programme to implement the recommendations will follow upon approval by the Law Society Council.

Your voice, together with many others, has the potential to transform workplace culture and ensure dignity, respect, and inclusivity. Why not be part of the change, unite your voices, and have your say on dignity matters? Keep an eye out for the survey later this month.

Julie Breen (the Law Society's professional wellbeing project coordinator) is coordinating the roll-out of the Dignity Matters survey. If you have feedback or questions, you can email her at professionalwellbeing@lawsociety.ie.

COME ON SIRENE!

Ireland is now connected to the Schengen Information System (SIS II), which allows law-enforcement agencies across 30 countries to share and check information. The EU Council approved Ireland's connection last December, but it only became fully operational on 15 March.

Gardaí had to build and test the IT infrastructure and develop the training needed to complete the connection to SIS II. A new Supplementary Information Request at the National Entries Bureau (known as SIRENE) within the force is now responsible for the daily management of the SIS system. The system gives police forces and other agencies access to data on wanted and missing persons, people who may not have the right to enter or stay in the EU, and objects or vehicles that may have been stolen, misappropriated, or lost.

Ireland remains outside the Schengen Common Travel Area, but takes part in some policing cooperation arrangements that are part of the *Schengen Agreement*.

Minister for Justice Helen McEntee said that Ireland's connection to SIS II would be a "game-changer" for gardaí in their fight against cross-border crime. Commissioner Drew Harris added that the benefits to policing in Ireland could not be understated.

WELLBEING

Our 'Ask an expert' section deals with wellbeing issues that matter to you.

GHOST RIDERS ON THE STORM

Q I am a solicitor who has learnt (the hard way) over many years of practice how to look after my wellbeing and mental health. However, my self-care routines aren't working at the moment. Am I doing something wrong?

A As a child, I recall travelling across the Yorkshire Pennines in a minibus during a blizzard. It was dark, the storm was fierce, and the terrain treacherous. An anxious silence was broken by the driver saying, apparently to no one, and with a slight shake of his head: "Go on then!" Three heartbeats later, the rear of the bus hit a bend in the road. It was not a bad crash, but it was a crash. The driver took the wheel again and we made it home without further incident.

This anecdote has occurred to me a lot over recent weeks as I have listened to many people describing experiences of their good habits or 'positive mental-health practices' not working so well. Often these come with recriminations: "I feel bad, so I must be doing something wrong."

Positive psychology has much to offer in a time when we are being encouraged to mind our mental health almost as frequently as we are being reminded to stay two metres apart. However, we should be careful not to limit ourselves to two alternatives – to either (1) give in to our ailments, or (2) outrun them indefinitely.

American psychoanalyst Gary Greenberg suggested that, in the pandemic, the role of therapists might be one of 'cataloguing the losses' and, to an extent, this has been borne out. In addition to the obvious losses – life, health, income – everyone reading this will have their own story of smaller, yet significant, losses that couldn't have been imagined before the pandemic. I respectfully suggest that it is impossible to indefinitely outrun the aggregate grief accompanying these losses, no matter how advanced our strategies might be. Feeling bad in these unprecedented times is much more likely to be a consequence of very real circumstance than any personal failure. This is some storm we are driving through, after all.

The driver in my story realised the bus would crash and made an active, informed decision. Letting the bus slide was a demonstration of his skillset rather than evidence of a lack of skill: he relinquished, rather than lost, control. Through some blend of experience, training, intuition (and perhaps luck) he understood that, in that specific moment, wrestling to keep the bus on the road would likely lead to a worse outcome. I hope there might be benefit in this anecdote for anyone struggling to stay positive just now.

Many years ago, I told my therapist that I was afraid to cry in case I would never stop. I now know that equating 'allowing myself to feel' with 'loss of emotional control' is a common mistake. It is vitally important right now that we continue with the positive mental-health practices that we know help us – but we might also consider making space for the times when our usual habits don't work. Temporarily relinquishing control of our emotions is not the same as losing emotional control. Whether it is with a partner, a friend, a family member, a pet, or perhaps even a therapist, don't be afraid to say to your heart: "Go on then", and just allow yourself to feel, before taking the wheel again.

It is not always a choice between crashing or getting home safely. Sometimes, crashing the bus is a necessary part of the journey. The skill is knowing when and how to crash safely.

To submit an issue that you'd like to see addressed in this column, please email professionalwellbeing@lawsociety.ie. Confidentiality guaranteed.

This question and answer is hypothetical and was written by Matthew Henson (existential psychotherapist, trainer, group facilitator, and member of the Law School Psychological Services team: www.matthewhenson.ie). Any response or advice provided is not intended to replace or substitute for any professional, psychological, financial, medical, legal, or other professional advice.

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THERE MAY BE TROUBLE AHEAD

The Judicial Council's *Personal Injuries Guidelines* are likely to see a huge influx of cases into the already overworked lower courts. **Stuart Gilhooly** foresees trouble ahead

STUART GILHOOLY IS A PARTNER AT HJ WARD AND CO, SOLICITORS, LLP

OF COURSE, THE USUAL SUSPECTS WERE CLAIMING THE REDUCTIONS WERE NOT ENOUGH, THUS GIVING COVER TO THE INSURERS TO SAY THAT THEY STILL COULD NOT COMMIT TO A REDUCTION IN PREMIUMS

It must have been difficult to drown out the noise. Ever since the Judicial Council was set up in 2019, the singular focus of the media and the public has been on the publication of its *Personal Injuries Guidelines*. The power to compile them was very much an afterthought to legislation for a body that had been in embryonic state for some years beforehand. However, it became the driving force to transform a bill that had been ambling through the legislative process at a leisurely place, becoming a missile hurtling through the Dáil.

The level of expectation was enhanced by the loud entreaties of various business lobbies and the persistent whining of a disingenuous insurance industry. The judiciary, in the form of the Personal Injuries Guidelines Committee (PIGC) that had been provided with this thankless task, to their credit, refused to be swayed by attempts to influence their decision-making. The brazen efforts of ISME in compiling their own alternative 'book of quantum', which they forwarded to the committee, demonstrates the lack of basic understanding in some areas of Irish society of the constitutional requirement that judges remain independent of outside influence.

The PIGC, although entitled to consult with whomever they saw fit, decided that engagement with stakeholders about an issue that had been essentially tasked solely to the judiciary would be inappropriate – and this seemed a sensible course.

Striking the right balance

The result was a set of guidelines with which no one was satisfied – and that, counterintuitively, suggests they struck the right balance. Certainly, from the point of view of the injury victim, the cuts are severe and constitute at least 50% in places, and even more in others – particularly the extraordinary reduction in damages for a nose fracture, which appears to be about 10% of its previous value. Of course, the usual suspects were claiming the reductions were not enough, thus giving cover to the insurers to say that they still could not commit to a reduction in premiums.

Experience tells us that the reality is that the insurers will never reduce premiums until it suits them, most likely for market reasons, and the business lobbies will never be happy until injury victims' compensation is so small that making a claim is no longer worthwhile.

So, what does it all mean?

As far we know at time of writing, there will be a transition period, which ensures that injustice does not arise where a claimant has rejected a PIAB award or where court proceedings have been issued.

The commencement date for the operation of the guidelines has not yet been formalised, but it is likely to be early in April. From that date, the guidelines will apply to any claim that does not fall within the exceptions referred to above – that is, the PIAB *Book of Quantum* will continue to apply to any proceedings issued and any PIAB awards rejected before the commencement date.

This will leave a two-tier system for a time. It is intended that, at the conclusion of proceedings, the guidelines will be opened by the parties and submissions made as to what section applies to the injury or injuries in question. It would seem inevitable that, if the *Book of Quantum* applies to the proceedings in question, as it clearly will for some time, it too should be opened in a similar manner in order to avoid confusion.

Matter of regret

It is a matter of great regret that the derogation for the guidelines does not also extend to claims currently before the PIAB. The argument is well made that many such claimants may have rejected offers made under the *Book of Quantum* regime, and

PIC: SHUTTERSTOCK

will receive awards or offers of a much lower nature. This may yet be the subject of a challenge, but would seem that it is in a different category of claim than those where awards have been rejected or proceedings issued. While the latter cases involve costs penalties where the values have changed to such a degree, it appears that any case that has not yet left the PIAB merely falls into a class where bad luck applies.

Any offers made are of a 'without prejudice' nature and not admissible in any court challenge that may be taken, so it is hard to see where the injustice arises, given that the guidelines must come into being at some point, and there will always be a claimant that will feel hard done by. This doesn't mean that it's fair, but a political decision has been made on foot of the advice of the Attorney General, and it is not going to change.

The effect of the guidelines on practice remains to be seen, but it's clear that it represents a sea change. The main victim of the cuts are soft-tissue injuries, particularly those of a minor nature. While the *Book of Quantum* does not provide a direct comparison, the reduction to €500 to €3,000 for six months' neck injuries; €3,000 to €6,000 for one year; and €6,000 to €12,000 for two years represents at least 50% on the original values.

While this is clearly not a problem for the many people who have never had such an injury, it will result in an injustice in some cases where the effect for that period was severe, but a full recovery occurred early.

Judicial discretion

The guidance provided by the Judicial Council does ensure that, where more than one injury occurs, the damages cannot accumulate by direct reference to the appropriate figure to each individual injury, but rather by the judge selecting the most significant one, and then providing for an uplift to reflect the other injuries suffered. This guidance does provide discretion for a judge in determining the level of the uplift.

This is not the limit of a judge's discretion. Section 22 of the *Civil Liability and Courts Act 2004* has been amended to provide stronger wording. The amendment requires a judge to have regard to the guidelines. Where it differs from the previous wording is the change that now requires a judge to provide reasons for departing from the guidelines. When the section was originally enacted, it allowed a judge to take other matters into account besides the *Book of Quantum*, so the requirement to provide reasons is a very significant departure.

It is likely, however, that judges will exercise, sparingly, whatever remaining discretion they have to award outside the guidelines, and reserve it for exceptional cases.

The result is likely to be a huge influx of cases into the already overworked lower courts. The High Court – which, in fact, is currently the best-resourced original jurisdiction – will see a large reduction in its caseload, which will feed into the Circuit Court. While there will be a consequent domino effect of some of its proceedings feeding into the District Court, both courts will require extra judges, courtrooms and support staffing. In the likely event that such further resourcing will not be forthcoming, substantial delays are inevitable.

The guidelines are accessible at www.judicialcouncil.ie/publications, and all practitioners in this area should read them carefully and familiarise themselves with them. They are due to be reviewed in three years' time. g

JUDGE DUTY

'Knowing the judge' is as important to a litigator as the research and legal arguments presented, and can distinguish the 'great' practitioner from the simply 'ordinary'. Here's the science bit, explains **Brian Barry**

DR BRIAN BARRY IS A SOLICITOR AND LAW LECTURER AT TU DUBLIN

IN OTHER JURISDICTIONS WHERE JUDICIAL TRAINING IS MORE ADVANCED, EXPERIMENTAL STUDIES HAVE FACILITATED JUDGES' MEANINGFUL SELF-REFLECTION ON THEIR PRACTICE AND HELPED THEM TO LEARN FROM EACH OTHER IN A SYSTEMATIC WAY

Before entering the courtroom, lawyers will carefully test their evidence and thoroughly rehearse how each of their factual and legal arguments will play out. But as every litigator knows, one of the biggest factors that will affect how they finally present their case will only be known on, or shortly before, the day: who is the judge?

Although litigation solicitors and their clients rightly expect whoever they appear before to be excellent, objective, and consistent decision-makers, judges are, of course, human. This makes 'knowing the judge' as important a skill as any for the litigation lawyer; one that distinguishes the great practitioner from the ordinary. Yet what is it to 'know' the judge, and what is the measure of that?

Subtle factors

A growing and increasingly sophisticated body of research from a variety of academic disciplines has emerged in recent years, scientifically testing and measuring how subtle but very real factors beyond the law affect how judges judge.

Psychologists, political scientists and economists, among others, have demonstrated how psychological effects, numerical reasoning, implicit biases, court rules and processes, influences from political and other institutions, and new technologies can all affect judicial decision-making in different contexts.

Among the more memorable recent studies on what can make the difference in courtroom decision-making are those that have considered whether judges have had their lunch, the wavering fortunes of the sports team they support – or even, in one experiment on a group of German judges, how the roll of dice can affect sentencing decisions.

These striking examples aside, this scholarship has reached a level of sophistication and depth that makes knowing about it indispensable for the litigation lawyer looking to hone their skills of 'knowing the judge', and useful for judges who want to understand the science that speaks to their everyday experiences on the bench. What kinds of insights can this research provide for the lawyer, the judge and the Irish judiciary as a whole?

Hindsight bias

In a negligence claim, a judge already knows about the harm that has come the plaintiff's way. They must necessarily judge with the benefit of hindsight.

But, when evaluating whether the defendant's conduct was actually negligent, can the judge push the tendency to think 'that was obviously going to happen all along' out of their mind?

Judges are undoubtedly cognisant of hindsight bias. For example, in high-profile litigation concerning the cervical screening programme (*Morrissey v Health Service Executive and Others*), both the High Court and Supreme Court reflected on how hindsight bias can lead to decision-making errors.

Nevertheless, might some judges sometimes perceive the connection between a defendant's conduct and the plaintiff's harm as stronger and more inevitable than it actually was when the harm occurred?

While some experimental studies point to judges' impressive ability to suppress hindsight bias – particularly in criminal law matters – other studies suggest that, in negligence cases, the very fact of knowing the outcome can make a difference in judges' evaluations of whether the defendant breached their duty of care.

Crunching the numbers

Two live issues for the Irish judiciary at the moment are providing guidelines for damages in personal injuries cases and for sentencing. These are situations where judges must crunch the numbers, converting the qualitative into the quantitative.

On 6 March, the Judicial Council adopted the *Personal Injuries Guidelines*. Damages caps are also on the cards after the Law Reform Commission concluded that the damages-capping

model in the recently enacted *Judicial Council Act 2019* meets constitutional tests.

Research on the effects that damages caps can have on judges' numerical reasoning is worth considering. While caps will, of course, cut out the possibility of excessively high awards, studies demonstrate that they can also have the paradoxical effect of drawing the average level of awards higher than before their introduction, because the amount set by the cap itself serves as an anchor.

This is an example of the 'anchoring effect': when making a numerical judgement, people commonly rely on an initial value available to them.

Furthermore, those tasked with implementing new sentencing guidelines should consider research demonstrating how guidelines can influence sentencing patterns in inadvertent, unexpected ways.

Take, for example, the 'framing effect': the way a numerical value is presented or 'framed' changes a decision-maker's perception of it. In the 1990s in Finland, the average length of sentences meted out for theft dropped after sentencing legis-

THE WAY A NUMERICAL VALUE IS PRESENTED OR 'FRAMED' CHANGES A DECISION-MAKER'S PERCEPTION OF IT

LAW SOCIETY OF IRELAND

IMPORTANT NOTICE ABOUT PAPER VERSIONS OF THE 2021 LAW DIRECTORY

Solicitors who want to receive a paper version of the Law Directory in 2021 need to notify the Law Society by 23 April 2021.

To notify the Law Society, log on to the Law Society website and go to the Law Directory section. Amend your profile by ticking the box that confirms your **'Opt In'** preference at:
https://www.lawsociety.ie/Dashboard/lawdirectoryupdate/

Transitioning to a Greener More Convenient Resource

Following member requests and a decision by the Law Society Council, the Law Directory is becoming a digital resource that can be accessed on PCs and mobile phones. Solicitors can access the Directory as a mobile-friendly site or download an Apple or Android app in order to access practitioner details that are updated throughout the year.

It will not be possible to supply paper versions of the 2021 Law Directory to solicitors who have not amended their profile to confirm their 'Opt In' preference by 23 April 2021.

If you encounter problems in amending your profile - please contact Shane Farrell by email at: s.farrell@lawsociety.ie or by telephone at: 01 672 4937.

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lation was reframed to express sentences in days rather than in months.

Particularly intriguing are experimental studies where judges bravely serve as the judicial equivalents of lab rats. This research has reached a tipping point – it is methodologically robust enough for Irish judges to consider undertaking equivalent studies.

This could play a useful role in education programmes to be prescribed through the Judicial Council. In other jurisdictions where judicial training is more advanced, experimental studies have facilitated judges' meaningful self-reflection on their practice and helped them to learn from each other in a systematic way.

This research could also inform the development of selection exercises used for recommending candidates for judicial office, should a new appointments commission be established.

Strong reputation

Despite recent controversies, the Irish judiciary continues to enjoy a deservedly strong international reputation.

While Chief Justice Frank Clarke's tenure has been characterised by an emphasis on public engagement, perhaps a characteristic of the next chief justice's tenure could be to fully embrace judicial scholarship and to apply it.

PIC: SHUTTERSTOCK

Although the picture this body of work paints may sometimes be pessimistic (although, not always – a recent study analysing over 5,000 decisions of the Irish Supreme Court indicated no evidence of political partisanship in decision-making), this research is fundamentally geared towards improving justice systems.

This research can help lawyers to be more categoric and certain in their advice, better able to respond to their client's all-important question: 'what are my chances?' For judges and the judiciary, it will help them strive for better, fairer justice through more consistent decision-making.

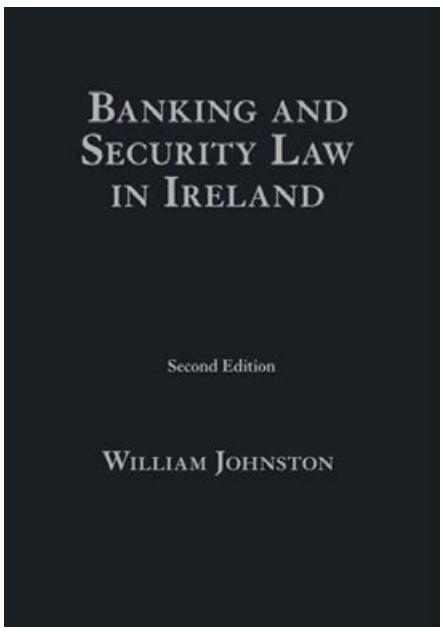
It's time to embrace it. g

How Judges Judge: Empirical Insights into Judicial Decision-Making is published by Routledge.

WHILE CAPS CUT OUT THE POSSIBILITY OF EXCESSIVELY HIGH AWARDS, THEY CAN HAVE THE PARADOXICAL EFFECT OF DRAWING THE AVERAGE LEVEL OF AWARDS HIGHER THAN BEFORE THEIR INTRODUCTION

BANKING AND SECURITY LAW IN IRELAND (2ND EDITION)

William Johnston. Bloomsbury Professional (2020), www.bloomsburyprofessional.com. Price: €250.75



This book is a follow-up to the first edition, published in 1998. The changes in the area in the intervening period have been monumental. These changes have resulted from a vast array of case law that occurred after the 2008 financial crisis, but also as a result of legislative change.

The two most significant reforming pieces of legislation in this area are the *Land and Conveyancing Law Reform Act 2009*, which repealed and replaced the ancient legislation underpinning all mortgages and charges, and the *Companies Act 2014*, which brought about many fundamental changes to company law. Perhaps most relevantly for practitioners in the area of banking and security law, major changes were introduced by the 2014 act in areas such as guarantees, examinerships, insolvency, and areas of security.

This book deals with all of these developments in a very comprehensive manner, handling its subject matter very well – and it is an engaging read. It is interspersed with case law and commentary, with incredibly extensive coverage of the areas of loan agreements, guarantees and security over land, moveables, debts, bank accounts, and shares. Floating charges and registration of company security are also dealt with very comprehensively (and practically). A most welcome addition is the inclusion of a chapter on 'Demand and appointment of a receiver'. This chapter sets out recent issues in respect of which there has been extensive litigation in recent years, including the wording of letters of demand.

This book should be regarded as an invaluable addition to the knowledge in this area, and it will be of immense assistance to practitioners operating in this rapidly evolving area of law. The publication of the second edition is timely, given the fact that many lenders are currently reviewing security following the COVID crisis.

In the coming months, it is expected that these security reviews will, unfortunately, result in enforcement of security. This book will be a great resource for legal practitioners and others working in the areas of banking and security.

Sinead McNamara is a partner in FitzGerald Legal & Advisory LLP, 6 Lapps Quay, Cork.

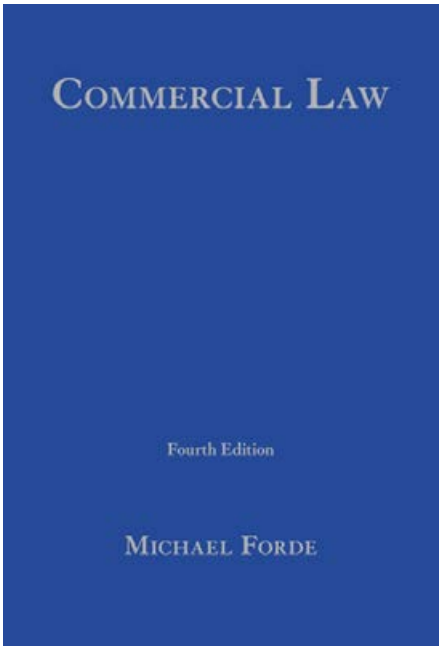
COMMERCIAL LAW (4TH EDITION)

Michael Forde. Bloomsbury Professional (2020), www.bloomsburyprofessional.com. Price: €165.75 (e-book €149.28).

This book undertakes the huge task of explaining several vast areas of law, and it does so admirably and comprehensively.

Taken literally, 'commercial law' would encompass all law that regulates those engaged in commerce. Dr Forde addresses this point in his introductory chapter, noting Prof Roy Goode's description of it as "the branch of law which is concerned with rights and duties arising from the supply of goods and services". He puts the law in its historical, general, and European contexts, observing the evolution of codes of law, not only to define obligations of parties, but more often recently to redress inequalities of bargaining power.

The chapters that follow take us through the bodies of law that fall into this description, starting with agency, and then moving into the areas of sale of goods and supply of services. The interlocking areas of payment and security then follow. These are followed by insurance, international trade, intellectual property, competition, regulated industries, dealing with the State, arbitration, and concluding with consumer protection.



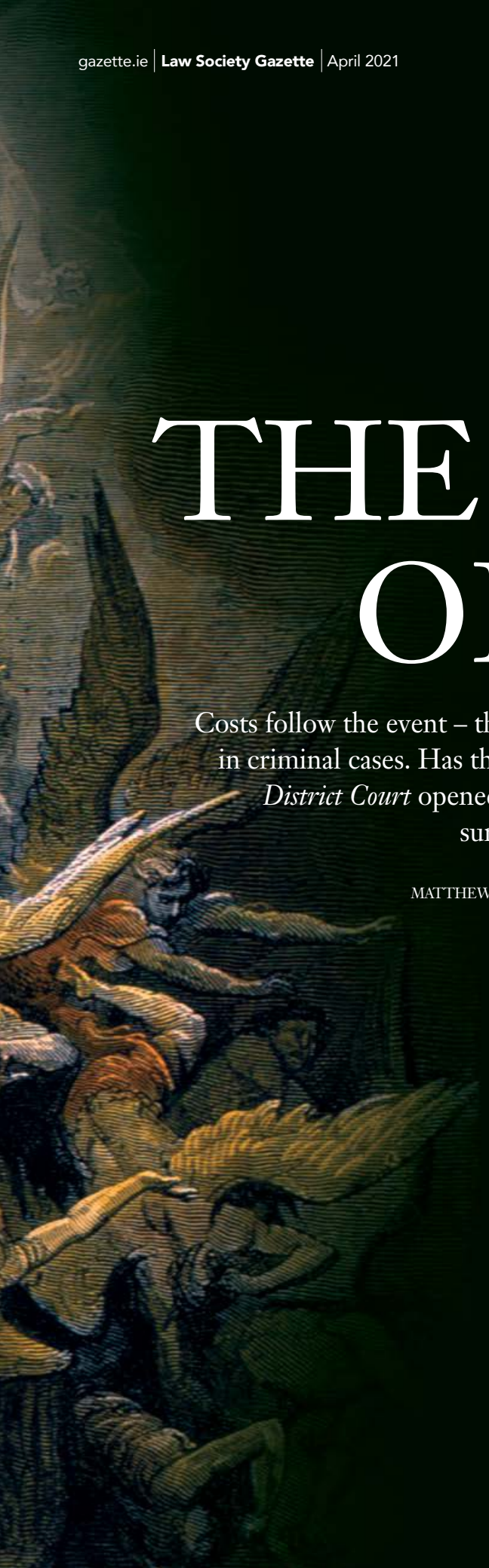
Given that there are books that drill more deeply into many of these individual areas (or indeed separate aspects of them), this book must, in some cases, necessarily provide more of an overview. But that is essential and most welcome for those who are not experts in these areas. What distinguishes many of these areas of law is the multiplicity of their sources: for example, the chapter on international trade, which will no doubt become even more complex post-Brexit, deals extensively with the matrix of treaties, law, conventions and practices that regulate this area of commerce.

Also deserving of special mention is the chapter on intellectual property, which provides an extensive analysis (and demystification) of the many interlocking rights that can subsist under this heading.

Expansive in its scope and pleasing to read, we can be grateful to Dr Forde for this expert and timely publication, which will be an essential component of the solicitor's library.

Paul Egan SC is a senior consultant with Mason Hayes & Curran LLP.

PIC: ALAMY



THE WAGES OF SIN

Costs follow the event – though there have been exceptions, specifically in criminal cases. Has the amendment of order 36 of the *Rules of the District Court* opened the Gates of Hell? **Matthew Holmes** surveys the Ninth Circle

MATTHEW HOLMES IS A DUBLIN-BASED BARRISTER

AT A GLANCE

- **Costs follow the event: the loser pays the winner's costs**
- **It used to be that a defendant in a criminal case could not seek their costs against the prosecution, even if they were acquitted**
- **The rules have changed, particularly recently for District Court cases**

Costs follow the event. Traditionally, this has been the rule in almost every area of law. If a case is brought, the loser has to pay the winner's costs, as the winner should not be penalised for upholding their legal rights.

As one of the most important rules, it is subject to a number of exceptions – perhaps the biggest are found in criminal law. A defendant in a criminal case could not seek their costs against the prosecution even if they were acquitted. In *People (Attorney General) v Bell* (1969), the Supreme Court noted that this rule was centuries old. And the rules have now changed, particularly recently for District Court cases.

PIC: ALAMY

Order 36 of the *Rules of the District Court* was amended on 29 September 2020 by SI 496/2020 (*District Court (Order 36) Rules 2020*).

It now reads: "Where the court makes an order in any case of summary jurisdiction (including an order to 'strike out' for want of jurisdiction), it may make an order in accordance with law ordering any party to the proceedings to pay to the other party such costs and witnesses' expenses as it shall think fit to award."

Previously this rule had read: "Where the court makes an order in any case of summary jurisdiction (including an order to 'strike out' for want of jurisdiction), it shall have power to order any party to the proceedings *other than the Director of Public Prosecutions, or a member of the Garda Síochána acting in discharge of his or her duties as a police officer* [emphasis added], to pay to the other party such costs and witnesses' expenses as it shall think fit to award."

Junipers and cedars gloat

The changes to this rule were introduced following the 2019 decision of the Court of Appeal in *DPP v District Judge McGrath*. Here, the accused was alleged to have assaulted a wildlife ranger, and alleged in

turn that he, in fact, had been assaulted by the ranger. The case was struck out, although the accused, unusually, objected to the DPP's request to withdraw the case because he wanted to clear his name. He was awarded his costs against the DPP. This award of costs was quashed by the High Court, but was upheld by the Court of Appeal.

The Court of Appeal held that exempting the DPP and members of An Garda Síochána, acting in the course of their duty, from having costs orders made against them was *ultra vires* the delegated power granted to the District Court Rules Committee. The court noted that, in every version of the *District Court Rules* that had existed, there had been a prohibition on costs against the DPP, the Attorney General (who prosecuted prior to the DPP), and against gardaí acting in the course of their duty.

Mr Justice Edwards accepted that there may be excellent policy reasons why the DPP and members of An Garda Síochána acting in the course of their duty should be exempted from having costs orders made against them in summary criminal proceedings. However, he was of the view that such a policy could only lawfully be implemented by means of primary legislation.

Limbo

Despite the fact that this statutory instrument was introduced, it is still open to the Government at any stage to introduce legislation to bring the law back to its prior state. Under section 8(2) of the *Garda Síochána Act 2005*, gardaí prosecute in the name of the DPP. This means that it is unlikely that costs will be awarded against individual gardaí directly, despite the rules allowing for this. Instead, it is likely that costs will be awarded against the DPP. It may be that costs will be awarded against individual gardaí if very serious allegations are made against them during the course of a case, which are upheld by the court. In *Bell* (the first-ever case where costs were awarded to the defence here), it was alleged that the gardaí had threatened the defendants into making false confessions.

At the moment, there is no scale for costs in criminal cases, as there is for civil District Court cases. Further, there is nothing in order 36 or the legal-aid rules preventing an award of costs against a defendant in criminal cases. These awards are sometimes sought in non-garda prosecutions brought by statutory bodies, which are most frequently heard in Court 8 in the Four Courts. In many of these prosecutions, there are statutory provisions for the payment of the prosecution's costs by the defendant. On rare occasion, the costs in these cases can be higher than any financial penalty imposed. It would, therefore, appear that costs in criminal cases would be full costs, not yet limited by any scale.

A place for owls

In *Foley v Clifford* (1946), it was held that a costs order in a criminal case could not be appealed to the Circuit Court. The case was dismissed, but an order for costs was made against the accused. He could not appeal, as this was not a "penal or other sum" within the meaning of section 18 of the *Courts of Justice Act 1928*. However, this is an old Circuit Court decision and not a binding precedent.

The award of costs against prosecutors has been allowed for some time in the circuit and superior courts, and the law here might be used as guidance in summary cases. Privately retained defence teams in these cases are significantly rarer than they would be in the District Court, but are not unheard of.

The Court of Appeal, in *DPP v T O'D (No 2)* (2017), noted that: "Applications for costs by successful defendants in criminal cases are relatively rare because most are processed with the benefit of State-provided legal aid."

Guidance was given as to costs by the Court of Criminal Appeal in *DPP v Bourke Waste Removal Ltd* (2012). There, it was held that the costs of an unsuccessful Central Criminal Court prosecution for breaches of the *Competition Acts* could be awarded against the DPP. The defendants had been acquitted on all counts by the jury. The trial judge awarded them their costs, and this was appealed by the DPP pursuant to section 24 of the *Criminal Justice Act 2006*. The court referred to what it described as the "helpful judgment" of Charleton J in *Director of Public Prosecutions v Kelly* (2007), as well as a judgment of Cooke J in *Director of Public Prosecutions v McNicholas* (2011). In *Kelly*, Charleton J had provided ten questions to be relied on in deciding on costs.

In *Bourke*, the court reduced this to four questions:

1) Was the prosecution warranted, in regard to the matters set forth in the book of evidence, what actually transpired at the trial, and what responses were made by or on behalf of the defendants prior to the trial?

> THERE IS NO SCALE FOR COSTS IN CRIMINAL CASES, AS THERE IS FOR CIVIL DISTRICT COURT CASES. FURTHER, THERE IS NOTHING IN ORDER 36 OR THE LEGAL-AID RULES PREVENTING AN AWARD OF COSTS AGAINST A DEFENDANT IN CRIMINAL CASES

> THE COURT OF APPEAL HELD THAT EXEMPTING THE DPP AND MEMBERS OF AN GARDA SÍOCHÁNA, ACTING IN THE COURSE OF THEIR DUTY, FROM HAVING COSTS ORDERS MADE AGAINST THEM WAS *ULTRA VIRES* THE DELEGATED POWER GRANTED TO THE DISTRICT COURT RULES COMMITTEE

2) Had the prosecution conducted themselves unfairly or improperly in relation to the defendants, by oppressive questioning or otherwise, and had the prosecution been pursued with reasonable diligence and expedition?
3) What was the outcome of the prosecution? If an acquittal, was this on foot of a direction granted by the trial judge and, if so, on what basis?
4) How had the defendants met the proceedings, both prior to and at trial, and had they associated themselves with undesirable elements, or otherwise contributed to drawing suspicion on themselves?

Purgatory

As well as providing these four questions, the Court of Appeal laid out the following general principles it would rely on when dealing with costs and cost appeals:

1) That the court would not interfere with the exercise of a discretionary judgment of a trial judge in relation to costs, unless it was satisfied that such exercise was substantially flawed, or was such that, in the interests of justice, it ought to be set aside.
2) When the trial court exercises its discretion in criminal cases to award costs, that discretion is not coupled with any specific presumption under the *Rules of the Superior Courts 1986* that costs should follow the event.
3) That, in exercising the court's costs jurisdiction, the actual result of the prosecution was more than a purely neutral factor. The actual result was not determinative of orders for costs following the event, but was the starting point of the court's consideration on costs, and was to be considered in conjunction with other relevant circumstances.

Final judgement

Of these principles, the latter two are the most important in summary cases. One helpful case is *T O'D*. There, the accused had been convicted of the historical sexual assault of a schoolboy. The conviction was quashed due to an error in the trial judge's ruling, and permission was refused for a retrial.

The Court of Appeal applied the four questions from *Bourke*, and awarded the defendant his costs. It found that:

1) The prosecution was warranted,
2) The case against the appellant was one of very significant antiquity,
3) While the outcome of the prosecution in the Circuit Criminal Court was a verdict of guilty, that verdict was quashed by order of the court, making it appropriate that the court approach the application for costs as if the appellant had been acquitted, having regard to the reasons for his conviction appeal being allowed, and
4) There could be no criticism as to the manner in which the appellant has met the proceedings.

For further discussion of *Bourke*, see *Dowling v Bord Altranais agus Cnaimhseachais na hÉireann* (2017).

The majority of criminal cases where someone will pay for their own legal representation are heard in the District Court. This may be because the case is too minor, so that legal aid wasn't awarded; that the client's means are such that they can afford their own solicitor; or that they want a specialist who doesn't work for legal aid.

This change may have greater ramifications, meaning that some weaker cases are not prosecuted for fear of costs implications. On the other hand, some may be reluctant to award costs; or primary legislation may be brought in. Time will tell. g

LOOK IT UP

CASES:

- *Director of Public Prosecutions v Kelly* [2007] IEHC 450; [2008] 3 IR 202
- *Director of Public Prosecutions v McNicholas* [2011] IECCC 2
- *Dowling v Bord Altranais agus Cnaimhseachais na hÉireann* [2017] IEHC 641
- *DPP v Bourke Waste Removal Ltd* [2012] IECCA 66; [2013] 2 IR 94
- *DPP v District Judge McGrath* [2019] IECA 320
- *DPP v T O'D (No 2)* [2017] IECA 173
- *Foley v Clifford* [1946] IR Jur Rep 53
- *People (Attorney General) v Bell* [1969] IR 24

LEGISLATION:

- *Courts of Justice Act 1928*, section 18
- *Criminal Justice Act 2006*, section 24
- *District Court (Order 36) Rules 2020* (SI 496/2020)
- *Garda Síochána Act 2005*, section 8(2)
- *Rules of the District Court*, order 36
- *Rules of the Superior Courts 1986*

STONY GREY SOIL

Lynda Smyth has a clear perspective on work in a rural practice. She speaks to **Mary Hallissey** about the challenges of helping to run a busy practice while raising four children under the age of nine

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

Mother of four Lynda Smyth is a busy solicitor working in a provincial practice that caters to a wide farming and SME clientele in the hinterland of Castleblayney, Co Monaghan. A partner in Coyle, Kennedy, Smyth (founded in 1906), the Ballybay native has some acute observations on how legal practice has changed since she qualified. Coming from a business background, she knows that it's not about competition on fees alone – in a rural practice, you have to have a good rapport with your clients.

"Clients want to feel a connection with you – you get to know them, their businesses, and their families. The concept of the 'family solicitor' is still very strong in rural practices. One of the main challenges for any solicitor in private practice is the level of fees that are charged. Clients are a lot more conscious of their legal spending, and often aren't aware of the work involved in a transaction. They continually want better value for money, so this means solicitors must be increasingly competitive in the fees they charge."

Conveyancing, probate and litigation are still the bread-and-butter of the country practice.

ALL PICS: MANUEL LAVERY

> CLIENTS WANT TO FEEL A CONNECTION WITH YOU – YOU GET TO KNOW THEM, THEIR BUSINESSES, AND THEIR FAMILIES. THE CONCEPT OF THE 'FAMILY SOLICITOR' IS STILL VERY STRONG IN RURAL PRACTICES

And increased regulation has resulted in greater responsibility and pressure on smaller practices, she muses. "It can be hard to keep on top of all the regulatory and management requirements and still get your work done," she concedes. "The buck stops with you on everything, and that can be stressful."

A country practice

Conveyancing has become increasingly complex, with a lot more administrative work. The responsibility for these increased administrative burdens falls squarely on the shoulders of the legal practitioner.

"I find conveyancing is a lot more time-consuming than other types of legal work. While, in many ways, the title system hasn't changed – and has even simplified – the introduction of extra [property-related] taxes all add to the administrative workload of conveyancing-heavy legal practices. It can be time-consuming to explain the various property taxes to clients, and we often end up having to register and pay for these taxes as part of a conveyance. A commercial client would be familiar with these concepts, but many clients are unaware of them."

Rural property transactions have complexities that urban property transactions may not have, such as wayleaves, visibility agreements, rights of way, and so on. And the farming community has difficult decisions to make in terms of transfer of lands, in that they must weigh up their likely future need for nursing-home care, and where the money for that will come from if they transfer the farm.

"There is a multitude of potential pitfalls when dealing with a conveyance, more so than with probate, litigation or criminal matters," she says. "You have a certain dread of something going wrong, even though you do your best to do everything right. There is a sense that you are responsible for everything, even mapping and engineering matters, which are obviously not our areas of expertise," she reflects. "It's fast-paced and wrinkle-inducing, and not all that lucrative!"

Neighbours

However, Lynda brightens as she speaks glowingly of her wonderfully supportive colleagues. Monaghan solicitors have both an email group and a WhatsApp group, and are happy to share information and knowledge – and the odd joke.

This support is invaluable, she says. "I have some great role models among my Monaghan colleagues – mothers like me who manage to run successful practices and juggle busy home lives."

Monaghan people are very industrious, she says, with a strong entrepreneurial streak, and they are very fair in their dealings. The proximity to the border breeds ingenuity and resilience, she notes. "They take no nonsense and are straight-talking."

And there is a high proportion of self-employed people in the county, with many successful homegrown businesses. Monaghan is known for its engineering, construction, and agri-food enterprises – nine out of ten employers in the county are involved in food production.

Many of Lynda's clients are welcomed in workwear and muddy boots – Lynda doesn't bat an eyelid due to her farming background. "I dress more informally too. It's not unusual to find me in runners." And it's runners she needs, as she dashes to school pick-ups, the childminder, court, and back home in the evenings to get the children ready for bed – before gearing up for a second shift.

She works extremely long hours, but loves her work because she says there's always something new to be learned. "I love the variety of a general practice, hopping from probate, to personal injuries, crime and property. It's so interesting – you're getting an insight into everybody's life – we have a wee flavour of all these different lives."

Home and away

It was the same when Lynda was growing up, helping her parents run the family pub and hearing the customers' stories.

Her parents were also hardworking multi-taskers, being farmers and undertakers, as well as publicans. "There was never a dull moment in our house as kids – if we weren't serving customers in the bar, we were helping prepare a coffin!

"We were brought up in the pub, as we lived above it, so we ate our dinner, did our homework and entertained our friends in the pub. My siblings and I actually all met our spouses in the family pub."

While there are no lawyers in her family, Lynda, the youngest of four, was drawn to the law and was the first in her family to go to university – to NUI Galway, where she excelled. This was followed by a training contract at A&L Goodbody, which was a great foundation for a legal career, with excellent methodology and attention to detail.

"When I came to Dublin, I was a bit overwhelmed. I didn't even know what a bagel was, and there was an entire shop in the IFSC selling bagels!" she laughs.

But ultimately, city life in a big city firm just wasn't for Lynda. With a house-building project already underway, a future in her home county of Monaghan was always on the cards.

On the day she received her parchment at Blackhall Place, in February 2006, her future husband Damien proposed, slipping a ring on her finger on the James Joyce bridge over the River Liffey. The couple married the following October. "I'm with Damien since I was 18 and he's a great husband and father – he's very hands-on at home and supportive to me.

"I'm a home bird," she confides, and was delighted to be offered a position at Coyle, Kennedy, Smyth when she qualified. "I landed in Monaghan, and it was a steep learning curve in terms of the work they were doing. It was a different kind of law from the commercial work I was trained in."

Reflecting on the lot of the self-employed professional, Lynda speaks plainly: "Any business is only as good as its referrals, and the principals must stay on top of their game all the time, to keep bringing in business, while working at speed."

Sons and daughters

But being self-employed has brought its own challenges: "You do have to plan ahead so you have a contingency plan for holidays and maternity leave, and the work is still on your desk when you get back.

"The main benefit I see in terms of being self-employed is the flexibility. You get the work done, but I can collect the kids from school if needed or bring them to a football match."

Lynda acknowledges that there's no high-flying lifestyle accruing from work as a rural solicitor, however rewarding and privileged that work may be. Though the cost of living is low in Monaghan, relative to the city, Lynda and her husband and family have a modest, though comfortable life, only because of all their hard work.

Lynda also sacrificed extended time with her four babies and was back at her desk within a few weeks of giving birth each time, often with a nursing newborn in tow.

"It was great to be able to take the babies into work while I was still feeding them. I popped the Moses basket in the corner and worked away. Clients passed no remarks," she says.

SLICE OF LIFE

Influences?
■ My dad, Liam. He's just so wise – in my eyes anyway! In terms of events, that would be the birth of my four children – I'll never forget how amazing it felt seeing them for the first time.

Book in her bag?
■ *Into the Woods* by Tana French. My favourite book is *The Catalpa Tree* by Denyse Devlin. It has stayed with me over the years when I can't remember a lot of the others.

Foot-tapper?
■ Country – anything you can jive to!

Cats or dogs?
■ We have a Pomeranian called Petey. He's great with the children.

Film favourite?
■ *Dirty Dancing* – it's a classic! Closely followed by *Footloose*.

Must-visit eatery?
■ The Courthouse in Carrickmacross – they do fabulous fish dishes.

Favourite sports star?
■ My wee man Liam plays soccer and GAA – he's my favourite sportsperson.

> THERE WAS NEVER A DULL MOMENT IN OUR HOUSE AS KIDS – IF WE WEREN'T SERVING CUSTOMERS IN THE BAR, WE WERE HELPING PREPARE A COFFIN! WE WERE BROUGHT UP IN THE PUB, SO WE ATE OUR DINNER, DID OUR HOMEWORK, AND ENTERTAINED OUR FRIENDS IN THE PUB

She acknowledges the 'mammy guilt', describing how she cried going back to the office without her first baby – instead, the childminder was getting to mind her while she was at work.

With four children under nine, Lynda describes having no free time for herself, but she gets involved in her kids' activities where possible – she's even taken to learning the banjo with a group of nine-year-olds!

"In years to come, I'll probably look back and say returning to the office so soon wasn't the right thing to do – but at the time I didn't feel I had any other options, because, in a small practice, you are the product. For anyone self-employed, it can be difficult

to take full maternity leave, especially in a small town where you work so hard to build relationships and establish a client base.

"I guess every self-employed mother probably has the same issues. If I take six months' maternity leave, I'm not generating income for the business, plus putting pressure on my colleagues.

"It can be hard to find a suitable locum," Lynda adds, "and, of course, you still have to keep yourself when you are off. Your overheads are still there, rent and rates, staff and wages, insurance. And the law changes daily. There are practice directions popping into the inbox regularly.

"For me, it was easier just to go back to work and push through it – but it was hard, and I would be lying if I said I didn't feel the pressure and the guilt," she admits.

Called to the bar – Lynda with her mam Anna and dad Liam in pre-COVID days

The secret life of us

While acknowledging that it's good to have a hunger and something to strive for, at the end of the day Lynda is not driven by financial rewards.

"Being in Monaghan means I'm close to home and close to my family, which means everything to me really. That is my reward. I still work in my parents' pub on busy occasions, and I'm very close to my parents and siblings, who all live locally."

The rural practice, like everything else, is changing – and fast. PIAB and the new regime in personal-injury awards will mop up a lot of that business for small practices, she believes.

There is a downward pressure on fees, and many areas of general practice are becoming more specialised. It's challenging and worrying, but on balance, she loves her work, and jokes: "To be honest, it's easier to go to work than stay at home with four kids!" g

AT A GLANCE

- In recent years, the legislature has reduced the time for bringing certain actions, and the courts have acceded to a number of applications to dismiss proceedings for delay
- A number of applications to set aside renewals have worked their way through the High Court and resulted in conflicting opinions as to the applicable test, along with criticism of the adequacy of reasons provided in some grounding affidavits

GETTING YOUR HOUSE IN ORDER

The *Rules of the Superior Courts (Renewal of Summons) 2018* amended order 8 of the rules, with effect from 11 January 2019. **Caoimhe Ruigrok** gets her ducks in a row

CAOIMHE RUIGROK IS A DUBLIN-BASED BARRISTER AND ACCREDITED MEDIATOR

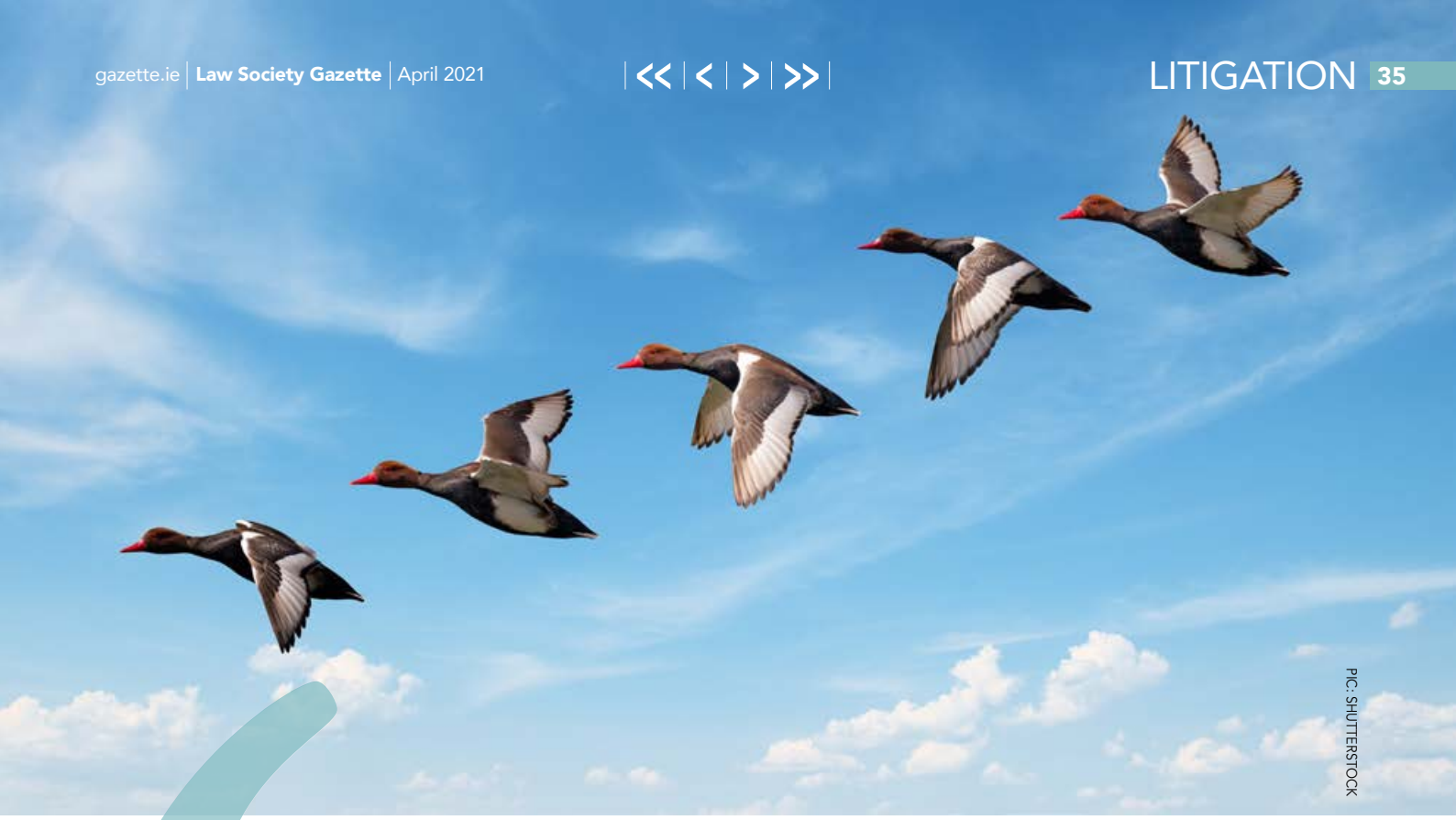
Recently, a number of applications to set aside renewals have worked their way through the High Court and resulted in conflicting opinions as to the applicable test, along with criticism of the adequacy of reasons provided in some grounding affidavits. The position has recently been clarified by the Court of Appeal in *Murphy v HSE* (2021).

In recent years, the legislature has reduced the time for bringing certain actions, and the courts have acceded to a number of applications to dismiss proceedings for delay. The reasoning is to ensure a plaintiff commences proceedings within a reasonable period and that the *Statute of Limitations* must be available to both sides of litigation on a reciprocal basis (*Moloney v Lacey Building and Civil Engineering Limited*).

The courts recognise that the progression of cases and the avoidance of delays in litigation does not rest solely with the parties alone (*Moynihan v Dairygold Cooperative Society Ltd*; *Gilroy v Flynn*), but also with the courts, being an emanation of the State and the State's obligations under articles 6 and 13 of the ECHR to ensure a fair trial in a reasonable time and an effective remedy (*McFarlane v Ireland*).

The order of things

Order 8, rule 1 of the *Rules of the Superior Courts* remains the same and provides that an application may be made to the Master during the currency of the summons: "No original summons shall be in force for more than 12 months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may apply before the expiration of 12 months to the Master for leave to renew the summons."



PIC: SHUTTERSTOCK

> THE COURT MUST CONSIDER WHETHER THERE IS SOME OTHER GOOD REASON FOR EXERCISING THE DISCRETION TO ORDER THAT THE SUMMONS BE RENEWED

Order 8, rule 2 provides: "The Master, on an application made under subrule (1), if satisfied that reasonable efforts have been made to serve such defendant or for other good reason, may order that the original or concurrent summons be renewed for three months from the date of such renewal inclusive."

Rule 2 allows the Master to renew the original or concurrent summons for three months. The Master may renew a summons once where the application is made during the currency of the summons and where the plaintiff has demonstrated (a) reasonable efforts to serve the summons or (b) where they have established "other good reason". A plaintiff is required to establish which ground they are relying on and set out those grounds in the grounding affidavit.

Where a plaintiff relies on the 'other good reason' limb, the plaintiff is required to establish the other good reason why the summons should be renewed. The 'other good reason' is *not*, as often mistakenly believed, to be 'other good reason for not serving the summons'. In *Lawless v Beacon Hospital* (2019), Peart J held that the rule "enables the court to order renewal either where reasonable efforts to serve have been made within the time, or for other good reason. The words 'other good reason' are not linked to the failure to serve the summons, as the trial judge states. Rather, the court must consider whether there is some other good reason for exercising the discretion to order that the summons be renewed."

Application to extend

Order 8, rule 3 provides: "After the expiration of 12 months, and notwithstanding that an order may have been made under subrule (2), application to extend time for leave to renew the summons shall be made to the court."

Rule 3 sets out the procedure for applications after the expiration of 12 months and that such applications should be made to the High Court, "notwithstanding that an order may have been made" by the Master, and the High Court may grant a further renewal for a period of three months (*Downes v TLC Nursing Home Limited* and *Murphy v HSE*).

Order 8, rule 4 says: "The court on an application under subrule (3) may order a renewal of the original or concurrent summons for three months from the date of such renewal inclusive where satisfied that there are special circumstances which justify an extension, such circumstances to be stated in the order."

The amendment to rule 4 reduces the period a summons can be renewed "from six months to three months, [which] may indicate an

'I don't have my ducks in a row'

intention to tighten procedures" (*Murphy v ARF Management Limited*).

In *Murphy v ARF*, Meenan J held that the High Court may only renew the summons once, and this interpretation was cited with approval in *Downes*. While not relevant to the case before the court, the Court of Appeal in *Murphy v HSE* said that the amended rule 4 "does not contain any clear or express provisions limiting the number of renewals, and that this would have been set out explicitly if it was the intention of the rule makers". It was further noted that "it is conceivable that if a summons was renewed on the basis of special circumstances, such special circumstances might persist beyond the three-month period of renewal, or further special circumstances might arise".

Step on

Recent case law has also given rise to much debate as to the applicable test, and whether it is a one or two-step test (*Murphy v ARF*; *Ellahi v Governor of Midlands Prison*; *Brereton v Governors of the National Maternity Hospital*; *Murphy v HSE* (High Court); and *Downes* and *O'Connor v HSE*). While the majority in the High Court appeared to prefer or accepted a two-step test, the Court of Appeal in *Murphy v HSE* held that a single-step test applies, and there is no requirement to first seek leave to extend time to bring the application.

The Court of Appeal then considered the single-step test, which is that the court must be "satisfied that there are special

> WHERE A PLAINTIFF RELIES ON THE 'OTHER GOOD REASON' LIMB, THE PLAINTIFF IS REQUIRED TO ESTABLISH THE OTHER GOOD REASON WHY THE SUMMONS SHOULD BE RENEWED. THE 'OTHER GOOD REASON' IS NOT, AS OFTEN MISTAKENLY BELIEVED, TO BE 'OTHER GOOD REASON FOR NOT SERVING THE SUMMONS'

> A DEFENDANT SEEKING TO SET ASIDE THE RENEWAL OF A SUMMONS SHOULD ISSUE THEIR MOTION PRIOR TO ENTERING AN APPEARANCE, AND ANY DEFAULT APPLICATIONS THAT MAY ISSUE SHOULD BE ADJOURNED UNTIL A COURT HAS DETERMINED THE APPLICATION TO SET ASIDE

circumstances which justify an extension" and said the special-circumstances test is higher than the original 'good-reason' test, but is below the bar of 'extraordinary' – and the special circumstances relied upon should be considered on a case-by-case basis.

The Court of Appeal went on and approved the analogy offered by Hyland J in *Brereton* that the test of 'special circumstances' as it applies resisting a claim for security for costs was useful, and that "the court should consider whether it is in the interests of justice to renew the summons, and this entails considering any general or specific prejudice or hardship alleged by a defendant, and balancing that against the prejudice or hardship that may result for a plaintiff if renewal is refused", which reflects the principles set out in *Chambers v Kenefick* (2005).

The continued provisions for the renewal of a summons, and the possibility of more than one renewal in the High Court, may provide some comfort – but it does come with a caution. In *Brereton*, a delay of ten weeks was viewed as being at the outer limit of what the court deemed acceptable, considering the facts of that case. Previously, leniency was afforded by courts hearing *ex parte* applications, in the knowledge that a defendant could bring an application to set aside any renewal, but the courts' requirement to set out the special circumstances relied upon in the order may give rise to greater scrutiny in *ex parte* applications. Further, awareness of successful applications to set aside renewals may encourage more defendants to apply to set aside renewals.

Affidavits

Given that the application under order 8 is *ex parte*, it is essential that all relevant facts are laid before the court hearing the renewal application, and the court hearing the application to set aside.

A number of judgments make reference to deficiencies in affidavits grounding applications to renew where affidavits contain misrepresentations (*Whelan v Health Service Executive*), inconsistencies/contradictions (*Downes*) or no meaningful explanations (*Ellahi*).

The courts have become increasingly critical of general grounds relied upon in grounding affidavits – for example, inadvertence on the part of legal advisors (*Congil Construction Ltd (In Liquidation) v Kitt*; *Downes*; *Murphy v HSE* in the Court of Appeal); the plaintiff's claim being statute barred (*Murphy v ARF*); and the absence of an expert report where the plaintiff failed to obtain the necessary reports in a timely manner.

Where the delay can be explained and efforts were made to obtain reports in a timely manner, a court will consider the particular facts (*Murphy v HSE*), but where inadequate reasons were offered for a delay (*Ellahi*), a court may refuse to renew or may set aside any such renewal.

The failure to notify defendants of legal proceedings has given rise to some criticism (*Moloney*) but, in a claim giving rise to a 'notifiable event' in professional-negligence proceedings, a court should be slow where the notification itself may have serious consequences for some professionals (*Murphy v HSE*, Court of Appeal).

A defendant seeking to set aside the renewal of a summons should issue their motion prior to entering an appearance, and any default applications that may issue should be adjourned until a court has determined the application to set aside (*Downes*).Where a defendant enters an unconditional appearance, the appearance will cure any defect in service, including the service of an expired summons (*Lawless*). g

LOOK IT UP

CASES:

- *Brereton v Governors of the National Maternity Hospital* [2020] IEHC 172
- *Chambers v Kenefick* [2005] IEHC 526
- *Congil Construction Ltd (In Liquidation) v Kitt* [2018] IEHC 247
- *Downes v TLC Nursing Home Limited* [2020] IEHC 465
- *Ellahi v Governor of Midlands Prison* [2019] IEHC 923
- *Gilroy v Flynn* [2004] IESC 98
- *Lawless v Beacon Hospital* [2019] IECA 256
- *McFarlane v Ireland* (application no 31333/06)
- *Moloney v Lacey Building and Civil Engineering Limited* [2010] 4 IR 417
- *Moynihan v Dairygold Cooperative Society Ltd* [2006] IEHC 318
- *Murphy v ARF Management Limited* [2019] IEHC 802
- *Murphy v HSE* [2021] IECA 3; [2020] IEHC 483
- *O'Connor v HSE* [2020] IEHC 551
- *Whelan v Health Service Executive* [2017] IEHC 349

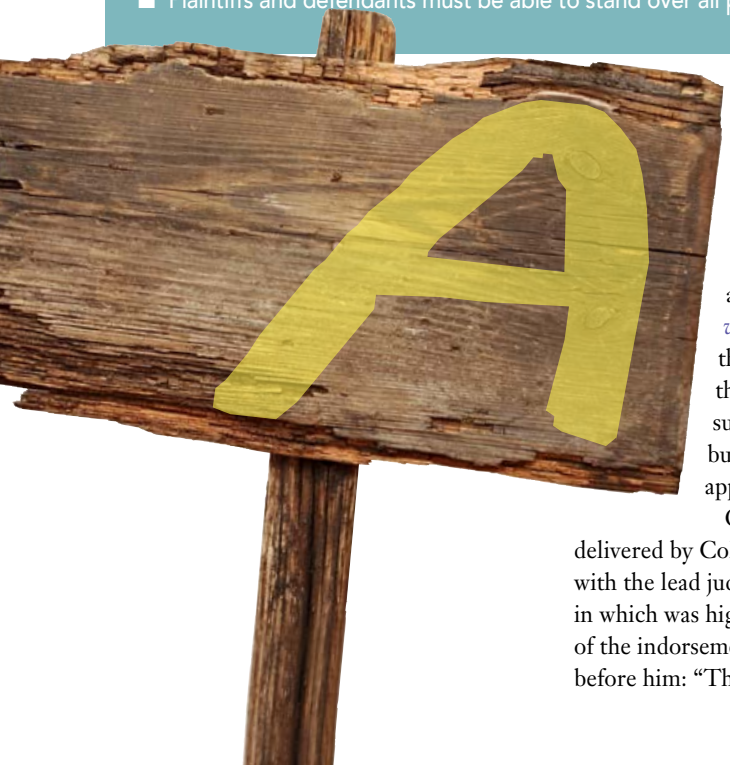
CAREFUL NOW!

Practitioners acting for both plaintiffs and defendants must be cognisant of the requirements under sections 12-14 of the *Civil Liability and Courts Act 2004* relating to pleadings. 'Mind your pleas and Qs,' warns **Brian Hallissey**

BRIAN HALLISSEY IS A BARRISTER PRACTISING IN PERSONAL INJURIES AND PROFESSIONAL NEGLIGENCE LITIGATION

AT A GLANCE

- Recent High Court and Court of Appeal decisions have brought the art of pleading into focus
- Courts expect pleadings to be clear and concise
- Generic or 'boilerplate' indorsements of claim will not be well received
- Beware blanket denials, as they may compel further particulars of the claim
- Plaintiffs and defendants must be able to stand over all pleas contained in the pleadings



A number of recent decisions of the Court of Appeal and High Court have brought pleadings into the spotlight, both for plaintiffs and defendants. In *Morgan v ESB*, the plaintiff alleged that he slipped and fell at the defendant's premises. He succeeded in the High Court, but this was overturned on appeal.

Of interest is the judgment delivered by Collins J (in which he agreed with the lead judgment of Noonan J), and in which was highlighted the generic style of the indorsement of claim in the case before him: "The majority of the particulars of wrongdoing are in boilerplate form, expressed in such generic terms as to be utterly uninformative ... for instance, it is said, without more, that the ESB failed to provide a safe place of work for the plaintiff. It is also said the ESB was in breach of the *Safety, Health and Welfare at Work Act 2005*. No clue is given as to what provision of that act the ESB was said to be in breach of, or what act or omission on its part constituted such breach."

Noting that the 'cover-all-bases' art of pleading was no longer permissible since the introduction of the *Civil Liability and Courts Act 2004*, he concluded that: "A plaintiff is required to plead specifically and cannot properly rely on the pleading

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equivalent of the Trojan Horse, which can, as needed, spring open at trial and disgorge a host of new and/or reformulated claims."

Tentacles of doom

It is to be noted, also, that an overly prolix personal injuries summons containing such 'boilerplate' pleadings might have cost implications under order 19, rule 4 of the *Rules of the Superior Courts*.

Morgan was not the first time Collins J had considered the 2004 act. In *Crean v Harty*, the plaintiff had undergone hip surgery and alleged that, as a consequence, he had suffered peripheral neuropathy of his right lower leg. There was no allegation of negligence in relation to the surgery; rather, the plaintiff claimed he had not given fully informed consent. The defendant had delivered a blanket defence, including the following plea: "The first defendant denies that they failed to obtain the plaintiff's informed consent prior to surgery on 7 October 2015."

Particulars were raised in respect of this plea, seeking precise particulars of the information allegedly given, by whom and when. The defendant refused to provide the particulars sought on the basis that it was a "straight denial of a plea contained in the personal injuries summons. It is not permissible to raise particulars upon a denial." However, Collins J rejected this assertion, noting: "A straight denial – perhaps more accurately characterised as a bald denial – appears to be precisely what this part of section 13(1)(b) is targeted at. As already noted, there may be circumstances where it is not possible to give particulars of a denial, but where it is possible, section 13(1)(b) mandates the provision of such particulars."

Escape from victory

Noonan J also sharply criticised a plea of contributory negligence in the defendant's defence in *Naghten v Cool Running Events Limited*. In this case, the plaintiff was ice-skating on an ice-rink when she (unsurprisingly) slipped. Unfortunately, another skater skated over her hand, causing a laceration. She alleged that the defendant had been negligent in, among other things, allowing too many participants onto the rink.

The incident had been captured on CCTV, which was a key issue for the court.

The defence alleged that the plaintiff (who was a minor at the time) was guilty of contributory negligence, in that she, among other things, "acted in such a manner that she knew or ought to have known would cause her personal injury". This plea was criticised by the court on the basis that the incident was captured on CCTV, and no witnesses as to fact were called by the defendant, therefore leading to the conclusion that no staff members were able to lead evidence of any alleged inappropriate behaviour on the part of the plaintiff.

A further plea was made that the plaintiff's mother had failed to supervise the plaintiff or have regard for her safety. Again, the court concluded this plea was "advanced without any evidential basis and, indeed, on the contrary, in the teeth of the [CCTV] evidence, which was at all times in the defendant's possession".

There was a further plea that that the mother had failed to seek proper treatment or to take any steps to alleviate her daughter's pain and suffering. The court concluded that this was a serious and hurtful allegation of neglect, and no credible attempt was made to stand over it at the trial.

However, the court was most critical of the fact that the director of the company – who had signed the affidavit of verification and did give evidence for the defendant – distanced himself from the pleas under cross-examination, and stated they were not made on his instructions. The court concluded: "The days of making allegations in pleadings without a factual or evidential basis, if they ever existed, have long since passed. Section 14 of the *Civil Liability in Courts Act 2004* obliges plaintiffs and defendants alike to swear an affidavit which verifies any assertions or allegations contained in pleadings in personal-injuries actions … The focus of section 14 is most commonly on plaintiffs, particularly when taken in conjunction with section 26 dealing with fraudulent claims. This case provides a timely reminder that section 14 applies with equal force to defendants, and careful consideration is required before pleas of the kind that are seen in this case are advanced, which I would deprecate in the strongest terms."

The case is a clear reminder that a defendant must take the utmost care when delivering a defence, particularly where CCTV exists of the incident. Clients should always be advised that it is an offence to swear a misleading or false affidavit under section 14(5) of the *Civil Liability and Courts Act 2004*.

Speed 3

A plea that remains in the pleadings, even if not advanced at the hearing, can lead to criticism from the courts if it is one that has no evidential basis. Furthermore, from a barrister's perspective, rule 5.5 of the *Code of Conduct* expressly prohibits a barrister from drafting any pleading, witness statement or affidavit that is not supported by the client's instructions.

The potential consequences of a plea improperly made in pleadings – but not advanced at the hearing – was recently seen in *Doyle v Donovan*. The case arose out of a road-traffic accident, and the defendant alleged in her defence that the plaintiff deliberately caused the collision. In the Circuit Court, the defendant did not stand over the plea and, in terms of the evidence, the furthest the defence went was that the plaintiff had braked suddenly and this may have been negligent. On appeal, the defendant conceded liability, and the case proceeded as an assessment, but no application was made to amend the pleadings. The plaintiff sought aggravated damages, but this was refused by Simons J. He stated that it was inappropriate to do so, as:

a) The swearing of a false or misleading affidavit of verification was a criminal offence and it would, therefore, normally not be necessary for a court to impose an additional sanction by an award of aggravated damages,
b) The conduct of the defendant was confined to the plea in the defence, and the impugned plea was not actually put to the plaintiff in the Circuit Court, and the defendant herself did not stand over the plea,
c) There was an asymmetry between plaintiffs and defendants, as there was no way of sanctioning a plaintiff who was guilty of litigation misconduct, and
d) It is more appropriate to sanction litigation misconduct by an appropriate costs order.

> A DEFENDANT MUST TAKE THE UTMOST CARE WHEN DELIVERING A DEFENCE, PARTICULARLY WHERE CCTV EXISTS OF THE INCIDENT. CLIENTS SHOULD ALWAYS BE ADVISED THAT IT IS AN OFFENCE TO SWEAR A MISLEADING OR FALSE AFFIDAVIT

> AN OVERLY PROLIX PERSONAL INJURIES SUMMONS, CONTAINING SUCH 'BOILERPLATE' PLEADINGS, MIGHT HAVE COST IMPLICATIONS UNDER ORDER 19, RULE 4 OF THE RULES OF THE SUPERIOR COURTS

In the subsequent costs hearing, Simons J noted that, between the conclusion of the Circuit Court hearing and the High Court hearing and costs hearing, no explanation or apology had been offered by the defendant and, instead, a further issue was raised in respect of the special damages that had been claimed by the plaintiff, which suggested that there had been an exaggeration of his special damages in the sum of €30 (for over-the-counter medicine). This had not been put to the plaintiff at the hearing. The court concluded that it was satisfied that the defendant and her insurer had engaged in precisely the type of litigation misconduct that justified the making of an award of costs on the higher 'legal-practitioner-and-client' basis.

The decision in *Doyle* can be contrasted with *Stokes v South Dublin County Council*, where Barr J awarded aggravated damages of €5,000 to the plaintiff following an allegation that his claim was a fraudulent one. This was pursued in cross-examination, and so differs from *Doyle* under point (b) above.

Down with this sort of thing

Finally, can a *successful* defendant who is guilty of litigation misconduct face a sanction?

A parallel can be drawn with *O'Carroll v Áras Sláinte Limited & Ors*. This was a medical negligence action in which the plaintiff's case was dismissed. However, she was 'robustly' cross-examined by the defendant and, in particular, a picture of the plaintiff on Facebook was put to her, with the suggestion that she was not being truthful with her evidence regarding her injuries.

In the High Court, Cross J refused to award the defendant its costs against the plaintiff, and this was appealed by the defendant. The Court of Appeal agreed that Cross J was entitled to mark his disapproval of the line of questioning, which was pursued even after the court had indicated that it did not consider the line of questioning proper. The Court of Appeal allowed the appeal, but only allowed the defendant to recover 50% of its costs, which it considered to be a more proportionate order.

When considered in conjunction with the cases set out above, this decision would seem to indicate that a costs sanction could equally apply to a successful defendant who has delivered a defence with an improperly made plea.

Go on, go on, go on

Practitioners for both plaintiffs and defendants must be cognisant of the requirements under sections 12-14 of the *Civil Liability and Courts Act 2004*. Courts will expect pleadings to be clear and concise, and it would seem that a generic or 'boilerplate' indorsement of claim will not be received well. Equally for defendants, care should be given to a blanket denial, as it may still expose the defendant to an order compelling further particulars of the claim.

Plaintiffs and defendants must be able to stand over all pleas contained in the pleadings. Perhaps more importantly, if there is evidence that undermines the plea that is available to the defendant at the time of the delivery of the defence (such as CCTV), it is likely to be the subject of, at best, severe criticism and, at worst, a sanction in terms of costs. Outside of the civil proceedings, a deponent who swears a misleading affidavit of verification commits an offence.

Finally, absolute care must be taken where a plea is made in a defence expressing or implying fraud without *prima facie* grounds for doing so, as the court will be at large to make an award of aggravated damages or costs on a legal-practitioner-and-client basis. It may be necessary to amend the pleadings, even prior to an appeal, in order to avoid such consequences. g

LOOK IT UP

CASES:

- *Crean v Harty* [2020] IECA 364
- *Doyle v Donovan* [2020] IEHC 11 and [2020] IEHC 119
- *Morgan v ESB* [2021] IECA 29
- *Naghten v Cool Runnings* [2021] IECA 17
- *O'Carroll v Áras Sláinte Limited & Ors* [2020] IECA 127
- *Stokes v South Dublin County Council* [2017] IEHC 229

LEGISLATION:

- *Code of Conduct for the Bar of Ireland*
- *Civil Liability and Courts Act 2004*
- Order 19, rule 4 of the *Rules of the Superior Courts*
- *Safety, Health and Welfare at Work Act 2005*

In an American study into loneliness, lawyers came out on top as the loneliest profession. Does this surprise you? **Andy Nazer** investigates

ANDY NAZER FORMERLY LED A VARIETY OF PROJECTS AT THE CAMPAIGN TO END LONELINESS

LONELY ARE THE BRAVE

AT A GLANCE

- Loneliness can be relentless and become the centre of a person's life – and it's difficult to talk about
- Most of us keep quiet about loneliness because there are misconceptions of loneliness as a personal failing
- Loneliness and social isolation can cause harm to our physical and psychological wellbeing – there is evidence that it shortens lives and, for most, it diminishes the quality of life and work

Lawyers are generally seen by society as intellectual, confident, reliable, capable, and logical people. When they are feeling vulnerable or worried, it can be difficult to open up and talk because of these societal expectations. There may also be concerns about confidentiality and the effect of gossip on potential business. Stressful workplaces

PIC: SHUTTERSTOCK

and interpersonal environments can further compound the problem. This all sounds very lonely.

I asked a young solicitor about her working life during the pandemic, and this is what she shared: "I flat-share and so simply finding my own space to work that was quiet and sympathetic wasn't easy! Outside this issue, my days are filled with Zoom meetings with clients and colleagues, phone calls, online research, document review, preparing cases, strategising, etc. The role requires you to constantly present yourself in the best possible light, accept disappointment (losing a case, confronting errors), maintaining client confidentiality, suppressing your emotions, and having to present as strong when inside you are feeling vulnerable."

I am sure some of you can add to this list of issues. You may also be experiencing financial pressures, practice politics, soaring pressures on your private life, or you may be worried for your career. Is it any wonder then that words like 'burnout', 'isolation' and 'loneliness' are regularly appearing in our media at the moment?

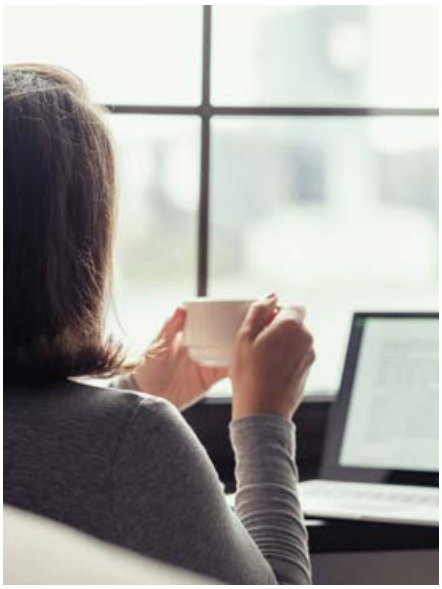
Empty rooms

Loneliness can be relentless and become the centre of a person's life. It's difficult to talk about. It's difficult, sometimes, even to talk about talking about it.

Loneliness is different for each of us. It can be social, where you lack a wider network; emotional, where you miss an individual or group of people; or existential, where you find it difficult to connect with others and feel separated from society. For me, it is the cavity between the social connections in my life and the connections I would like.

For many, loneliness is transient – it comes and goes throughout our lives. It can be situational or chronic – occurring at a certain time of the week/month/year or overwhelming and long lasting. It does not discriminate and can strike anyone at any time. It affects the young, the old. and those in between. In normal times, some sections of society are more vulnerable to loneliness, but the pandemic has largely changed that. Now anyone can experience loneliness.

It can be personal and painful and often enters unannounced and unnoticed. There are numerous causes of loneliness, but lower



PIC: SHUTTERSTOCK

levels of human contact and connection, a reduction of informal and formal support, unshared grief, and increasing social anxiety are significant contributing factors. As social animals, we have an innate desire to belong. We don't always experience this consciously, but it resides deep within us. In the past, we lived in tribes. Today, our 'tribe' is often our immediate family or work colleagues. Belonging is personal. People often describe it as feeling 'socially connected' or being part of a 'community' where they feel secure. Since March 2020, much of this has been missing from our lives.

Unfortunately, most of us keep quiet about loneliness because there are misconceptions of loneliness as a personal failing, or as only affecting older people and or the introverted. The increasing dialogue taking place around loneliness, however, is changing this. Press articles, and hopefully readers like you, will help break the stigma associated with loneliness.

If you are experiencing loneliness, know that you are not alone. According to the Central Statistic Office's most recent research on wellbeing (February 2021), over 26% of individuals surveyed felt lonely 'all or most of the time' in the four-week period prior to being interviewed. Interestingly, female respondents were nearly twice as likely to report such feelings compared with men (17% female; 9.2% male) and respondents living in rented accommodation were twice as likely to report feeling lonely 'all or most of the time' than those in owner-occupied dwellings (22.2% v 10.3%). In addition, 41.7% of respondents rated their overall life satisfaction as 'low' right now. This is the highest rating for 'low' overall life satisfaction captured in CSO surveys to date. In 2013, when many households were suffering the effects of the 2007 financial crisis, this rate was 15.3% and it dropped to 8.7% in 2018, when the economy was growing strongly.

Only the lonely

While loneliness and grief are two separate concepts, grief often opens the door to loneliness. The collective grief we are experiencing in the pandemic is similar to that associated with chronic loneliness. We share the grief for thousands of lives lost, the loss of connection with the people we care about, and the loss of the life we once had. For some, this includes the loss of employment,

> LONELINESS CAN BE A REMINDER THAT WE NEED SOMETHING. THERE WILL BE ELEMENTS OF YOUR LIFE YOU CAN'T CONTROL, SO ASK YOURSELF WHAT YOU CAN CONTROL AND WHAT YOU CAN DO TO FILL THIS NEED. A GOOD PLACE TO START IS BY INCREASING THE NUMBER OF DAILY CONTACTS WITH OTHER PEOPLE

> IN NORMAL TIMES, SOME SECTIONS OF SOCIETY ARE MORE VULNERABLE TO LONELINESS, BUT THE IMPACT OF THE PANDEMIC HAS LARGELY CHANGED THAT. NOW ANYONE CAN EXPERIENCE LONELINESS

opportunities, dreams, relationships, our daily routines, and meeting friends and family. It may be compounded by a sense of losing one's identity – who am I anymore, without all of these activities, relationships and routines that previously shaped my life?

Over the coming months and years, as we navigate towards a 'different life', we will process the grief we have accumulated and try to free ourselves from the burden of loss, disconnection, and loneliness. Many of us may find this will take a period of adaption. We may still feel disconnected, disorientated, and emotionally absent from society, but find ourselves physically back in our communities and workplaces.

When this transition happens, it will be important to identify how we feel, grow more accepting towards ourselves, and offer kindness and gentleness to ourselves and each other. Minding each other, with tenderness, we can regain positive connections and a sense of belonging to help us process our experience.

A million miles away

Loneliness and social isolation can cause harm to our physical and psychological wellbeing. Like smoking and obesity, there is evidence that chronic loneliness shortens lives. For most, it diminishes the quality of life and work.

Experiencing poor social connections and loneliness within the workplace can impair your executive function. It reduces task performance and blights your powers of reasoning, efficiency, planning, emotional regulation, analysis, abstract thinking, and accurate decision-making. It affects productivity and results in increased sickness levels and reduced staff retention within workplaces. Within a legal context, it has been reported anecdotally that loneliness affects how we focus on tasks, communicate with clients, and make deadlines. Lonely professionals have also told me that it affects their mood, stress levels, self-esteem, sleep habits and relationships at work and home.

Accepting you are lonely is a good place to start. Approximately one in four of us is experiencing loneliness, so you are not alone and there should be no stigma associated with seeking out greater connection. It is a feeling we all share and have at different times in our life. Identifying the causes is a first step to building a pathway back to better connection.

Having a sense of belonging is fundamental to building resilience against loneliness. Maybe we can all learn from this pandemic about what type of connections and what extent of connections we want in the future. Ask yourself: what type of connection do I need, who do I want to connect with, who would I like in 'my tribe', and how can I strengthen or rebuild my community moving forward?

Waiting on a friend

Listen to the loneliness. What is it telling you? Loneliness can be a reminder that we need something. There will be elements of your life you can't control, so ask yourself what you *can* control and what you can do to fill this need. Then make the effort to do so. A good place to start is by increasing the number of daily contacts with other people. Say a simple 'hello' to the neighbours, the supermarket cashier, or the barista. Remember, these authentic, warm moments of connection really count and can be very nourishing, even though low-key.

The final but possibly most significant action you or your practice could take is to celebrate and encourage acts of kindness. Kindness, consideration, and empathy in the workplace create a ripple effect throughout the organisation. You might start with being warmer and kinder to yourself first, giving yourself a break and noticing when the critical inner voice creeps in. If we are kind to ourselves, it is easier for us to be more compassionate, concerned, and empathetic to others.

Before loneliness becomes overwhelming, speak to a professional counsellor or your doctor. It's important to recognise that you are not alone and, just like the pandemic, most people's loneliness will pass. g

You might want to find out more about LegalMind, the independent and confidential mental health support that is available to Law Society members and their dependants at any time of the day or night. If you wish to speak to a mental-health professional today, you can call LegalMind on 1800 81 41 77 for in-the-moment support.

LOOK IT UP

- 'Lawyers rank highest on loneliness scale, study finds', ABA Journal, 3 April 2018
- 'Social impact of COVID-19 survey: wellbeing', Central Statistics Office, February 2021

WHEN TWO WORLDS COLLIDE

AI affects IP and has implications for it, but the intersection between them is complex and not without tensions. **Mark Hyland** boots up his floppies

DR MARK HYLAND IS IMRO ADJUNCT PROFESSOR OF INTELLECTUAL PROPERTY LAW AT THE LAW SOCIETY AND IS A LECTURER AT THE COLLEGE OF BUSINESS, TU DUBLIN

LIKE THE INTERNET OF THINGS, ROBOTICS, BLOCKCHAIN AND 3D PRINTING, AI IS A TECHNOLOGICAL DISRUPTOR. TOGETHER, THESE EMERGING TECHNOLOGIES ARE DRIVING THE 'FOURTH INDUSTRIAL REVOLUTION'

The idea of 'a machine that thinks' dates back to ancient Greece. But the years 1950 and 1956 are particularly significant in the evolution of artificial intelligence (AI).

In 1950, Alan Turing published a paper in which he attempted to answer the question 'can machines think?' In addition, he formulated the 'Turing Test' to determine if a computer can demonstrate the same intelligence (or the results of the same intelligence) as a human. The value of the test has been debated ever since.

The term 'artificial intelligence' was actually coined in 1955, but the term was popularised in 1956 by John McCarthy and Marvin Lee Minsky during a multidisciplinary summer workshop that proved to be a seminal event – from that point onwards, AI became a field of research in its own right within computer science.

AI? AI? Oh

The World Intellectual Property Organisation (WIPO) concedes that there is no universal definition of AI, but posits that it is aimed at developing machines and systems that can carry out tasks considered to require human intelligence. 'Machine learning' and 'deep learning' are two subsets of AI. In recent years, with the development of new neural networks techniques and hardware, AI is usually perceived as a synonym for deep supervised machine learning.

The British government has defined AI as "technologies with the ability to perform tasks that would otherwise require human intelligence, such as visual perception, speech recognition, and language translation". This definition was used by Britain's Intellectual Property Office in its 2020 public consultation on IP/AI.

'Intellectual property' refers to creations of the mind, such as inventions, literary and artistic works, designs, symbols, names and images used in commerce.

The principal intellectual property rights (IPRs) are patents (which protect inventions), trademarks (distinctive signs that identify and protect certain goods/services produced by an individual or company), copyright (which protects original literary, dramatic, musical and artistic works) and design rights (which protect aesthetic aspects of a product). IPRs are intangible assets and usually give the creator an exclusive right over his/her creation for a certain period of time.

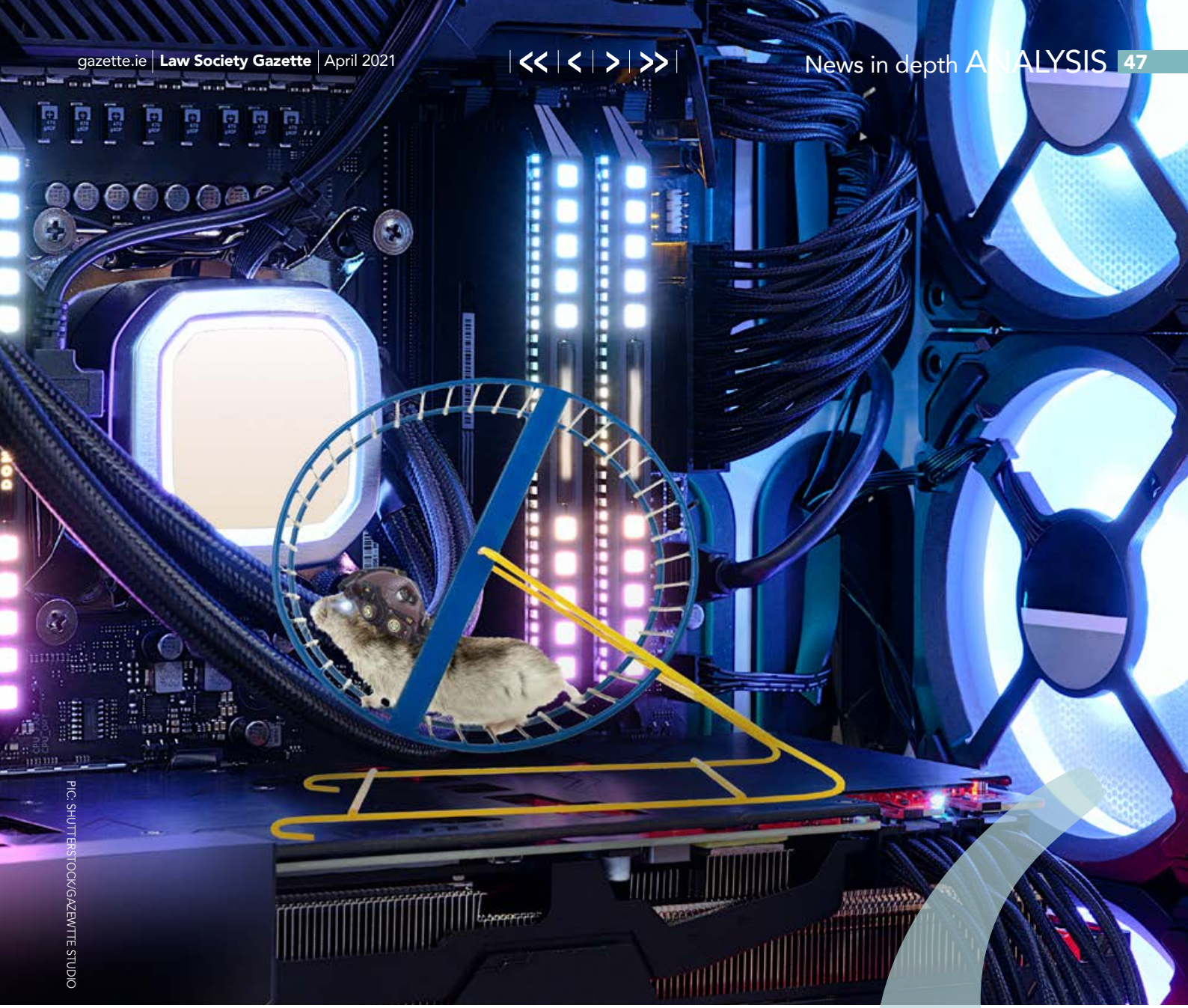
Deus ex machina

The significance of AI cannot be overstated. AI is bringing considerable benefits to individuals, professions, businesses, and communities across Ireland.

Already, automation can significantly speed up the creation, review and redaction of legal documents, and precision/accuracy is not compromised in the process. Two important time-consuming tasks in a law firm – legal research and discovery – can be achieved very effectively and considerably faster by AI. Predictive technology is also being used more and more in litigation to predict the outcome of court proceedings.

Like other countries, Ireland is developing its own national AI strategy in order to harness the opportunities presented and to manage the impacts. The Department of Business, Enterprise and Innovation ran a public consultation process in late 2019, seeking the views of all interested parties/stakeholders on key areas and issues that should be addressed by the strategy. The department also sought views on what the guiding principles should be and how they could be used to drive the design, development and deployment of AI in Ireland.

In June last year, Ireland made



PIC: SHUTTERSTOCK/GAZEWITTE STUDIO

The CyberKen Industries Tech22 Hamstroid™ power matrix

a national submission to the European Commission as part of an EU-wide public consultation on AI policy and regulatory steps. Ireland's submission was made in response to a commission white paper that promotes the uptake of AI, while also addressing the risks associated with it. In response to the approximately 1,200 submissions received, the commission produced a final report last November.

Disruptive technologies

Like the internet of things, robotics, blockchain and 3D printing, AI is a technological disruptor. Together, these emerging technologies are driving the 'Fourth Industrial Revolution'. AI is arguably the most potent disruptive force. Growth in computing power, availability of data, and progress in algorithms have turned AI into one of the most strategic technologies of the 21st century. With AI's exponential growth, the stakes could not be higher. The way we approach AI will define the world we live in.

Unsurprisingly, the forum that has generated the widest international audience and most diverse views on the IP/AI intersection is the WIPO Conversation on Intellectual Property and Artificial Intelligence. The 2019 WIPO *Technology Trends Report* says that nearly 340,000 AI-related patent applications have been filed since the emergence of AI in the 1950s. The *Revised Issues Paper on Intellectual Property Policy and Artificial Intelligence* (WIPO/IP/AI/2/GE/20/1 REV), dated 21 May 2020 and prepared by the WIPO Secretariat, covers the main IPRs, along with data, trade secrets, the technology gap and capacity building, accountability for IP administrative decisions and, lastly, AI and unfair competition.

WIPO's public consultations (of which there have been three so far, September 2019,

WITH THE DEVELOPMENT OF NEW NEURAL NETWORKS TECHNIQUES AND HARDWARE, AI IS USUALLY PERCEIVED AS A SYNONYM FOR DEEP SUPERVISED MACHINE LEARNING

LAW SOCIETY OF IRELAND

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July 2020 and November 2020) bring together WIPO member states and other stakeholders to discuss the impact of AI on IP. One of the principal goals of the conversation is to help to bridge the existing information gap between AI players and regulators and to build broad awareness of the issues in this fast-moving and complex field.

Britain's Intellectual Property Office ran a public consultation on the IP/AI intersection and the future of IP and AI policy from 7 September to 30 November 2020. Its call for views covered five IPRs: patents; copyright and related rights; trademarks; designs; and trade secrets. Respondents also had the opportunity to provide views on matters that cut across various IPRs.

In the USA, the Patent and Trademark Office (USPTO) organised a conference on IP/AI on 31 January 2019. Building on the momentum of those

discussions, in August 2019, the USPTO issued a request for comments on patenting AI inventions. This was followed by another request for comments in October, this time concerning the impact of AI on other IP policy areas, including copyrights, trademarks, database protections, and trade-secret law. The USPTO received almost 100 comments for each public consultation.

Subsequent to the public consultations, two important reports were published by the USPTO in October 2020: *Public Views on Artificial Intelligence and Intellectual Property Policy* and *Inventing AI: Tracing the Diffusion of Artificial Intelligence with US patents*. Through these reports, the USPTO provides both qualitative and quantitative analysis on the intersection between AI and IP law. The reports review current IP statutory frameworks in the US, as well as patent filing and grant patterns.

Crystal balls

It is clear from numerous public consultations that the themes of AI and its interface with IP are really focusing the minds of policymakers, legislators, lawyers and futurologists right across the world. The fact that WIPO is already planning its fourth session of the IP/AI Conversation for later this year demonstrates how important and significant AI is to be considered by the guardian of international IP.

IRELAND IS DEVELOPING ITS OWN NATIONAL AI STRATEGY IN ORDER TO HARNESS THE OPPORTUNITIES PRESENTED

PARALLEL BARS

Brexit is likely to have significant implications for EU companies doing business in the UK, including buying UK-based companies and/or competing for contracts from UK public bodies/utilities, writes **Cormac Little**

CORMAC LITTLE SC IS A PARTNER AND HEAD OF THE COMPETITION AND REGULATION UNIT OF WILLIAM FRY AND THE CHAIR OF THE LAW SOCIETY'S EU AND INTERNATIONAL AFFAIRS COMMITTEE

AFTER LENGTHY ENGAGEMENT, PARTLY PLAYED OUT IN THE MEDIA, A COMPROMISE WAS REACHED, WHEREBY THE BASICS OF EU STATE-AID LAW WILL APPLY IN THE UK (WITH SPECIAL PROVISION FOR NORTHERN IRELAND), ALBEIT OUTSIDE THE CJEU'S REMIT

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

Notwithstanding the withdrawal of the UK from the EU on 31 January 2020, the true impact of Brexit did not begin to become apparent until after the end of the transition period 11 months later. Thankfully, after an often-tortuous series of discussions, the EU and the UK eventually agreed a *Trade and Cooperation Agreement* (TCA) on 24 December 2020. This meant the potentially dire economic consequences of a 'no-deal' Brexit were avoided.

State aid or public-subsidy control, one of the major bones of contention between the two negotiating teams, is the subject of lengthy treatment in the TCA. While by no means as controversial a subject in the EU/UK talks, public procurement is also addressed in detail by the TCA. In contrast, the TCA contains scant provision regarding both merger control and competition-rules. The TCA's arrangements regarding all four areas are contained in its Part Two, dealing with trade, transport, fisheries and other arrangements). Irish (and other EU businesses) need to acquaint themselves with how any changes in each of these four areas might affect their respective dealings in the UK.

Subsidy control

A key priority of the EU during the negotiations was to ensure that EU-based businesses would not face competition from UK companies in receipt of state subsidies that do not conform to EU rules on state aid. By contrast, the UK wanted a clean break from the application of EU law, insisting that it would not be bound by either evolving EU state-aid rules or by the Court of Justice of the EU's interpretation of same. After lengthy engagement, partly played out in the media, a compromise was reached, whereby the basics of EU state-aid law will apply in the UK (with special provision for Northern Ireland), albeit outside the CJEU's remit. In addition, the UK will create its own independent subsidy control regime. (The relevant TCA provisions are contained in Part Two, Title XI: Level Playing Field for Open and Fair Competition and Sustainable Development, Chapter 3.)

While the UK is required to establish its own subsidy-control regime, the TCA does stipulate some of its key features. The UK has abandoned the term 'state aid' and, instead, targets the grant of a 'subsidy'. That said, the definition of 'subsidy' is similar to the EU's definition of state aid contained in article 107(1) of the *Treaty on the Functioning of the EU*, in that the former seeks to prevent financial assistance from the UK's resources that is capable of conferring an economic advantage that might affect trade between the EU and the UK. To determine whether a particular subsidy will undermine EU/UK trade, the TCA identifies six 'principles'. These conditions are broadly similar to the evaluation criteria currently used by the European Commission – such as the avoidance of over-compensation, proportionality and overall positive economic effect – in assessing potential aid measures.

Like the EU state-aid regime, the TCA provides for specific rules for certain industries/sectors such as financial services and air transport. Similarly, the TCA makes special provision for certain policy objectives, such as rescue/restructuring support and export subsidies. The TCA also requires the UK ultimately to introduce a *de minimis* exemption of up to, approximately, €390,000 to a single undertaking over three years. However, the TCA does not specifically address industries such as road/rail passenger transport and airports, or activities like research, development and innovation, that each benefit from special treatment under EU state-aid rules.

Under EU rules, state aid cannot be granted unless it falls within one of the block exemptions or is otherwise approved by the European Commission. The TCA does not replicate either possibility. Theoretically, the UK may, therefore, adopt

PIC: SHUTTERSTOCK

ALTHOUGH THE TCA DEALS WITH COMPETITION LAW IN A LACONIC FASHION, THE EU AND THE UK ARE BOTH REQUIRED TO MAINTAIN EFFECTIVE LAWS TO PROHIBIT BOTH ANTICOMPETITIVE ARRANGEMENTS AND ABUSES OF A DOMINANT POSITION

a regime that does not require prior approval for a subsidy to be granted. Enforcement in both regimes may also diverge. EU state aid has a well-established practice whereby aggrieved third parties may complain to the commission regarding support granted to their respective competitors. In addition, the commission's decisions may be and are often challenged before the CJEU. While the UK has free rein to adopt whichever enforcement mechanisms it prefers, the TCA suggests that judicial review will be the primary route that aggrieved third parties may use to challenge the grant of subsidies to their business rivals.

The UK has some thinking to do before its subsidy-control regime is fully up and running. Downing Street will want to avoid disadvantaging UK businesses by making it more difficult for them to receive state support than their EU-based competitors. Moreover, the identity of the independent body to administer the new UK subsidy regime and its functions have not yet been decided. At one extreme, this body may simply have an advisory role, including issuing *ex post* observations on a relevant subsidy. At the other extreme, it may have an enforcement role, particularly in issuing compliance advice before subsidies are granted and/or dealing with complaints from the business rivals of beneficiaries as a possible alternative to judicial review.

Finally, under article 10 of the Northern Ireland Protocol to the so-called *Withdrawal Agreement*, the entirety of EU state-aid laws/guidelines will apply to the UK in respect any measure that affects relevant trade between Northern Ireland and the state/the rest of the EU. This means that pan-UK subsidies may fall under EU state-aid rules where, for instance, they benefit a Belfast-based firm doing business in Dublin.

Public procurement

The TCA's provisions on the award of contracts by both public bodies and utilities are contained in its Part Two, Title VI: Public Procurement. Indeed, the TCA goes beyond the commitments of both the EU and the UK in the World Trade Organisation's *Government Procurement Agreement* (GPA).

The GPA applies in most of the world's major market economies, such as the EU, US, Japan, South Korea, Switzerland, Canada and, since 1 January 2021, the UK. The GPA requires its signatories to guarantee fair and transparent public procurement processes, while obliging them to treat suppliers based in other signatories in the same manner as its domestic businesses for any relevant award procedure.

The TCA extends the commitments of both the EU and the UK beyond the GPA. Suppliers in both jurisdictions have the right to compete for 'above threshold' contracts in gas/energy distribution and in the provision of hospitality, real property, education, or telecommunications services. In addition, relevant contracts to be awarded by private entities act-

ing as utilities must also be open to competition throughout the EU/UK.

The TCA also goes further than the GPA in seeking to ensure that award processes are, to the extent practicable, run electronically. Moreover, where a candidate needs to demonstrate prior knowledge, such experience does not need to have been garnered in the territory where the contracting entity is based, be it the EU or the UK. The TCA also requires both jurisdictions to maintain effective domestic dispute-resolution mechanisms. Any of the protections granted by the TCA and the GPA may not be relevant, should an EU entity incorporate a subsidiary in the UK or, indeed, partner with a UK-based company before participating in any relevant award process.

Merger control

The TCA's provisions (contained in Part Two, Title XI, Chapter 2) on both merger control and competition law are succinct. Each of the EU and the UK commits under article 2 of Chapter 2 to maintain their own individual rules governing transactions that may have significant anticompetitive effects. This means that the *EU Merger Regulation* (EUMR), with its one-stop shop rule, no longer applies in the UK. Accordingly, from 2021 onwards, transactions may need to be notified under both the EUMR and UK merger-control rules.

The latter regime is a rare beast, in that it does not provide for mandatory notifications. In other words, parties are free to complete their transactions without clearance from the UK Competition and Markets Authority (CMA). That said, the CMA has a statutory duty to monitor merger activity, allied to the power to review unnotified transactions within four months of completion. This means that the UK is creeping toward a *de facto* compulsory notification regime, with fewer and fewer merging parties willing to take the chance that their potentially controversial transactions will go unnoticed by the CMA. Indeed, UK merger control's '25% share of supply' screening test allows the CMA wide discretion to 'call in' transactions that may give rise to competition concern. In addition, while an EUMR notification does not require the payment of an administrative fee, a fee of up to £160,000 may be payable to the CMA, depending on the extent of the UK turnover of the target business.

As UK turnover is no longer counted as EU turnover for the purposes of the EUMR's alternative jurisdictional tests, allied to the fact that many multinational companies have significant business activities in the UK, the number of mandatory notifications to the commission under the EUMR is likely to fall. In such a scenario, merging parties will need to consider whether their relevant transaction requires a notification under the national merger-control rules of the relevant European Economic Area countries, including to our Competition and Consumer Protection Commission (CCPC) and/or to the respective national competition authorities (NCAs) in other EU Member States. The impact of Brexit is thus likely to trigger an increase in the number of parallel notifications.

Competition

Although the TCA deals with competition law in a laconic fashion, the EU and the UK are both required to maintain effective laws to prohibit both anticompetitive arrangements and abuses of a dominant position. For the time being, the status quo remains – what is likely to be unlawful under EU competition rules is also likely to be unlawful under UK competition rules. Moreover, the UK courts and the CMA are required to interpret UK competition law in line with EU competition precedent up to 31 December 2020. However, the UK authorities are not required to follow EU competition case law after that date. Thus, divergences are likely to emerge over time, complicating the compliance efforts of businesses operating in both the EU and the UK. Indeed, like merger control, the potential for parallel commission and CMA investigations of the same conduct is real, provided it affects trade both between EU Member States and also in the UK. By extension, the activities of a company or companies could be investigated by both the CCPC for a potential breach of Irish competition rules and by the CMA for a possible infringement of UK competition rules. However, the TCA does require the commission, the NCAs and the CMA to coordinate on related activities where appropriate and, to the extent permitted by law, exchange information.

Changes for business

In addition to dealing with increased 'red tape' for imports from or exports to Great Britain, EU businesses need to be aware of other effects of Brexit that are likely to increase their costs and/or additional management time. Whether an Irish company is buying a UK-based business rival, or one of its competitors is in receipt of UK Government support, whether this company is competing for a UK public or utilities contract or just doing business in the UK, it will need to be aware of the potential additional legal complexities caused by the departure of our near neighbour from the EU and its single market. g

> THE UK HAS SOME THINKING TO DO BEFORE ITS SUBSIDY CONTROL REGIME IS FULLY UP AND RUNNING. DOWNING STREET WILL WANT TO AVOID DISADVANTAGING UK BUSINESSES BY MAKING IT MORE DIFFICULT FOR THEM TO RECEIVE STATE SUPPORT THAN THEIR EU-BASED COMPETITORS

REPORT OF LAW SOCIETY COUNCIL MEETING

19 MARCH 2021

Personal Injury Guidelines

Stuart Gilhooly reported on the recent adoption of the guidelines by the Judicial Council, which voted 83 in favour and 63 against the new measures.

It was expected that the amendments (to the *Judicial Council Act 2019* and the *Personal Injuries Assessment Board Act 2003*), which would be necessary to give effect to the guidelines, would be attached to the *Family Leave Bill 2021* as it progressed through the legislative process.

Mr Gilhooly confirmed that practitioners would be apprised of the operative date for commencement of the new measures once that date became available.

EAST

The chair, Flor McCarthy, reported on the work of the Environmental and Sustainability Task Force (EAST), which had been conducted entirely virtually since its inaugural meeting in May 2020. As part of its report to the Council, the task force made a number of recommendations in respect of how the Society and the wider profession could take positive steps to reduce the substantial environmental impact of both.

In addition, and cognisant that the jurisdiction has no solicitor-focused group of experts in the area, the task force recommended the appointment of a new Environmental Law Committee at the Society, which would provide guidance on relevant matters and public commentary on legislative initiatives, as appropriate.

The Council will further consider the recommendations at its next meeting.

Banking charges on deposits

The chair of the task force, Maura Derivan, reported on progress since the last Council meeting.

The important role undertaken by bar associations and individual solicitors across the country was very much appreciated for its impact on the grassroots campaign of opposition to the imposition of charges on deposits.

Ms Derivan confirmed that further guidance and assistance would be provided to the profession on the issue.

Finance

Committee chair Chris Callan reported to the Council on relevant matters, which included practising certificate and membership numbers, considerations in respect of Davy Stockbrokers, as well as the ongoing examination of costs at the Society.

Education

The chair of the committee, Martin Lawlor, reported that agreement had been reached with the Solicitors Regulation Authority in relation to mutual recognition between Ireland and the Law Society of England and Wales.

He further reported on a recent meeting with the law societies of Northern Ireland, England and Wales, and Scotland in respect of the development of a competency framework for solicitors, and confirmed that the matter was progressing well.

Retirement of the DG

Following the appointment of the deputy director general, Mary Keane, as director general of the Law Society on an interim basis, the virtual meeting was joined by members of Ken Murphy's family, the Law Society's senior management team, and a great number of past-presidents, who expressed their thanks to Ken Murphy for his dedicated service – both to the Society and the profession – during his 26 years as director general.

REGULATION OF PRACTICE COMMITTEE

RETENTION OF PROFESSIONAL FEES EARNED FOR LONGER THAN PERIOD ALLOWABLE

The Regulation of Practice Committee, which monitors compliance with the *Solicitors Accounts Regulations 2014* (SI 516 of 2014), has encountered circumstances where professional fees were retained in the client bank account by solicitors for a period longer than allowed in the regulations. The committee wishes to emphasise to the profession that any money held in the client account that is properly available to be applied in satisfaction of professional fees due to the practice must be transferred within three months. This is set out in regulation 7 and, more specifically, regulation 7(1)(a)(iii) and regulation 7(3).

Regulation 7(1)(a)(iii) requires that: "A solicitor may withdraw from a client account in the case of clients moneys – moneys properly available to be applied by the solicitor in satisfaction (in whole or in part) of professional fees payable by the client concerned where it has been made clear to such client that clients moneys held by the solicitor for the client are being or will be applied by the solicitor in satisfaction (in whole or in part) of such professional fees; provided that such moneys shall be transferred in a timely manner from client account to office account."

Regulation 7(3) states: "In clause (1)(a)(iii) of this regulation and in regulations 11, 12 and 23, 'in a timely manner' means within a period not exceeding three months after the date on which the solicitor concerned has furnished to the client concerned a bill of costs (or an interim bill of costs, as the case may be) specifying the amount of the professional fees payable by the client and in respect of which professional fees the solicitor may properly apply clients moneys of the client concerned in satisfaction (in whole or in part) thereof."

Regulation 5(2) also sets out that: "A solicitor shall not hold moneys to which the solicitor is beneficially entitled in a client account for longer than three months."

Regulation 5(3) clarifies that "money to which a solicitor is beneficially entitled" means: "(a) Moneys held by the solicitor for professional fees in respect of all or part of the amount of which the solicitor is entitled, as provided for in regulation 7(1)(a)(iii), to transfer from client account to office account; or outlays in respect of which the solicitor is entitled, as provided for in regulation 7(1)(a)(ii), to withdraw from client account; (b) moneys held by the solicitor which, pursuant to regulation 12, should be the subject matter of a bill of costs furnished to the client concerned."

ALTERNATIVE DISPUTE RESOLUTION COMMITTEE

TOP TIPS FOR REMOTE MEDIATIONS

The President of the High Court has issued a clear direction that parties should engage in either formal or informal alternative dispute resolution (ADR) to attempt to resolve or narrow disputes before coming before the courts during the pandemic. Remote mediation can provide a cost-effective and flexible mechanism by which parties can reach a mutually acceptable agreement to a dispute.

Solicitors and their clients have adapted well to remote mediation, which still offers the advantages of traditional mediation, such as confidentiality, savings on costs, and control over the outcome.

The Alternative Dispute Resolution Committee of the Law Society has prepared some top tips for getting the most from your remote mediation:

1) Remember, remote mediations can be arranged at short notice, particularly at present, where practitioners generally have fewer court commitments due to the current restrictions. From a client perspective, it is certainly easier to get key decision-makers into a virtual room than into a traditional in-person mediation.
2) Because of the speed at which mediations can be convened, there are obvious legal cost savings and savings on outlay.
3) Remote mediations can work particularly well when there is a lot of rancour in the dispute – for example, in family shareholder disputes, physical distance may be helpful. Parties may also be more relaxed in their home environment.
4) The structure of the mediation will depend on the mediator and the parties involved. You should explain to your client how the process will run and what to expect on the day. The nature of remote mediation leads to more downtime at your desk, where other work can be completed. However, it is important to pace yourself and maintain focus on the issues at hand.
5) Staggered start times can be helpful, limiting 'hanging around' time at the outset.
6) Technology allows for the mediation to take place in 'instalments' over a number of days, if suitable. This can work very well with clients who might not have had the energy for a long day of mediation, such as elderly or ill clients.
7) It is important to clarify in advance what technology is to be used by the mediator, and to ensure all can access it. Parties may prefer to invite the mediator to their own secure virtual room, rather than use the mediator's technology. Practice the technology – sharing screens, etc – but remember to close down your other applications, particularly email notifications before doing so.
8) Setting up a 'back channel' between advisors and their clients is essential if they are not in the same room. It can be helpful to use, for example, a WhatsApp group rather than technology reliant on Wi-Fi in case of connection issues. A WhatsApp group can also be a useful tool to convene a meeting at short notice.
9) Encourage participants to turn on their cameras to ensure full engagement and build trust and rapport.
10) Parties can stay in the room in the absence of the mediator, or can log in and out, as required. While a balance is required, and breaks are recommended from screen time, overall, you should try to remain connected with, and available to, your clients as the day progresses, in the same way as you would at a physical mediation. If you continually log off when the mediator is out of the room, valuable time that can be spent exploring the case with the client will be lost.
11) Reviewing documents electronically can be intense and tiring. Giving parties a break from their screens is crucial to maintaining momentum, and quick updates can be given by phone or email.
12) Joint meetings can take place in a separate joint room. The common courtesy of taking turns to speak and not cutting across other parties when they are speaking is heightened in online meetings, as there can be a delay on the line – and this is worth emphasising to clients. This often ensures a more considerate conversation than in-person meetings, particularly if emotions are running high.
13) While remote mediations can be easier to convene, they can also appear easier to collapse if parties feel less committed as they haven't invested in physical presence. So it is very important to secure proper buy-in to the process from clients by preparing for it as thoroughly as you would for a physical mediation. Remember to explain to clients, both in advance and especially on the day, what follows in risk terms if no deal is reached, just as you would at a physical mediation.
14) The sometimes 'stop-start' nature of a remote mediation can make the process more drawn out, and distractions or technology interferences can hamper progress. Try to reduce such distractions in advance, where possible.
15) 'Hallway conversations' can still take place, but are less organic. Picking up the phone to the mediator, a client or colleague to have a side conversation can be harder than 'bumping into them', but is often worthwhile.
16) Ensure that parties have the technology to sign up to settlement agreements, where required.
17) Remember, even where full agreement is not reached in one day, points of difference can be narrowed and solutions become clearer in the subsequent days, often leading to a complete resolution shortly after a mediation.

GUIDANCE AND ETHICS COMMITTEE

TEN STEPS TO ETHICAL DECISIONS AS A SOLICITOR

1) *Honesty and probity.* Notwithstanding all and any pressures that might face practitioners in their professional and private lives, it is an absolute and fundamental condition of a solicitor holding a practising certificate that they behave at all times and conduct each and every professional engagement as an officer of the courts. Practising solicitors must be cognisant at all times of the position of trust they hold towards their clients and their obligation to behave at all times with honesty, probity, and integrity in all their dealings with colleagues.

2) *Know your client/AML/source of funds.* This area of practice is under constant review and development and is subject to national and European regulations and oversight by the Law Society of Ireland and the Legal Services Regulatory Authority (LSRA). To ensure compliance with your statutory obligations regarding anti-money-laundering, invest in implementing and instructing all staff in the operation and management of a comprehensive centralised system (instead of notation on/regarding individual files) for the collection, storage, accessing and updating of appropriate client data (subject at all times to GDPR obligations).

3) *Capacity/conflicts of interest.* Make sure you have clear instructions as to who your client is and how they are in a position to instruct you. Address and satisfy yourself at the outset that the instructing party has capacity. Are there any circumstances that would prevent you from taking instructions? Is there a conflict of interest or the appearance of one? Take advantage of the 'cooling-off' period in your section 150 notice to ensure you are satisfied that you have enough information to be able to perform your professional duties.

4) *Terms of engagement/accountability.* Are the terms upon which you/your firm will perform and deliver the legal services to your client agreed and evidenced in writing? This should include any engagements of third parties and the amount/manner and timing of the discharge of their and your professional fees.

5) *What are your instructions?* Having regard to the steps outlined above, do you now have sufficient information about the nature and extent of your instructions to allow you form an informed view about your ability to carry out your instructions?

6) *Help!* Based on your assessment of the instructions received, will it be necessary to engage counsel, other professionals, or service providers? Have you advised your client, and have you received instructions in writing that the client wishes to engage external advisors and that they will be responsible for the discharge of their fees?

7) *Time.* Is time of the essence, and can you realistically meet the client's expectations/contract obligations in the time available? Is there any possible statute issue? Do you have enough information to comfortably identify all statute issues that might arise? Do you have a policy of refusing instructions where the matter is within a fixed period of expiry of a limitation period?

8) *Evidenced in writing/records/review.* Have you ensured throughout the process, from receiving initial queries/instructions through to completion of the matter, that there is an accurate and vouched record of all aspects of your instructions and your actions and engagements, and those records are easily accessible and corroborated?

9) *Dealings with third parties.* Have all your professional obligations and undertakings to all parties and third parties (Revenue, local authorities, banks, mortgage holders, Department of Social Protection and so on) been discharged fully, and a written receipt in respect of same received and recorded on your file?

10) *Communications with clients/Law Society/LSRA and post-completion matters.* At all times, a solicitor must keep their client and their colleague(s) reasonably informed on a timely basis with relevant and appropriate information pertaining to the legal matter/file. Similarly, it is an obligation that the solicitor comply fully in a timely manner with any statutory requirements made of it by the Law Society of Ireland/LSRA. Solicitors must ensure that post-completion matters for a client are completed as soon as can reasonably be achieved. g

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 Kathleen Doocey, a solicitor practising as KM Doocey Solicitors at American Street, Belmullet, Co Mayo, and in the matter of the *Solicitors Acts 1954-2015* [2018/DT83 and High Court 2020 no 40 SA]

Law Society of Ireland (applicant)

Kathleen Doocey (respondent solicitor)

On 23 July 2019, the Solicitors Disciplinary Tribunal found the respondent solicitor guilty of misconduct in her practice as a solicitor in that she:

1) Allowed a deficit of €169,152 to arise and be on her client account as of 31 December 2017,
2) Concealed a deficit of €50,000 in relation to the C estate by using other clients' money credited to their ledger account, thereby concealing that deficit,
3) Put a statement of account dated 1 September 2015 on the client's file that showed an incorrect sale price of €255,000, instead of the actual sale price of €205,000, and also showed a total of €100,000 paid to clients, which had the effect of concealing the irregularities in relation to this matter,
4) Used €42,720 received from a client (JD) in respect of a purchase, which helped conceal the deficit that had arisen in relation to the C estate matter, leaving a shortfall of €42,658.50 on the JD client ledger account,
5) Used €42,195.57 from the OD estate to help clear the deficit on the JD ledger account and thereby caused a shortfall on the OD estate ledger account,
6) Took €37,831.78 from the estate of S (deceased) and credited that sum to the OD estate ledger account, which helped conceal the shortfall on that ledger account,
7) Cleared the debit balance of €33,177 on the S estate ledger account with a transfer of that amount dated 30 June 2017 from the Suspense SUS16 client ledger account, which concealed the shortfall on the S estate ledger account and left a shortfall on the SUS16 client ledger account,
8) Cleared the shortfall on the Suspense SUS16 client ledger account by the transfer of €35,900 dated 30 June 2017 from the client account of JG, which left a shortfall on his client ledger account,
9) Cleared the shortfall on the JG client ledger account by a transfer of €35,900 from another client ledger, Suspense account SUS17, which left a debit balance on that ledger account, thereby concealing the shortfall on the JG client ledger account,
10) Transferred €24,850 from the DC client ledger account to the Suspense SUS17 client account with a date of 13 December 2017, which contributed to a shortfall of €25,000 on the DC client ledger account,
11) Paid €25,000 from the client account on 21 December 2017 to the Legal Aid Board on DC's behalf, but failed to enter this payment in the books of account,
12) Took €24,000 out of a sum of €64,659.06 received into the client account from MD, a client, on 11 July 2017 and lodged the amount to the office bank account on 12 July 2017 and failed to record the receipt and payment of this sum in the client books of account, thereby concealing the misappropriation,
13) Wrongfully credited the €24,000 taken from MD's money in the account to the office ledger account of the Suspense SUS17 account, describing it as "rectification" and wrongfully described the lodgment of €24,000 as "loan funds" in the office bank account,
14) Wrongfully paid the sum of €8,581.41 from the client account to the office account and described it as "rectification" in the office bank account; on the same date, the €8,581.41 payment from the client account was debited to the Suspense SUS17 client ledger account and caused a debit balance on the SUS17 client ledger account to increase from €4,251.24 to €12,835.65,
15) Misdescribed the sum of €34,772.30 in the client account books, which helped conceal the fact that it was mainly composed of clients' money used to clear debit balances and deficits on other clients' ledger accounts,
16) Caused a debit balance of €18,225 to occur on the MD client ledger account in August 2017, mainly because of the misapplication of €24,000, and subsequently cleared this debit balance with a transfer dated 28 December 2017 of €18,225 from the Suspense SUS17 client ledger account,
17) Lodged a total of €26,000 to the client account on 23 November 2017, composed of €13,500 belonging to BN clients and €12,500 belonging to BC client, which was incorrectly credited to the Suspense SUS17 client leger account, where it cleared a debit balance and was used with other clients' moneys to cover various deficits on various client leger accounts, thereby concealing the shortfall and deficits on the client account,

18) Between January and December 2017, drew various amounts totalling €20,090 from the client account to the office account and paid a probate fee of €319 out of the client account, resulting in a debit balance of €18,459 on the client ledger account of the TS estate,
19) In January 2018, after clearance of the debit balance of €18,459, paid a further €6,150 and €4,920 from the TS estate to the office account, leaving a sum of €11,070 remaining to be refunded to the client account in relation to that estate as of January 2018,
20) In the C estate, failed to enter a client account cheque for €4,322 written on 24 November 2017 in the books of accounts and, instead, the same amount was dated 1 November and was debited to the estate client ledger account and credited to the Suspense SUS17 client ledger account, with the effect of reducing the debit balance on that ledger account and increasing the debit balance on the C estate ledger account,
21) Failed to show a receipt of €5,750 in the client ledger account of LOC client, notwithstanding the payment of same in September 2017, and credited this sum of €5,750 in the books of account to a number of clients' ledger accounts in various amounts, thereby reducing the debit balances on those accounts,
22) Drew amounts totalling €10,698 to the office account in the period 2015 to 2017, which were debited to the client ledger account of the C estate, leaving a shortfall of €6,177 as of 31 December 2017 in the C estate,
23) Having received €5,000 into the client account of PR client in December 2017 for the purposes of discharging a liability in that amount in a family law matter, failed to pay that money until 2018, and instead moved the €5,000 to the credit of the Suspense SUS17 client ledger account with a date of 31 December 2017, thereby concealing a shortfall on that account,
24) Drew amounts from the client account to the office account in the period February 2016 to December 2017 in the estate of JOD, exceeding the amount of costs agreed with the client by about €20,000.

The Solicitors Disciplinary Tribunal ordered that the Law Society bring its findings and report before the High Court.

On 16 November 2020, the High Court ordered that:

1) The respondent solicitor's name be struck off the Roll of Solicitors,
2) The respondent solicitor pay a fine of €2,000 to the compensation fund,
3) The respondent solicitor pay costs of €1,500 for the proceedings before the disciplinary tribunal,
4) The respondent pay agreed costs of €11,527 for the proceedings before the High Court. g

LAW SOCIETY PROFESSIONAL TRAINING

Centre of Excellence for Professional Education and Lifelong Learning

CPD Cluster Events 2021

The 2021 Law Society Finuas Skillnet clusters are run in partnership with the regional bar associations and will provide essential practice updates on key issues relevant to general practitioners.

Topics, speakers and timings vary for these training events and all offer a mix of general, regulatory matters and management and professional development CPD hours. In order to enable access for all, these events will be available to attend as webinars with live Q&As. All materials will be sent to delegates in advance.

11 May	**Essential Solicitor Update 2021** in partnership with the Leitrim Bar Association, Longford Bar Association, Roscommon Bar Association and Sligo Bar Association
20 May	**Midlands General Practice Update 2021** in partnership with the Laois Solicitors' Association, Kildare Bar Association, Midlands Bar Association and Carlow Bar Association
17 Jun	**North West Practice Update 2021** in partnership with the Donegal Bar Association and Inishowen Bar Association
2 July	**Essential Solicitors' Update 2021** in partnership with the Clare Bar Association and Limerick Bar Association

To register please visit www.lawsociety.ie/cpdcourses

DATE	EVENT	CPD HOURS	DISCOUNTED FEE*	FULL FEE
ONLINE COURSES				
Where courses are listed with two dates, please select one date to attend.				
13/14 April	**Dealing with Difficult Clients and Situations**** Online via Zoom Meetings	3 Management & Professional Development Skills (by eLearning)	€135	€160
20&21 21&22 April	**Project Management***** Online via Zoom Meetings Delivered as two half day sessions	6 Management & Professional Development Skills (by eLearning)	€160	€185
22 April	**Effective Mediation in Ireland** Online via Zoom Webinar	2 General (by eLearning)	€135	
Online, On Demand	**BrexEd Talks**	Varies depending on modules attended	€186	

For a complete listing of upcoming courses including online GDPR, Fintech, Regulatory Matters, visit www.lawsociety.ie/cpdcourses 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 ** Open Skills Training Programme open to all staff working in the legal sector
*** Open Skills Managers Training Programme open to all managers working in the legal sector.

WILLS

Coney Jenkinson (née Ellis), Adrienne (deceased), late of 5 Ballyfermot Crescent, Ballyfermot, Dublin 10, and formerly of 1A Belmont Park, Raheny, Dublin 5, who died on 8 November 2020. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Sarah Flynn, Corrigan & Corrigan, 3 St Andrew's Street, Dublin 2; tel: 01 677 6108, fax: 01 679 4392, email: sarah.flynn@corrigan.ie

Dunleavy, Patrick (deceased), late of 8 Eglinton Terrace, Dundrum, Dublin 14, who died on 2 February 2006. Would any person having any knowledge of the whereabouts of any will made or purported to have been made by the above-named deceased, of if any firm is holding same, please contact O'Brien Murray Solicitors, 95 Main Street, Bray, Co Wicklow; tel: 01 286 8211, email: info@obrienmurray.ie

Farrell, John Andrew (deceased), late of 78 Aungier Street, Dublin 2, formerly of 343 Harold's Cross Road, Terenure, Dublin 6W, who died on 19 September 2020. Would any person having knowledge of the whereabouts of any will made by the above-named deceased, or if any firm is holding same, please contact O'Connor & Bergin, Solicitors, Suites 234-235, The Capel Building, Dublin 7; DX 200234, The Capel Building; tel: 01 873 2411, email: info@oconnorbergin.ie

Farrington, Ann (Anna) (deceased), late of Bishop Street, Dublin 8, who died on 6 October 2020. Would any person having knowledge of the whereabouts of any will made by the above-named deceased, or if any firm is holding same, please contact EC Gearty & Co, Solicitors, 4/5 Church Street, Longford; DX 29015; tel: 043 334 6312, email: lgearty@ecgearty.ie

Fortune, Ann(e) (deceased), late of 9 Synnott (Sinnott) Row, Phibsboro, Dublin 7, and formerly of 1A Synnott (Sinnott) Row, Phibsboro, Dublin 7, who died on 21 November 2020. Would any person having knowledge of any will made by the above-named deceased please contact Johnston Solicitors, 179 Crumlin Road, Crumlin, Dublin 12; email: info@johnstonsolicitors.ie

Gaynor, Sheilagh (otherwise Julia Gaynor) (deceased), late of 3 Aberdeen Street, off Infirmary Road, Dublin 7, in the city of Dublin. Would any person having knowledge of the whereabouts of a will executed by the above-named deceased, who died on or about the 21 November 2020, please contact Doyle & Company Solicitors, 123 Cabra Road, Dublin 7; tel: 01 838 3388, fax: 01 838 2028, email: mail@doyleandcompany.ie

Groome, Henry (deceased), late of Boyne Hill, Kinafad, Co Offaly, who died on 24 January 2021. Would any person having knowledge of the whereabouts of any will executed by the said deceased please contact Hamilton Sheahan and Company, Solicitors, Main Street, Kinnegad, Co Westmeath; DX 235001 Kinnegad; tel: 044 93 75040, email: roisin@hamiltonsheahan.ie

Hiney, Owen (deceased), late of 27 Churchfield Heights, Castletown, Co Laois, and Killaney, Mountrath, Co Laois. Would any person having knowledge of the whereabouts of any will made by the above-named deceased, who died on 16 February 2020, please contact Clarke Jeffers Solicitors LLP, 30 Dublin Street, Carlow; DX 18006 Carlow; tel: 059 913 1656, email: info@cj.ie

Kavanagh, Bernard (deceased), late of Shanahona, Ballyhogue, Enniscorthy, Co Wexford, who died on 15 September 1980. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Miriam Wilson of MT Wilson Solicitors, 49 North Main Street, Wexford, Co Wexford; tel 053 910 0034, email: info@wilsonlaw.ie

Kavanagh, Margaret (deceased), late of Shanahona, Ballyhogue, Enniscorthy, Co Wexford, who died on 13 April 1998. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Miriam Wilson of MT Wilson Solicitors, 49 North Main Street, Wexford, Co Wexford; tel 053 910 0034, email: info@wilsonlaw.ie

Kavanagh, Michael (deceased), late of Shanahona, Ballyhogue, Enniscorthy, Co Wexford, who died on 9 June 2018. Would any person having knowledge of the whereabouts of any will made by the above-named deceased

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%)

HIGHLIGHT YOUR NOTICE BY PUTTING A BOX AROUND IT – €30 EXTRA

ALL NOTICES MUST BE PAID FOR PRIOR TO PUBLICATION. ALL NOTICES MUST BE EMAILED TO catherine.kearney@lawsociety.ie and PAYMENT MADE BY ELECTRONIC FUNDS TRANSFER (EFT). The Law Society's EFT details will be supplied following receipt of your email. **Deadline for May 2021 *Gazette*: 21 April 2021.**

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*.

please contact Miriam Wilson of MT Wilson Solicitors, 49 North Main Street, Wexford, Co Wexford; tel 053 910 0034, email: info@wilsonlaw.ie

McDonnell, Charles (deceased), late of 54 Georgian Hamlet, Baldoyle, Co Dublin, who died in or about 23 November 2019. Would any person having knowledge of the whereabouts of any will made by the above-named deceased please contact Keith Walsh Solicitors, 8 St Agnes Road, Crumlin, Dublin 12; tel: 01 455 4723, email: moira@kwsols.ie

McGrath, John Gerard (otherwise Gerard) (deceased), late of Apartment 12, Caragh, Brideholm, Commons Road, Cork, and Knockanevin, Borrisoleigh, Thurles, Co Tipperary. Would any person having knowledge of the whereabouts of any will made by the above-named deceased, who died on 20 January 2021, please contact Butler Cunningham & Molony Solicitors, Slievenamon Road, Thurles, Co Tipperary; DX 40006 Thurles; tel: 0504 21857, 22315, email: info@bcmthurles.ie

Morris, Elizabeth (Lily) (deceased), late of 15 Knocklyon Park, Templeogue, Dublin 16. Would any person with any knowledge of a will executed by the above-named deceased, who died on 18 November 2020, please contact Mairead Leyne, solicitor, 3 Park House, Greystones, Co Wicklow; DX 205003 Greystones; tel: 01 287 3483, email: maireadleyne solicitor@gmail.com

Murphy, Brian (deceased), late of 14 Church Square, off Church Road, East Wall, Dublin 3, who died on 20 February 2021. Would any solicitor or person having knowledge of the whereabouts of any will made by the above-named deceased please contact Lawlor O'Reilly & Co, Solicitors, 43 Upper Gardiner Street, Dublin 1 (ref: JD/M010006); tel: 01 878 7255, email: law@lawlororeilly.com

Smith/Smyth, Desmond (otherwise Bernard Desmond) (deceased), late of Millhouse, Bunclody, Co Wexford, and Foxfield Lodge, Ballymacahara, Ashford, Co Wicklow, who died on 21 February 2020. Would any person having knowledge of the whereabouts of a will made by the above-named deceased please contact Mary Brady, Wright Solicitors, Mill Street, Monaghan, Co Monaghan (ref: MB/CM/S304); tel: 047 82132, fax: 047 84338, email: mary@wrightsolicitors.ie

Thursby, Anthony (Tony) (deceased), late of 29 Arnott Street, Portobello, Dublin 8, who died on 29 September 2020. Would any person having knowledge of the whereabouts of any will made by the above-named deceased, or if any firm is holding same, please contact Clear Solicitors, 42 St Stephen's Green, Dublin 2; tel: 01 644 5777, email: info@clearsolicitors.ie

Weyman, Anthony (Tony) (deceased), late of Shass, Dowra, Co Leitrim, and formerly of 49 Upper Cheltenham Place, Bristol, England. Would any person having knowledge of a will executed by the above-named deceased, who died on 20 December 2020, please contact Kelly & Ryan LLP, Solicitors, Manorhamilton, Co Leitrim; tel: 071 985 5034, email: reception@kellyryanmanor.com

TITLE DEEDS

In the matter of the *Landlord and Tenant Acts 1967-2019* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of an application by Helene Duignan

Take notice that any person having any interest in the freehold estate or any intermediate interests of the following property: 22 Lower Kilmacud Road, Stillorgan, Co Dublin, held by the applicant under indenture of lease dated 16 December 1958 and made between Michael Murray & Company Limited of the one part and Patrick J Murray of the other part for a term of 144 years from 25 March 1954, subject to the yearly rent of £12 and the covenants and conditions therein contained.

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

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

Date: 1 April 2021

Signed: Michael Sheil & Partners (solicitors for the applicant), Temple Court, Temple Road, Blackrock, Co Dublin

In the matter of the *Landlord and Tenant Acts 1967-2019* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of an application by Kieran Murphy, Mary Treacy and Kieran Murphy in respect of premises at 9 The Crescent and Palmyra Avenue, Galway

Any person having an interest in the freehold estate or any superior or intermediate interest in the property known as all that part of the lands of Sherwoods Fields, comprising the hereditaments and premises known as 9 The Crescent (formerly 4 Palmyra Crescent) and the lands at the front and rear (with the store thereon fronting Palmyra Avenue) held (*inter alia*) under a lease dated 20 May 1853 and made between John Richard William Whaley of the one part and Michael Dooley of the other part for a term of 999 years from 29 September 1852, subject to the annual rent of £22 sterling (but indemnified in respect of the entire of said rent by other property demised by the said lease) and to the covenants and conditions therein contained.

Take notice that the applicants, Kieran Murphy, Mary Treacy and Kieran Murphy, intend to submit an application to the county registrar for the county and city of Galway for the acquisition of the freehold interest and any inter-

mediate interest in the aforesaid property, and any party or parties asserting that they hold a superior interest in the aforesaid property are called upon to furnish evidence of title to the aforesaid property to the below-named solicitors within 21 days from the date of this notice.

In default of any such notice being received, the applicants, Kieran Murphy, Mary Treacy and Kieran Murphy, intend to proceed with the application before the county registrar for the county and city of Galway for directions as may be appropriate on the basis that the person or persons beneficially entitled to the freehold, including the superior interest(s) and intermediate interest(s), are unknown or unascertained.

Date: 1 April 2021
Signed: Kieran Murphy & Company LLP (solicitors for the applicant), 9 The Crescent, Galway

In the matter of the *Landlord and Tenant Acts 1967-2005* and in the matter of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and in the matter of the dwellinghouse and premises known as 'Maigh Dara', Loverslane, Castlecomer Road, Kilkenny: an application by Gerard Walsh and Anne Walsh

Take notice that any person having any interest in the freehold estate or any intermediate interest in the following property: the dwellinghouse and premises known as 'Maigh Dara', Lovers Lane, Castlecomer Road, Kilkenny, which was demised by indenture of lease dated 23 December 1924 and made between the Right Reverend John Godfrey, and Very Reverend Percy Phair, and the Reverend Andrew Albert Victor Hogg of the first part, Arthur Geoffrey Davis of the second part, and Hanna Walsh of the third part, for a term of 99 years from 29 September 1924, subject to the yearly rent of £4 and to the covenants on the part of the said Hanna Walsh and the conditions in the said lease contained.

Take notice that the applicants, Gerard and Anne Walsh, intend to submit an application to the county registrar for the city of Kilkenny for the acquisition of the freehold interest in the aforesaid property, and any party ascertaining that they hold a superior interest in the aforesaid premises (or any of them) are called upon to furnish evidence of the title to this aforementioned premises to the below named within 21 days from the date of this notice.

In default of any such notice being received, said applicants intend to proceed with the application before the county registrar at the end of the 21 days from the date of this notice and will apply to the county registrar for the city of Kilkenny for directions as may be appropriate on the basis that the person has been officially entitled to the superior interest including the freehold reversion in each of the aforesaid premises are unknown or ascertained.

Date: 1 April 2021
Signed: Smithwick Solicitors (solicitors for the applicant), 43 Parliament Street, Kilkenny

PRO BONOBO

'A' IS FOR 'APPLE', 'I' IS FOR 'IDIOT'

Turns out that the pen is mightier than the code: you can fool artificial-intelligence tools with words.

Take the AI system called 'Clip'. Show it a picture of an apple, and it will identify it as an apple. But show it the same picture with the word 'iPod' pasted on it, and it will identify it as an Apple.

In another classic case of misdirection through the use of words, this has been dubbed by the company behind Clip as a 'typographic attack', *The Guardian* reports. Research company OpenAI argues that this apparent weakness is really a strength, proving that the AI is capable of "organising images as a loose semantic collection of ideas, providing a simple explanation for both the model's versatility and the representation's compactness".

Or, in other typographically represented linguistic symbols, it can 'think' about the world in terms of ideas, rather than just images. Be that as it may, it's worth bearing in mind during your next AI-assisted discovery trawl.

'PLAN FROM ATLANTIS' FOILED

Spanish police have seized a homemade submarine capable of carrying more than two tons of drugs, the BBC reports. Police found the craft during an international operation while it was being built in the Costa del Sol.

The 30x10-foot semi-submersible had never sailed, in what one leading Irish media outlet dubbed 'The Plan from Atlantis'.

"We think it was going to go onto the high seas to meet a mother ship to take on board drugs," police told reporters.

"It's like an iceberg. In practice, nearly all of it goes under water apart from the top, which is the only part that would be seen from another ship or a helicopter."

TAIWAN SEEKS TO HALT SNP CONFUSION

Taiwanese officials issued a plea for people to stop changing their name to 'salmon', after dozens did so to take advantage of a restaurant promotion, RTÉ reports.

During a two-day promotion, any customer whose ID card contained 'Gui Yu' (the Chinese characters for salmon) would be entitled to an all-you-can-eat sushi meal along with five friends. Around 150 people went to officially register a change in their name to take advantage of the deal.

Taiwan allows people to officially change their name up to three times, but officials said: "This kind of name-change not only wastes time but causes unnecessary paperwork."

Some of the newly registered names translate as 'Explosive Good-Looking Salmon', 'Salmon Prince', and 'Meteor Salmon King'. One person apparently added 36 new characters to his name, most of them seafood themed – no doubt hoping to get ahead of the next restaurant promotion.

BORNEAN BLACK-BROWED BABBLER BARBECUE BAN

In the 1840s, a mystery bird was caught on an expedition to the East Indies. 'The black-browed babbler' was never seen in the wild again, with a stuffed specimen being the only proof of its allegedly tasty existence.

"At last! We've found the rare Black-Browed Babbler."

However, last year, two men photographed a bird they didn't recognise and informed bird-watching groups, *The Guardian* reports.

Experts have now confirmed that it is, indeed, the babbler – still going strong in the wild, and particularly good with sweet chilli sauce. Er, allegedly.

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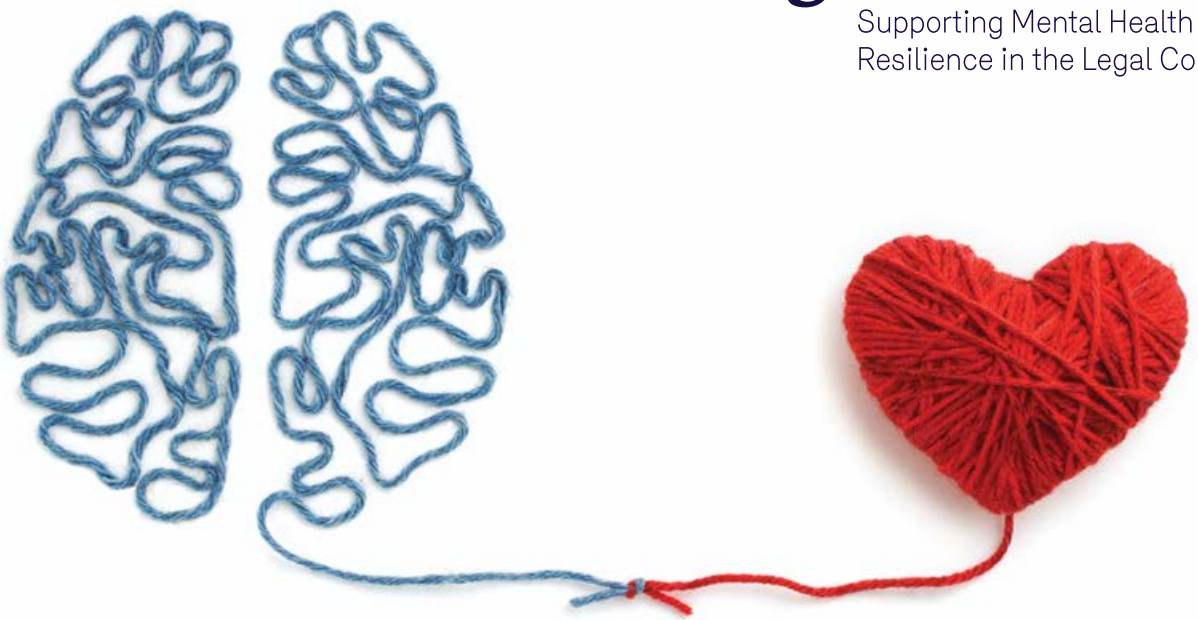

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LegalMind is a confidential, independent, low-cost mental health support for solicitors and their dependants.

The support is a permanent support, based in Ireland, and will be there for solicitors through any personal or professional challenges.

Solicitors can call LegalMind at any time of the day or night, from all over Ireland, and talk to a mental health professional about any issues they or their family may be facing.

After this initial conversation, solicitors may then avail of further low-cost supports – counselling, psychotherapy or psychological supports within a 30 kilometre radius of their home.

For more information visit: www.lawsociety.ie/legalmind

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