The Bar Review

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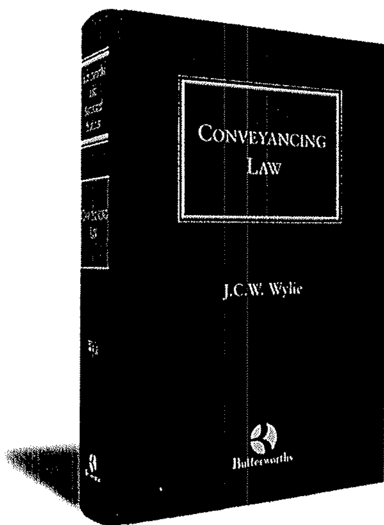

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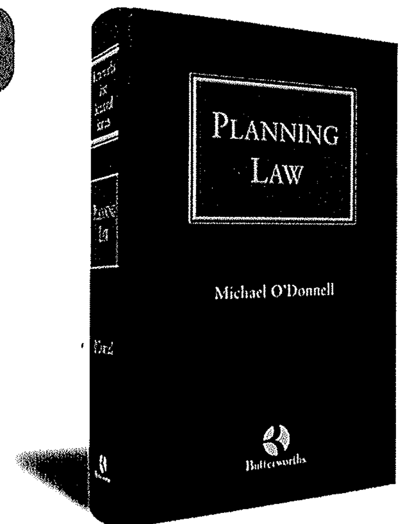

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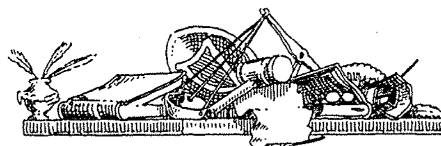

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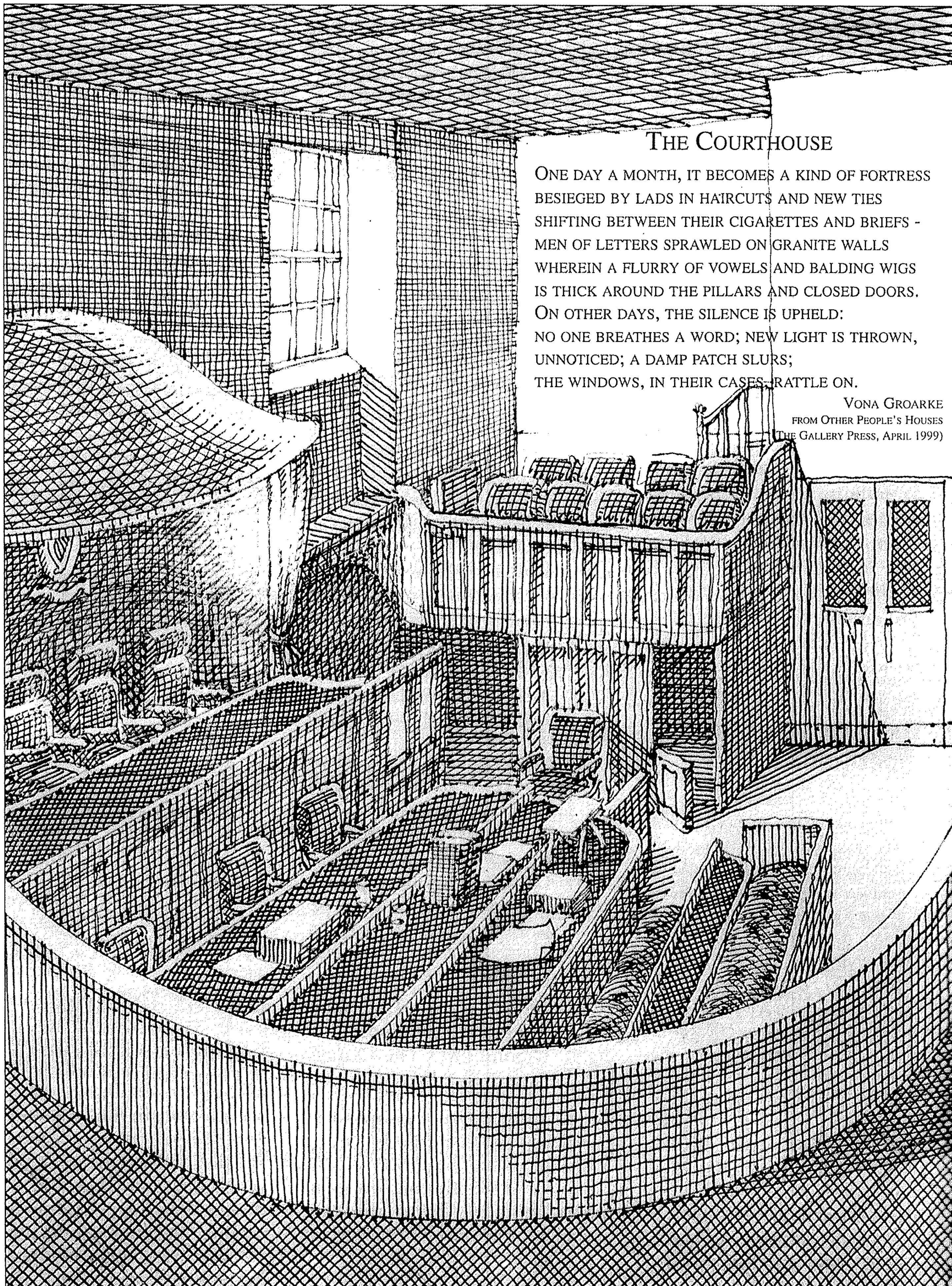


The Courthouse

One day a month, it becomes a kind of fortress
besieged by lads in haircuts and new ties
shifting between their cigarettes and briefs -
men of letters sprawled on granite walls
wherein a flurry of vowels and balding wigs
is thick around the pillars and closed doors.
On other days, the silence is upheld:
no one breathes a word; new light is thrown,
unnoticed; a damp patch slurs;
the windows, in their cases, rattle on.

Vona Groarke
from Other People's Houses
(The Gallery Press, April 1999)

The Year 2000 Problem

The Year 2000 problem – stemming from the inability of older software, hardware and 'embedded' systems to cope with dates after 31.12.99 – presents a major challenge to our political, economic and legal systems. While the debate about the Year 2000 problem has been characterised in some quarters by apocalyptic predictions, it seems clear that many systems will break down over the coming 12 months, with resulting economic and possibly physical loss. In this age of technological supremacy and global commercial interdependency, no sector of society will avoid the potential fallout from the Year 2000 problem; if one link in a chain of supply fails the whole chain may be affected.

As the countdown to the onset of the problem hastens, it is obvious that not all sectors of the economy will be Year 2000-compliant. It is thus incumbent on those in charge of public and private sector management strategies to prioritise Year 2000 compliance, and contingency projects in areas where the health and safety of individuals is at risk – particularly in the areas of health care, transport, utilities and manufacturing.

We have been fortunate in Ireland that the problem has been taken seriously by our political and business leadership. Ireland's level of Year 2000-preparedness rates very favourably internationally; studies by international observers put Ireland in the same league as the US, UK, Australia, Canada and Holland at the best rate of readiness. The Government's Interdepartmental Year 2000 Monitoring Committee has worked hard to ensure 80% compliance, at this point, of all major civil service systems. Similarly, its Year 2000 Business Awareness Campaign has worked hard at targeting the small and medium enterprise sector regarded as most vulnerable to Year 2000 failure. However, a recent report of the EU Commission, 'How the EU is tackling the Year 2000 Problem', identifies that time is running out for many sectors across the EU; in particular the energy sector, supply chains for goods and services and aspects of the health services. The report also emphasises the importance of governments prioritising work on systems that impact on the health, safety and welfare of their citizens. It concludes that it may be too late for effective regulatory intervention at this point. This increases the pressure on managers and suppliers of services – and their advisers – to implement their own preventive action.

It is in this context that the legal professions have a role in ensuring they advise clients as to the vital importance of taking preventive action on the Year 2000 problem without delay, whether by way of putting contingency plans in place or taking corrective action now. Indeed, lawyers who are remiss in this regard may well be exposing themselves to actions in negligence down the line. Advice on the importance of achieving Year 2000-compliance applies with equal force to the legal professions themselves who should be ensuring a bug-free transition to the provision of legal services in the new Millennium.

There has been much focus in the US on the possibility of floods of litigation arising from the Year 2000 problem. Such a focus can miss the point of the issue: the Year 2000 problem is a problem to be avoided, not litigated about after the event. Harsh economic consequences could result from relying on litigation to repair damage which could have been avoided by positive commercial action.

Y2K – recent comments and concerns

NIALL O'NEILL Barrister

The problem with Y2K is that no one knows what is going to happen with any degree of certainty. Some commentators have predicted global catastrophe and others have predicted that there will be only insignificant problems. Until recently most of the specialists in this area have sided with the former, more pessimistic approach, indicating that there were going to be 'mission critical failures' in many areas including what are known as the 'big three': power, telecommunications, and financial services. Now there are an increasing number of commentators who believe that the effect of Y2K will not be as bad as previously envisaged even when most of the latest research and progress reports still indicate a relatively low level of preparedness.

The Problem

At first glance the year 2000 problem seems quite simple: make software recognise the new century. However, fixing Y2K on such a vast scale is mind boggling. The following continue to be some of the problems:

i) When it might be thought that a piece of software is Y2K compliant there may have been a line of program code dealing with dates that may have been missed.
ii) The nature of programming means that changing code can have unintended consequences leading to more anomalies in a program.
iii) 'Embedded systems' where equipment is reliant on micro-controllers which are date-aware i.e. they switch on and off at specific times, are numerous and can be difficult to fix or may be missed.
iv) Awareness amongst small and medium sized enterprises (SMEs) is a concern shared by virtually every commentator, government and research group. Many SMEs that are aware of the problem don't believe it is going to effect them.
v) The software industry has a track record of delivering projects late.
vi) There is a world-wide shortage of software engineers.
vii) The implications of the Y2K problem will extend beyond the computing and information systems of individual organisations. It may affect supply chains, credit ratings, stock values, and expose executives and senior officials to legal risk. This may come as a shock to some enterprises.

Recent Optimism

There are certainly encouraging signals coming from respected observers of the year 2000 which is something that just didn't happen up to a year ago. This is mainly a result of the huge efforts that countries and companies have made over the past couple of years and the millions that has been poured into fixing the problem. Indeed stock market investors currently don't seem to be too worried about the start of the new millennium.

The Professor of Software Systems Engineering at University College London, Anthony Finkelstein, has said[1] that most of the dire warnings about the year 2000 problem are irresponsible scaremongering and such stories are put about by people with a commercial interest in the problem, while the more extreme tales are just urban myths. He added "I would not wish to argue for complacency, but I think we need a healthy antidote to the 'sky is falling in' mentality. I for one will not be worrying over much about my microchip-controlled toaster, and I will not be answering the door if the bug buster rings."

The Microsoft Corporation Chairman Bill Gates said recently that for most people the millennium bug should be no more than a "minor inconvenience"[2]. The American Federal Reserve Chairman Alan Greenspan has stated "I'm increasingly less concerned about whether there will be true systemic problems[3]." More significantly Y2K guru Peter de Jager, the man credited for identifying the Y2K problem[4] and considered its foremost expert, will be over the Atlantic Ocean at midnight flying from America to London to show that many of the worst fears about Y2K are unfounded.

Earlier this year Peter de Jager wrote an article called "Doomsday Avoided"[5] and blamed lawyers for many of the problems surrounding hype about Y2K. In the context of Y2K problems with the computer systems in American power stations he said "Which is it? Are there problems or aren't there? The answer may be hidden in some of-the-record conversations which go something like this...Peter, we didn't find anything which would have cut off power...but the lawyers won't let us say that since it comes across as a guarantee that we'll have power that day.......This obstacle of lawyers is evident in all industries. I know of banks, payroll companies, government agencies, insurance companies, water companies, etc.., who have told me privately that they're done, complete, finished... but cannot announce this good news because of the lawyers." However, just to put Mr. de Jager's optimism into context he has stated in a further article[6] that prudent planning would be a level of preparation sufficient to cope with a 2-3 week disruption of services.

International and Domestic Levels of Preparedness

Despite the more recent favourable comments the lack of preparation internationally especially amongst

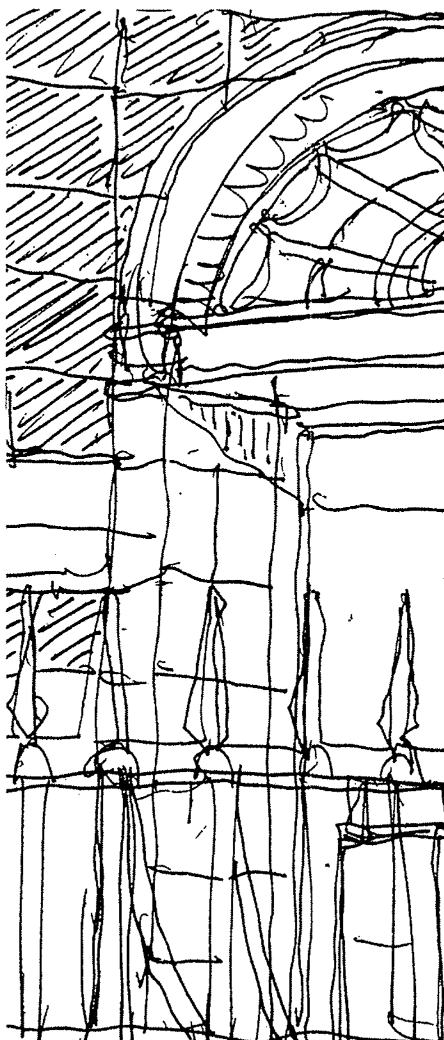
developing nations is a cause of considerable concern. The Gartner Group, a Connecticut based research company, bases its Y2K findings on 15,000 companies and government agencies in 87 countries. The company prepares a quarterly list of countries that it considers the least prepared and the most prepared. Ireland, happily, is in the most prepared group along with the United States, Austrailia, Belgium, Bermuda, Canada, Denmark, the Netherlands, Israel, Switzerland, Sweden and the United Kingdom[7]. Unsurprisingly the lower categories consist of developing countries from Africa, Asia and South America and their ability to cope has to be seriously questioned. At a recent teleconference[8] the Gartner Chief analyst Lou Marcoccio took one example: "Nigeria has dozens of mission critical failures, for example in power systems, every day. If they start having several more because of Year 2000 problems, some of which last for days instead of hours, what will that do their business?".

Many of the European Countries are not on the 'A' list according to the Gartner Group. The European Commission has reported[9] that those countries that have developed an early concern for Y2K and analysed the problems more closely are more pessimistic and less satisfied by their progress than countries which are not as advanced. The commission reported that concern is shared about the progress of regional /local administrations, the problem of embedded systems, supply chains and the awareness of small to medium enterprises. France and Germany and Italy have been criticised for taking there 'eye off the ball' because of their concentration on the adaptation of computer systems to the Euro.

The Commission has highlighted that information from member states is not forthcoming on the progress of the rail, road, and maritime sectors. It reports good progress being made in the telecommunication sector and the air transport sector. The financial sector has shown exemplary progress in its preparations. The Commission is most worried about the energy sector especially because of the mutual dependencies between infrastructures and the cross-border interconnections. As far as the nuclear industry is concerned the Commission is monitoring progress closely and reports that there is little cause for concern.

An example of lack of planning and action in Germany was highlighted in a recent article in FOCUS magazine. The 'Germany Conference of Cities' and FOCUS surveyed all German communities with more than 100,000 inhabitants. It reported one in four communities were unable to clearly outline their problem for electrical service. Half of all communities had not tested hospital systems and one third failed to complete procedures for their local transportation system[10].

Ireland reacted to the problem early on and the Government are very proactive in their approach. There is an interdepartmental monitoring committee in the Civil Service with private sector participation who report quarterly. Within each department there is also a committee which monitors and reports on Y2K compliance. The Department of Enterprise, trade and Employment have an on-going campaign to raise awareness. The Centre for Management Organisation and Development of the Department of Finance produced a Y2K compliance clause for all procurement and requests for tender by governmental departments in 1996. There is cross border co-operation and regular contact with other member states.



Other Aspects to Y2K

There are some issues that continue to be highlighted in the latest reports and research and some that are have not even been thought up to now, a few examples are:

- Gartner have highlighted time boundaries over which Y2K problems will manifest. Most of the failures will not occur at 00:00 on the 01/01/2000. Indeed the first Y2K problems started in the 1970s when 30-year mortgages started to affect certain computer systems. The research group predicts that the time most problems will occur is in July 1999 when many companies change to a new fiscal year 2000. The group believes that 25% of all Y2K problems will occur before January 1 2000 with 55% occurring during 2000 and 15% sometime in 2001. The other 5% occurred before 1999. The Gartner Group is concerned that too much attention is being paid to a single date and organisations are not taking into account what may happen over a thirty month period.
- There is concern that fear of Y2K may lead to more disruption than the bug itself. For example Telecom Eireann is concerned about the number of people utilising the phone network. There is always a normal increase in demand over the new year but if there was an extra surge due to people only testing the phones then the system may break down. Similarly banks are worried about a lack of confidence leading customers to withdraw all their money. The Bank of Japan announced on April 6, 1999 that it would set aside $331.3 billion (¥ 40 trillion) in case of any sudden increase in money demand by its customers.[11]

- Enterprises that have Y2K programs in operation may find it difficult to conduct effective inventories regarding embedded systems. Areas such as manufacturing, health and transport may suffer as a result.

- SMEs continue to be routinely criticised by virtually every report made on Y2K. Their vulnerability lies in their

dependence on external technical support and ignorance about the whole year 2000 issue. SMEs may have particular problems with embedded systems. Even SMEs in the manufacturing sector that are aware about year 2000 problems and have taken steps to protect their PC systems are sometimes oblivious to the embedded system problem.

- Many large corporations have already identified alternative suppliers and SMEs that are unable to provide reassurance of Y2K compliance may find themselves losing business, being denied credit, or bankrupt.

Conclusion

Recent optimistic comments made about the problem do not seem to acknowledge the most up to date information collated by different groupings. There have been huge efforts made and millions spent on the issue. However, there are still many live issues, such as SMEs and embedded systems, that will have effects that are impossible to measure. Even the most prepared organisations and countries will not be able to escape the knock-on effect from the unprepared. Though it is probably fair to say that the 'doomsday' scenario resulting in a 'digital winter' has probably been avoided and the worst fears, such as aeroplanes falling out of the sky, will not be seen. Yet it is impossible to predict how countries and organisations which have to a large extent ignored the problem will be able to cope if there are many 'mission critical failures' happening at the same time. What is important is that contingency planning continues to take place and organisations and governments continue to spend what it takes to ameliorate the worst effects of this problem. ●

1 The Computer Bulletin (British Computer Society) March 1999.
2 ZDNet April 12th, 1999.
3 Yahoo! News Thusday May 6th 1999.
4 "Doomsday 2000" Computer World September 6, 1993 is considered the original Y2K article.
5 www.year2000.com/archive/Nfy2kdoomsday.html.
6 "How Bad, How Long, How Likely?" April 14th 1999 www.year2000.com/archive/Nfy2 khowbad.html.
7 April 19, 1999.
8 Newsbytes 22 March 1999.
9 Communication from the Commission "How the European Union is tackling the Year 2000 Computer Problem" Final Draft 2 December 1998.
10 FOCUS Magazine Sunday March 28, 1999 German Edition.
11 Deutsche Bank Reasearch The Y2K Reporter April 12, 1999.

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Limiting Year 2000 Liabilities

DENIS KELLEHER, Barrister

When a company buys a piece of software or an item of computer equipment there are certain assumptions which they are legally entitled to make, such as those provided for in Section 14(2) of the Sale of Goods Act 1993 (as amended by section 10, Sale of Goods Act 1980) which provides:

> "Where the seller sells goods in the course of business there is an implied condition that the goods supplied are of merchantable quality, except that there is no such condition –
> (a) as regards defects specifically drawn to the buyer's attention before the contract is made, or
> (b) if the buyer examines the goods before the contract is made, as regards defects which that examination ought to have revealed".

So if a purchaser was informed prior to sale that the programs he was buying were not Year 2000 compliant he could not protest if the program later broke down. However, if a program were sold as 'year 2000' compliant and it subsequently failed, then the question of misrepresentation will arise. It is concerns such as this which make software suppliers unwilling to disclose the Year 2000 compliance of their products. As a result the Americans have introduced the *Year 2000 Information and Readiness Disclosure Act*, which exempts suppliers who disclose information such as this from liability.

Even if a buyer is able to assess a program before purchase, it is unlikely that he would be able to adequately assess its Year 2000 compliance. This is a process which involves far more than simply changing the date on a computers clock to 1st January 2000 and seeing what happens, dates can be inputted into a program in a whole variety of ways. A particular problem area is that 'embedded chips' which contain computer programs may be impossible to test.

The term merchantible quality is defined by section 14(3) of the Sale of Goods Act 1993 (as amended by section 10, Sale of Goods Act 1980) which provides that:

> "Goods are of merchantible quality if they are as fit for the purpose or purposes for which goods of that kind are commonly bought and as durable as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances and any reference in this act to unmerchantable goods shall be construed accordingly".

The terms 'fitness for purpose' and 'durability' could have a variety of meanings, in particular, it may not have been in the contemplation of the parties when the contract was made that the program in question would still be in operation in the year 2000. Suppliers and purchasers may have different expectations of how long a computer will remain in use, the purchaser may intend to use a computer until the hardware breaks down, the supplier may expect the purchaser to only use the software until its next upgrade becomes available. The variety of commercial issues which might be thrown up by millennium bug litigation is potentially endless. Only a few cases relating to information technology have actually come before the courts. In *Saphena Computing -v- Allied Collection Agencies*[1] it appears to have been decided that it was not a breach of fitness for purpose to supply software which contained bugs which the supplier was able and willing to fix if it was informed of the bug during or after acceptance testing. It remains to be seen whether this view would be extended to the millennium bug.[2]

Goods must be fit for the purpose for which they are 'commonly bought', most computer programs are replaced after a few years or even months by an upgrade and many users will move to that new program, so it might be argued that a program was not 'commonly bought' in the 1980's or the early 1990's with the intention that it would still be in use in the year 2000.

On the other hand, defects do not have to be readily discoverable to affect the merchantible quality of the good, if you bought a car and it seemed fine until you drove it down the motor way and the engine seized this would mean that it was not of merchantible quality.[3] A similar argument might be made in relation to the millennium bug. It has been suggested that the merchantible quality of a good can vary according to the time you are examining it for defects. In the case of *Henry Kendall & Sons -v- William Lillico*[4] animal foodstuffs had been held to be satisfactory at the time of their sale, a latent defect was then discovered which suggested that they were unsuitable for feeding to animals. Subsequently to this it was found that although the foodstuffs were defective they might be used to feed cattle. The House of Lords held that the subsequent knowledge was relevant and since the goods had eventually been found to be suitable for at least one of their uses, they were of merchantible quality. This judgement might suggest that if a program which worked fine now and was of merchantible quality but which failed come the 1st of January 2000, then it might no longer be of merchantible quality.

In *Lexmead (Basingstoke) -v- Lewis*[5], a trailer hitch disintegrated and was only held together by a piece of

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dirt. The dirt fell out while the trailer was in use, it detached itself and crashed into an oncoming vehicle. The farmer who had bought the hitch failed in his claim that the hitch was not fit for its purpose, as he was aware of the defect but did nothing about it. In the same way if a user is aware of the millennium bug but does nothing about it, then the question of merchantible quality will not arise.

Exemption Clauses.

It is accepted that software will fail from time to time. Phone systems have collapsed, space rockets have exploded and most recently the SOHO (Solar and Heliospheric Observatory) satellite which went dead in June 1998, 930,000 miles from earth, due to faulty software.[6] Software producers are aware of this fact, so they have taken steps to try and protect themselves from claims. Software licences will inevitably contain limitation of liability clauses. A typical one reads:

> "...ICL's liability will not exceed the price, or charge payable for the item of equipment, program or service in respect of which the liability arises or £100,000 (whichever is the lesser). Provided that in no event will ICL be liable for:
>
> (i) loss resulting form any defect, or deficiency which ICL shall have physically remedied at its own expense within a reasonable time;
> (ii) any indirect or consequential loss or loss of business or profits sustained by the customer;
> (iii) loss which could have been avoided by the customer following ICL's reasonable advice and instructions".

The enforceability of clauses such as this is dealt with by section 55(4) of the Sale of Goods Act which provides:

> "In the case of a contract of Sale of Goods, any term of that or any other contract exempting from all or any of the provisions of sections..14...of this act shall be void where the buyer deals as a consumer and shall in any other case, not be enforceable unless it is shown that it is fair and reasonable."

The test for deciding whether or not a term is fair and reasonable is set out in the schedule to the Act:

1. "....it shall be a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made."

2. Regard is to be had in particular to any of the following which appear to be relevant:
   (a) the strength of the bargaining positions of the parties relative to each other taking into account (among other things) alternative means by which the customer's requirement could have been met;
   (b) whether the customer received an inducement to agree to the term or in accepting it had an opportunity of entering into a similar contract with other persons but without having to accept a similar term;
   (c) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to the custom of the trade and any previous course of dealing between the parties);
   (d) whether the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable; and
   (e) whether any goods involved were manufactured, processed or adapted to the special order of the customer.

English and Irish law has similar, although not identical, provisions relating to sale of goods and the question of what was fair and reasonable has been examined with relation to computer programs in two cases.

The leading decision on software limitation of liability clauses is: *St Albans City Council -v-ICL* 1995 FSR 686. The Plaintiff was a local authority in the UK, the defendant agreed to supply a system to help the plaintiff administer the Poll tax. The program malfunctioned and it over-estimated the number of charge payers in St Albans. As a result the Council set the charge at two low a level and sued for £1,314,846. A Limitation of liability clause was contained in the contract which it had signed. This read:

> "...ICL's liability will not exceed the price, or charge payable for the item of equipment, program or service in respect of which the liability arises or £100,000 (whichever is the lesser). Provided that in no event will ICL be liable for:

(i) loss resulting form any defect, or deficiency which ICL shall have physically remedied at its own expense within a reasonable time;
(ii) any indirect or consequential loss or loss of business or profits sustained by the customer;
(iii) loss which could have been avoided by the customer following ICL's reasonable advice and instructions".

Scott Baker J then had to decide was this term enforceable. The clause had been queried by the plaintiffs at negotiation, however they had gone on to sign the contract containing it. He held that it was not. In looking at the reasonableness of the limitation clause he held

- The defendant had considerable resources, it was part of a group which had a worth of 2 billion in 1988, and profits of 100 million in the first half of 1988.
- The defendant had product liability insurance of £50 million
- The defendant called no evidence to show that it was fair and reasonable to limit its liability to £100,000.
- The Plaintiff received no inducement to accept the clause.

The Plaintiff won. The Defendant appealed unsuccessfully, save for the fact that it got damages reduced by £484,000 since this could still be recovered from the ratepayers. However, this case can be distinguished on its facts, the plaintiff was under severe pressure as to time when signing the contract, the defendant was one of only very few companies who could deal with this sort of problem.

Is Software a Good?

In this case the court of appeal did hold that the Sale of Goods Act did apply to software, but this is may not be the final word on the subject. The Irish Courts or the House of Lords might hold differently, although it is

my view that Sale of Goods legislation does apply to software. A particular problem in applying the Sale of Goods Act to this area is that it is not fully clear at this stage whether or not software is a good for the purposes of the Act. In an Australian case *Toby Constructions Products -v- Computer Bar Sales Pty Ltd (1983) 2 NSWLR 48, 50 ALR 684* the court held that a sale of a computer system, comprising both hardware and software constituted a sale of goods. In *St Albans City Council -v- ICL* Scott Baker J held 'that software is probably goods within the Act'. Although he pointed out that if software was not a good it was hard to hold what it was.

Reasonable Steps

Many insurance contracts, if not all insurance contracts, will contain a condition requiring that "the insured shall, at all times, take reasonable precautions to prevent accidents, loss or damage".[7] At this stage, the existence of the millennium bug is well known and an insurance company could argue that it was reasonable to take precautions to prevent damage. 'Reasonable' in this context was defined as meaning:

> "...that the insured should not deliberately court a danger, the existence of which he recognises...The purpose of the condition is to ensure that the insured will not, because he is covered against loss by the policy, refrain from taking precautions which he knows ought to be taken."[8]

Clauses such as this may be invoked by insurance companies, if the exemptions which they are already building into their insurance contracts are found not to apply.

Conclusion

Ireland is not bringing forward any legislation to deal with this problem. However, there are a variety of Bills going through the American legislature which may limit the liabilities of US manufacturers in the event of millennium bug problems. So a major issue for Irish and European lawyers may be to ensure that litigation relating to millennium bug issues is kept out of the Amercian courts. ●

1 (1995 FSR 616)
2 See generally, Kelleher & Murray, *Information Technology Law in Ireland*, Butterworths, 1997, also *http://www.ncirl.ie/itlaw.*
3 *Bernstein-v-Pamson Motors*, 1987 2 All ER 220.
4 1969 2 AC 31
5 1982 AC 225
6 *The Economist*, October 17th, 1998.
7 Buckley, *Insurance Law in Ireland*, Oak Tree Press, 1997.
8 per Lord Diplock in Fraser v Furman[1967] WLR 898.

Protective Legal Steps to Combat the Year 2000 Problem

KAREN MURRAY, Barrister

According to a study released on the 6th of May 1999, large U.S. corporations' optimism about their Year 2000 computer compliance may be 'unrealistic'.[1] The study was carried out by research firm Triaxsys that looked at how much companies had spent last year on the Y2K problem. In Ireland, the Health and Safety Authority has suggested that up to 50% of Irish organisations will suffer some form of failure to the Y2000 problems.[2] It is likely, however that if there are going to be problems, they will begin to be seen prior to January 1st 2000. We are already in the 1999-2000 financial year, so year 2000 problems could be surfacing around now. Even a couple of years ago, credit card companies had to restrict the issue of credit cards whose expiry date was after the year 2000.[3] In March 1999, testimony was given to the US Congress of how American grocers who had paid $100,000 for a new computer system then had to watch that system crash when it tried to process a credit card with an expiration date after the year 2000.[3]

Repair the Y2K problem

The best way of dealing with this problem is to avoid it, by repairing or replacing the relevant software before the 1st of January 2000. Replacing software may be expensive, but it is the safest method. But in many cases there may be no option, whether for cost or practical reasons, but to repair the software. If the company which wishes to repair the software owns that software, then there will be no problem, but if company which wished to repair is separate from the owner then there may be significant legal problems, to say nothing of the practical implications.

Computer programs are protected as literary works under the *European Communities (Legal Protection of Computer Programs) Regulations 1993*. This regu-

lation gives the owner of the program, the exclusive right to control the reproduction, translation, adaptation, arrangement and alteration of a computer program. The provisions of regulation 6(1) should be noted in this context.

> "Where there are no specific contractual provisions to the contrary, the ...(*reproduction, translation, adaptation and alteration of a computer program*).....shall not require authorisation by the rightholder where they are necessary for the use of the computer program by the lawful acquirer in accordance with the intended purpose, including for error correction."

So unless the contract of sale for the program, or rather, the software licence with which it is sold contains a specific provision providing that there can be no error corrections in the software, it should be legally possible to correct errors such as the millennium bug which are present in the software. Although, the serious practical difficulties may still remain. One of the most notable is that computer programs are generally supplied in the supplied in the code of object or machine readable code. This means that when a company receives a computer program on a computer disk, the program it receives is only present as a series of binary digits such as 10100010101. This is because computers can only understand information in this form. Humans prefer to program in languages which are similar to those they use in every day speech such as Java and C++, a program written in this form is called the source code. This source code is then complied to form the object code. It is possible to decompile object code to arrive at source code but this is difficult in practical terms and is difficult to justify legally. Decompilation is permitted for the purposes of interoperability under the Regulations, whether you could argue that interoperability extends to allowing a computer program to continue to operate is unclear.[4] Depending upon licence conditions it may be possible to apply to the courts for an order.

The best protective step is to the supplier of the software to fix the software. The following matters should be examined:

- Was the software 'bespoke' or was it bought off the shelf? The millennium bug is caused by a 1950's programming convention and the reason why this is a problem now, is because programs written subsequently, either incorporated elements from those earlier programs or else followed the same conventions to ensure compatibility with those conventions. Disputes may focus on which party specified this requirement. If you represent a bank which in the 1980's commissioned new software and specified that it had to work with its millennium bug ridden software which dated from the 1960's, then the bank may be in a weak position when negotiating with the supplier. If on the other hand you represent an accountant who bought a batch of 'off the shelf' programs in the 1990's and who now finds they are not year 2000 compliant, he may be in a stronger position.
- Did a consultant or sub-contractor recommend that you buy this software? If they did then they may be liable for negligent misstatement.
- What does the end-user licence say? This may contain guarantees or warranties.
- Is there a maintenance contract with a third party?

Even if you do not want to pay the supplier you might be well advised to pay for several reasons.

- Practical reasons – the suppliers wrote the program originally so they are in a better position to fix it. In particular, they will have access to all the relevant records and source codes.
- It avoids all the copyright difficulties.
- If the original supplier 'fixes' the software and it still does not work on January 1st 2000, then a there will be a good cause of action.

Legal Liabilities

The reality is that any company which has not practically completed the work of repairing the millennium bug may not have the time to do so now. A company which cannot repair its systems will then have to fall back on trying to minimise its potential losses and if such losses occur trying to recover them from suppliers or sub-contractors. Any legal advice on potential liabilities should always bear in mind that there are two scenario, firstly suing suppliers for damage caused to your client and secondly, your clients customers suing your client for damages which they may have suffered. Although potential legal liabilities can arise under a number of headings, the most important being contract,[5] it is likely that any millennium bug litigation will involve some claim under the law of tort or negligence.[6]

- The plaintiff must show that the defendant owed him a duty of care. A supplier of goods might have a duty of care to supply products which will not forseeably cause personal injury or damage to other property of the purchaser. A consultant or advisor might have a duty imposed on him for any incorrect statements or advice which cause economic losses.
- There is a breach of that duty of care.
- Damage results, which is reasonably foreseeable and not too remote.

In this regards,

- At this stage, all business must mitigate their losses.[7] The Dutch airline KLM has stated that it might have to ground part of its fleet on new years eve 1999 because it is concerned about Governments and air-traffic controllers failing to make their own systems safe. They are confident that their own planes will continue to work properly.[8] Users should check their systems to see if they are year 2000 compliant, otherwise they may find even if an award of damages is made, it might be reduced by their contributory negligence. If a user takes reasonable steps to ensure that its system will survive the millennium bug, it would appear that the supplier will not be able to avoid its liabilities.[9] However, it should be kept in mind that if a user takes unreasonable steps, they may find that they have broken the chain of causation.
- The burden of proof lies with the party making the assertions, so preparations should be made to gather as much evidence as possible at this stage. Records in the form of correspondence, telephone conversations, meetings and any other contact with the suppliers and maintenance firms.

Defective Products Liability

The Defective Products Act 1991 provides that a producer will be liable in tort for damage caused wholly or partly by a defect in his product. The Act only applies to consumers and to products defined as 'moveables' including moveables incorporated into another product. There is some argument as to whether this Act would apply to software; however, most products contain computer chips which have computer programs embedded in them. If these programs should fail and cause the failure of the entire product, the courts or indeed the litigants may not be interested in dissecting the product to find which component failed. The fact that the entire product failed may be enough.

The Act is limited in other ways. Damage means death, personal injury or damage or destruction of property other than the defective product. The item of property destroyed or damaged must be of a type normally intended for private use and used by the injured person for his own private use. An interesting feature of this Act is that it applies to electricity where damage is caused as a result of a failure of electricity generation. So if the ESB should suffer a failure as a result of year 2000 problems it might be liable to its customers.

Identifying other legal problems

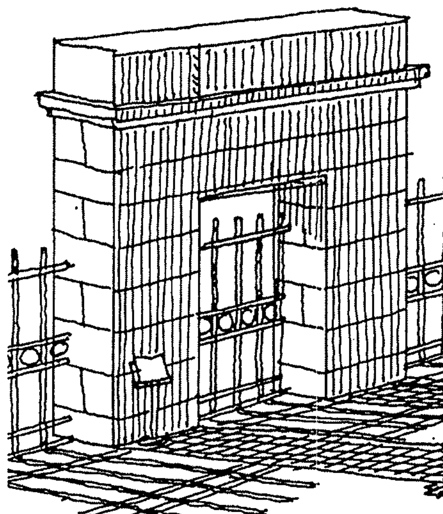
Litigation can take many forms and attention tends to be focused on whether or not the suppliers of computer systems will be sued if those systems fail. But companies such as banks or public utilities which utilise these systems many find that they are sued if their own systems fail. Other liabilities may also arise as a result of the Millennium bug.

A. Criminal Damage.
Many people involved in dealing with the millennium bug problem may anticipate that they may be liable for civil damages if they fail to do their jobs properly. However, they may not have thought that they could be liable for criminal penalties. The Irish law on computer misuse is contained in the Criminal Damage Act 1991. Section 2(1) of this Act makes states:

"A person who without lawful excuse damages any property belonging to another intending to damage any such property or being reckless as to whether any such property would be damaged shall be guilty of an offence".

To damage data is to "add to, alter, corrupt, erase or move to another storage medium or to a different location in the storage medium in which they are kept.... to do any act that contributes towards causing such addition, alteration, corruption, erasure or movement". The millennium bug is just one problem, which could cause data to be damaged in the manner specified in the Act. So if a supplier were to fail to fix a millennium bug problem and as a result its customers data were to be damaged, then the supplier could be liable in criminal law. Such a prosecution would depend on whether it can be shown that the supplier had been reckless.

B. Data protection.
The Data Protection Act 1988 provides that anyone who controls personal data is under a duty of care to ensure that it is accurate.[10] The Act provides that data will be held to be inaccurate if it is data which is incorrect or misleading as to any matter of fact. If the controller should fail in this duty, section 7 of the Act provides that he may be sued by the subject of the personal data. The Act also provides that the data controller or processor must preserve the data by using appropriate security measures by taking steps to prevent any alteration, disclosure or destruction of the data and against their accidental loss or destruction.



C. Health and safety
The Health, Safety and Welfare at Work Act, 1989 provides that employers are responsible for ensuring the health, safety and welfare of their employees. "Workplace health and safety systems range from processed control systems to fire detection and suppression systems to lift controls and air conditioning systems".[11] Although this Act cannot give rise to tortuous liabilities,[12] the Health and Safety Authority has indicated that its inspectors' powers will be extended to deal with year 2000 issues. They will have the power to shut down firms where they suspect there may be a risk to employees' safety and health.[13]

D. Company Law
The existence of potential y2000 liabilities should be taken into account when assessing the role of Directors of a company,[14] role of auditors and those carrying out due diligence, where a business or other body is being purchased.[15] •

1 The research was compiled from 647 Fortune 1000 companies' total Year 2000 project the percentage of those budgets that had already been spent. *http://www.triaxsys.com/prlag.htm*
2 *The Irish Times*, January 14th, 1999.
3 Johnson, *Silicon Valley News*, 18th April 1999.
4 Kelleher & Murray, *Information Technology Law in Ireland*, Butterworths, 1997. *http://www.ncirl.ie/itlaw.*
5 To be dealt with by Denis Kelleher BL.
6 Mc Mahon & Binchy, Irish Law of Torts, Butterworths, 1990.
7 Kelleher, *Litigation and the year 2000*, GILSI, January 1999. http://www.law-society.ie
8 *The Financial Times*, 17th October 1998
9 *Nitrigin Eireann Teo. v Inco Alloys* [1992 1 WLR 498.
10 Section 2.
11 Mr Tom Kitt, Minister for Labour, Trade and Consumer Affairs. *The Irish Times*, January 14th 1999.
12 Under s60.
13 *The Irish Times*, January 15th, 1999.
14 *Dorchestor Finance v Stebbing* [1989] B.C.L.C. 498.
15 See Halberstam Elias & Co. *Countdown to 2000*, Butterworths, 1998.

Are you Y2K OK?

GREG KENNEDY, Global Networks and Operations Manager, Point Information Systems

As if there weren't enough acronyms in computers now we come across "Y2K" or "Year 2000" or "The Millennium Bug". One might be forgiven for thinking the whole world has gone mad talking about this problem given the huge coverage it is now getting as we approach the year 2000. However, whilst we may hear various explanations, each more catastrophic than the last, we seldom hear what it's implications are and how to fix it.

What is it?

Imagine the odometer in your car could only count to 1999. What happens when you travel that extra mile? Your clock moves onto 0000. The car will continue to run but you will have to remember it has already done 2000 miles.

Transfer that to the computer, which we will assume, can only count to 1999. When the clock ticks over on 31st December what will the year read? Some computers will adjust to 2000, in which case you are okay. Others will adjust to 1900 or more likely it will adjust to January 1st 1980. Why 1980? The clock in the original IBM Personal Computer (PC) was set to start on January 1st 1980, a trait which stayed with the PC up until a few years ago. So if the clock runs over on itself it will restart at 1980.

This is only one side of the problem. This involves the clock built into the computer i.e. a piece of hardware. What about the other side of computers? Software.

What do you mean -99 years old?

When computers began to proliferate in the business world of the 1970's all of the parts were extremely expensive, storage space particularly. Think of how many dates of birth are held in computers and that will give an indication of the storage necessary.

Given that it was very expensive to store information, programmers made an assumption, which in fairness was valid at the time. "Assume every year is in the 1900's and then you will only have to store the last two digits of a date. By the time we need to deal with year in 2000 someone will have replaced my software".

This assumption permeated every date storage system in the world. Every insurance policy with the start and end date, every heart monitor, every VCR. Every computer was programmed to assume that the year always started with 19.

This means that when the clocks roll over to 2000, if they can, the combination of an assumed 19xx date and the 00 of the 2000 will result in a year of 1900.

Take the simple calculation of age. Subtract your year of birth, say 1970 from the current date, incorrectly 1900, and you are suddenly -70 years old.

What are the symptoms?

This can range from your computer refusing to start, to operating normally but having subtle miscalculations in programs. Imagine your computer calculating that you have worked negative time on a case and owe your solicitor money.

What can I do to prevent it?

You need to examine both the hardware and software side of things.

The brains of the hardware is a very small program called the BIOS (pronounce by-os). This is the program that counts the seconds and keeps track of the clock. This program can be updated. Most of the top computer makers have BIOS updates that will make your hardware Year 2000 compliant.

I would stress though that updating the BIOS is not a task to be taken lightly. Do it incorrectly and you could completely disable your machine. You computer reseller can help you in this task.

The software side is slightly more complicated only because there is so much more software than there is hardware. Most people will have Windows 95 or Windows 98 and these can be fixed. Microsoft is not supplying fixes for Windows 3.1 or DOS so those users will have to upgrade.

Most software programs e.g. Microsoft Word, Corel WordPerfect, Windows etc. have what are called "Service Packs" available. These service packs are the loose-leafs of the computer world. Whilst they don't replace the whole program they will amend certain parts of it.

These service packs are available for download from the Internet. Applying a service pack is not as risky as updating the BIOS, however, be prepared for a long download time if you are connected via telephone as these packs are very big.

For non-mainstream software you will need to check with your supplier to see what needs to be done, if anything, to make it compliant.

But I only bought my computer last year!

Even recent purchasers need to check their equipment. The hardware is probably not affected but the software certainly is.

Windows (95/98/NT) is not fully compliant. Microsoft states that they are "Compliant with Issues". So you will still need to check your software.

Microsoft Office 97 is compliant with issues also. Corel Wordperfect Suite is compliant. These are the mainstream software in use today. You should still check on the Internet or with your supplier as to whether you are compliant. Some suppliers will provide a "letter of compliance" which states they are Year 2000 ready.

Should I stick my head in the sand?

You could do that but your computers still will not work on January 1st 2000. The process of updating (not upgrading) a computer to Year 2000 Compliance is not complex, in fact it is only about two hours work. It does need to be done.

You should balance the cost of either updating the computer yourself or getting an engineer to do it for you against the cost of not having the information at all. That is the true value of your computer.

Useful addresses

CNET Discussion of Y2K www.y2k.com
Microsoft www.microsoft.com/y2k
Corel www.corel.com/y2k
Intel www.intel.com
Compaq www.compaq.com
Dell www.dell.com/y2k
Gateway 2000 www.gw2k.com/

Legal Update

The Bar Review
Journal of the Bar of Ireland. Volume 4. Issue 7. May 1999

A directory of legislation, articles and written judgments received in the Law Library from 19th March 1999 to 18th April 1999.
Judgment Information compiled by the Legal Researchers, Judges Library, Four Courts.
Edited by Desmond Mulhere, Law Library, Four Courts.

Administrative Law

O'Callaghan v. Disciplinary Tribunal
High Court: **McCracken J.**
22/03/1999

Judicial review; *certiorari*; solicitor; disciplinary procedures; application to quash decision of respondent tribunal that applicant's name should be struck off Roll of Solicitors; whether correct procedures were followed by tribunal; whether procedures were contrary to constitutional and natural justice; whether procedure to establish *prima facie* case was contrary to natural and constitutional justice; whether procedures set out in Part II, Solicitors (Disciplinary Committee) Rules, 1961 were in accordance with natural and constitutional justice; whether decision of tribunal should be quashed on the grounds that the Rules do not provide that members of the tribunal may be provided in advance of the hearing with documents at evidence; whether applicant's rights were violated by the fact that one member of the committee who decided there was a *prima facie* case also sat on the tribunal of inquiry; whether, objectively viewed, applicant could apprehend that he would not obtain a fair and independent hearing because members of tribunal had prejudged the issues; s. 7(2), Solicitors (Amendment) Act, 1960 as amended by s.17, Solicitors (Amendment) Act, 1994.
Held: Application dismissed.

Eastern Health Board v. Judge Ballagh
High Court: **Morris P.**
12/02/1999

Judicial review; *certiorari*; *mandamus*; case stated; purchase of contaminated yoghurt; application by way of judicial review for reliefs in respect of decision of respondent refusing to state a case to High Court; whether there was a warranty protecting shopkeeper against prosecution; interpretation of warranty in ss.63(1)(d) and 63(2), Health Act, 1947; whether the application was frivolous; whether there was a basis for the application; whether respondent had made findings of fact or of law; s.5, Summary Jurisdiction Act, 1857; s.63(1)(d), Health Act, 1947.
Held: Respondent had made a determination of a point of law; application was not frivolous; relief granted.

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Department of the Marine and Natural Resources Minerals Development Acts, 1940-1995
Report by the Minister for the Marine and Natural Resources for the six months ended 31 December 1998. In accordance with section 77 of the Minerals Development Act, 1940 and section 8 of the Minerals Development Act, 1979.
Dublin Stationery office 1999
N87.C5

Agriculture

Duff v. Minister for Agriculture and Food
High Court: **Laffoy J.**
25/03/1999

Assessment of damages; milk quotas; EC law; national remedy; award of damages for loss suffered as a result of a mistake of law; plaintiffs had been denied entitlements to additional milk quotas due to the defendant's mistake of law in failing to establish a national reserve; preliminary issue of the formula according to which the plaintiffs would have been allocated additional quota if the Minister had not committed the error of law; art. 3, Council Regulations EEC/857/84.
Held: Formula determined.

Aliens

Laurentiu v. The Minister for Justice, Equality and Law Reform
High Court: **Geoghegan J.**
22/01/1999

Judicial review; Constitution; delegation; refugee; asylum; mandamus; certiorari; deportation; humanitarian grounds; applicant was denied refugee status; whether decision refusing refugee status was unreasonable; whether adequate reasons were given for the decision; whether applicant should have been permitted to remain in Ireland on humanitarian grounds; whether the power conferred by the Aliens Act, 1935 to order deportations was excessively wide; whether an Act can confer a legislative power without laying down any policy or principles for its exercise; whether there were sufficient guidelines in the Aliens Act, 1935 for the exercise of the power conferred by that Act; whether the Aliens Order, 1946 was *ultra vires* the powers of the Minister; whether the Aliens Order, 1946 contained substantive legislation; Aliens Act, 1935; Aliens Order, 1946; Art. 15 of the Constitution.
Held: S.5(1)(e) of the Aliens Act, 1935 is inconsistent with the Constitution; Art. 13(1) of the Aliens Order, 1946 and the deportation order made in this case were invalid.

Statutory Instrument
Aliens (Amendment) Order, 1999
SI 17/1999

Arbitration

Articles
Arbitration: when and why?
Hutchinson, Brian
1999 IBL 2

Statutory arbitration
McDermott, Sean M
1999 IBL 9

Library Acquisition
Arnaldez, Jean-Jacques
Collection of ICC arbitral awards
1995
Paris ICC 1997
N398

Banking

Library Acquisition
Chalmers Sir, Mackenzie D
Chalmers and Guest on bills of exchange, cheques and promissory notes
15th ed / by A G Guest
London Sweet and Maxwell 1998
Guest, Anthony Gordon
N306.2

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Prompt Payments of Accounts, Act, 1997 (Rate of Interest Penalty) (Amendment)
Order, 1999
SI 62/1999

Building & Construction

Library Acquisition
Department of the Environment and Local Government Building regulations 1997: Technical guidance documents
Dublin Stationery Office 1997
N83.9.C5

Children

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Children – the modern law
2nd ed
Bristol Family Law 1998
N176

Bedingfield, David
The child in need, children, the state and the law
Bristol Family Law 1998
N176

Hutchinson, Anne-Marie
International parental child abduction
Bristol Family Law 1998
M543.4.Q11

Rooted sorrows, psychoanalytical perspectives on child protection, assessment, therapy and treatment.
Edited by The Hon Mr Justice Wall
Bristol Family Law 1997
(papers given to a conference for judges and mental health professionals)
N176

Civil Liberties

Library Acquisitions
Dashwood, Alan
The principles of equal treatment in EC law papers collected by the Centre for European Legal Studies, Cambridge
London Sweet and Maxwell 1997
O'Leary, Siofra
M208.N1

Doyle & Donnelly
Freedom of information: philosophy and implementation
Dublin Blackhall Publishing 1999
M209.I6.C5

Commercial Law

Article
Rescue finance: a new direction for securitisation?
Downey, Conor
1999 IBL 33

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Chalmers and Guest on bills of exchange, cheques and promissory notes
15th ed / by A G Guest
London Sweet and Maxwell 1998
Guest, Anthony Gordon
N306.2

Company Law

Flanagan v. Kelly
High Court: **O'Sullivan J.**
26/02/1999

Company law; liquidation; solvency; striking out proceedings; claim that the defendant prepared inaccurate and incorrect declaration, report and statement of the company's liabilities and assets which undervalued the company's property; order sought striking out the plaintiff's claim; whether the plaintiff had a personal cause of action; whether there was a duty of care owed to the plaintiff; whether there was a duty to warn the plaintiff of the impending liquidation; whether the plaintiff suffered loss; whether there was sufficient proximity between the plaintiff and the defendant.
Held: Order granted striking out the proceedings.

Comet Food Machinery Company Limited, In re
Supreme Court: O' Flaherty J., **Keane J.**, Murphy, J.
26/01/1999

Company; liquidation; power of court to summon directors for examination; applicant creditors had obtained a judgment in their favour in respect of defective machinery purchased from respondent; respondent went into voluntary liquidation; whether assets of respondent had been diverted to other company with a view to frustrating applicants' claim for damages; directors of respondent ordered by High Court pursuant to s.245(1), Companies Act, 1963 to appear before the Master to be examined on oath and to produce certain documents; whether, upon an application pursuant to s.245, a creditor must demonstrate that the examination would probably result in a benefit to him; whether the order of the High Court was in accordance with established principles; ss.245 and 280(1). Companies Act, 1963.
Held: Appeal dismissed; order of the High Court affirmed.

Article
Salaried partners: easy targets?
Twomey, Michael J
1999 (March) GILSI 20

Statutory Instruments
Companies Act, 1963 (Section 377(1)) Order, 1999
SI 64/1999

Companies Act, 1963 (Ninth Schedule) Regulations, 1999
SI 63/1999

Competition Law

Chanelle Veterinary Limited v. Pfizer (Ireland) Limited
Supreme Court: O'Flaherty J., **Murphy J.**, Lynch J.
11/02/1999
Competition law; concerted practice; distribution systems; appellant was de-listed

from network of authorised distributors of respondent's animal health products; whether decision to de-list appellant was unilateral; whether there was an agreement, express or implied, or a concerted practice between respondent and the other distributors; whether appellant was de-listed for promoting a competing product; whether there was a restrictive distribution system; ss. 4 and 5 Competition Act, 1991; Articles 85 and 86, Treaty of Rome.
Held: Appeal dismissed

Article
Competition law and restrictive covenants
Kettle, John
1999 CLP 67

Consumer Law

Library Acquisitions
Harrison, Reziya
Good faith in sales
London Sweet and Maxwell 1997
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O'Rourke, Raymond
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Statutory Instrument
Consumer Credit Act, 1995 (Section 2)
Regulations, 1999
SI 15/1999

Contract

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Harrison, Reziya
Good faith in sales
London Sweet and Maxwell 1997
N284

Copyright

Library Acquisition
Copinger, Walter Arthur
Copinger and Skone James on copyright
London Sweet and Maxwell 1999
N112

Criminal Law

D.P.P. v. Judge O'Buachalla
High Court: **Quirke J.**
15/01/1999

Criminal procedure; judicial review; second-named respondent charged with dangerous driving pursuant to s.53(1) and 2(a), Road Traffic Act, 1961; charge disposed of summarily; consent of applicant to summary disposal had not been sought; no objection raised in the course of proceedings regarding jurisdiction of first-named respondent; effect of s.13, Criminal Procedure Act, 1967 upon the prosecution of offences pursuant to s.53 of 1961 Act; whether first-named respondent acted without jurisdiction; whether s.13 of the 1967 Act removed jurisdiction of District Court to deal summarily with charges preferred at the election of the applicant pursuant to s.53(1) and 2 (a), Road Traffic Act, 1961; whether inaccurate declarations on face of conviction order were errors of form rather than of substance.
Held: First-named respondent had acted within jurisdiction; charge could be disposed of summarily; inaccurate declarations on face of order were defects of form rather than of substance and parties had not been prejudiced thereby; relief refused.

Murray v. Judge McArdle
High Court: **Morris P.**
19/02/1999

Criminal procedure; judicial review; District Court jurisdiction; summons; application for orders of certiorari quashing orders of respondent whereby applicant was convicted of offences under Road Traffic Acts, 1961 and 1994; original summons issued by a District Court clerk who was improperly appointed; original summons struck out; fresh summons issued on foot of original application; whether respondent acted without jurisdiction; whether respondent acted in excess of jurisdiction; whether issue of summons must be based on a complaint; whether complaint was struck out when original summons was struck out; whether there must be a fresh complaint in order to confer jurisdiction on the District Court; s.1, Courts (No. 3) Act, 1986; O.15, r.2, District Court Rules, 1997.
Held: Relief refused.

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Advisory Committee on Communicable Diseases in Prison
Report of the advisory committee on communicable diseases in prisons
Dublin Stationery Office 1994
Pl.9798
M681.C5

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Adopted by the Committee of Ministers of the Council of Europe
10 September 1997, and explanatory memorandum

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Chichester Barry Rose 1996
M608

Sharpe, Sybil
Judicial discretion and criminal investigation
London Sweet and Maxwell 1998
M600

Employment

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Danger in the air
Hill, Niall
1999 (March) GILSI 24

The employment appeals tribunal
Daly, Emile
1999 (1) P & P 13

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Redmond Dr, Mary
Dismissal law in Ireland
Dublin Butterworths 1999
N192.24.C5

Rubenstein Michael
Unfair dismissal a guide to relevant case law
17th ed
London Industrial Relations Services
1999
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N192.24

Rubenstein, Michael
Discrimination a guide to the relevant case law on race and sex discrimination and equal pay
12th ed
London Eclipse 1999
Cases from Industrial Relations Law Reports
N191.2.C5

European Law

Articles
Current developments in European law
Davis, Alan
1999 IBL 26

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Barav, A
Yearbook of European Law 1997
Oxford Clarendon Press 1998
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Public and utility procurement a practical guide to the UK regulations and associated community rules
2nd ed
London Sweet & Maxwell 1997
W109.6

O'Rourke, Raymond
European food law
Isle of Wight Palladian Law Publishing 1998
W112.4

Statutory Instrument
European Communities (State Financial Transactions) (Amendment) Regulations, 1999
SI 30/1999

Evidence

The Eastern Health Board v. K.
Supreme Court: **Denham J, Barrington J., Keane J., Lynch J., Barron J.**
29/01/1999

Wardship proceedings; hearsay evidence; allegations of sexual abuse against father; allegations made initially to speech therapist and repeated subsequently to social worker; interview with social worker video-recorded; evidence of speech therapist and social worker together with video-recording admitted in evidence; children made wards of court and custody awarded to Health Board; whether hearsay evidence is admissible in wardship proceedings; whether hearsay evidence ought to have been admitted in present case; whether trial judge should have conducted an inquiry into whether child was competent to give evidence; whether video-recorded statements of children have greater status than other statements of children; whether evidence was such that High Court was entitled to find that children should be taken into wardship
Held: Hearsay evidence is admissible in wardship proceedings; evidence should not have been admitted in this case; High Court had failed to enquire whether child was competent to give evidence; High Court had failed to enquire whether it was necessary to adduce hearsay evidence; appeal allowed; matter remitted to High Court.

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Family Law

P. v. P.
High Court: **McGuinness J.** (*ex tempore*)
27/11/1998

Judicial separation; divorce; parties separated for five years; respondent in financial difficulty; high level of conflict between parties; no reasonable prospect of reconciliation; family home to be transferred to applicant; second house in sole ownership of respondent; outstanding proceedings for repossession of second house; custody; access; maintenance; whether applicant entitled to a decree of judicial separation; whether applicant entitled to a decree of divorce; whether respondent should be awarded joint custody of children; whether applicant should pay respondent 10% of equity in family home; whether second house should be sold in order to discharge outstanding mortgages; whether respondent should make lump sum payment to applicant in respect of maintenance; whether order should be made pursuant to s.18(10), Family Law (Divorce) Act, 1996; whether respondent should have carriage of sale of second house; whether order for costs should be made in favour of applicant; s.2(1)(a) and (1)(f), Judicial Separation and Family Law Reform Act, 1989; s.5(1)(a) and (1)(c), Family Law (Divorce) Act, 1996.
Held: Decrees of judicial separation and divorce granted; joint custody order refused; respondent not entitled to 10% equity in family home; lump sum order granted; order made pursuant to s.18(10), 1996 Act; order made directing sale of second house; respondent to have carriage of sale; no order made in respect of costs.

Herron v. Ireland
High Court: **Quirke J.**
22/02/1999

Judicial review; guardianship; age of majority; attachment and committal; re-entry of proceedings; Attorney General's scheme; order made by Supreme Court in 1993 for the secure residential placement for the psychological assessment, diagnosis and treatment of the applicant's 12 year old son; whether order was still in force after he attained the age of majority; whether he was an "infant" within the meaning of the legislation; obligation of State to provide for children with special needs considered; Art. 42.5 of the Constitution; s.11, Guardianship of Infants Act, 1964; ss. 2 and 6, Age of Majority Act, 1985.
Held: Court had jurisdiction to deal with the matters notwithstanding the fact that the son had attained the age of 18 years; proceedings re-entered; no order for attachment and committal.

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N170

Fisheries

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Hake (Restriction on Fishing) Order, 1999
SI 57/1999

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SI 56/1999

Monkfish (Restriction on Fishing) (No 2) Order, 1999
SI 58/1999

Gaming

Statutory Instruments
Horseracing (Interest of Late Payment of Levies on Course Bets) Regulations, 1998
SI 571/1998

Racecourses (Payment of Levies on Course Bets)(Amendment) Regulations, 1998
SI 570/1998

Garda Síochána

Trent v. Commissioner of An Garda Síochána
High Court: **O'Donovan J.**
15/01/1999

Garda Síochána Complaints Board; two formal complaints made by complainant to Board; complainant sought damages for violation of constitutional and statutory rights, negligence and breach of duty arising out of the manner in which both complaints were handled; whether practice of adding information to complaint form after it has been executed by complainant was permissible; whether any material harm was caused to complainant by additions to complaint form; whether power of Chief Executive Officer pursuant to s.6(4), Garda Síochána (Complaints) Act, 1986 to include, with report of investigating officer, recommendations as to how the matter should be handled, was unconstitutional; whether failure of Board to invite complainant to make representations with regard to complaint prior to its adjudication thereon amounted to a denial of fair procedures and a breach of natural justice; whether the Board had a statutory duty to furnish the complainant with reasons for rejecting his complaint; whether investigations into complainant's background and circumstances for the purpose of ascertaining the type of person he was amounted to a violation of his right to privacy; ss.6 and 7, Garda Síochána (Complaints) Act, 1986.
Held: Claim dismissed.

Information Technology

Article
On-line opportunities knock
O'Sullivan, Claire
1999 (March) GILSI 27

Injunctions

Cavan County Council v. Eircell Limited
High Court: **Geoghegan J.**
10/03/1999

Planning; exempted development; injunction; retention permission; whether court should exercise discretion to refuse injunction; Art. 9, Local Government (Planning and Development) Regulations, 1994; Clause 29, Part I, Second schedule to the Regulations; s.27, Local Government (Planning and Development) Act, 1976 as amended.
Held: Injunction granted.

International Law

Holfeld Plastics Ltd. v. ISAP OMV Group SPA
High Court: **Geoghegan J.**
19/03/1999

Private international law; European Community law; jurisdiction; practice and procedure; striking-out proceedings; contract; allegation that there was an exclusive jurisdiction agreement conferring jurisdiction on the Courts of Italy in a contract for sale of extrusion line; whether the orders of the plaintiff for the goods incorporated the terms and conditions of the defendant; application of Art. 17 of the Brussels Convention; whether there was genuine consensus between the parties as to the terms of the contract; whether such agreement was in writing or evidenced in writing; Art. 17, Brussels Convention, 1968; O.12, r.26, Rules of the Superior Courts
Held: Contract incorporated the terms and conditions of the defendant; there was a valid exclusive jurisdiction clause; Court declined jurisdiction and struck out the action.

Article
The review of corporate claims by the United Nations compensation commission
Gaffney, John P
1999 CLP 80

Landlord & Tenant

Statutory Instrument
Landlord and Tenant (Amendment) Act, 1980, (Section 13(4)) Regulations, 1999
SI 52/1999

Legal Profession

Carroll v. The Law Society of Ireland
High Court: **McGuinness, J.**
19/01/1999

Judicial review; declaration; admittance to the Roll of Solicitors; jurisdiction; respondent refused to admit applicant as a solicitor and proposed to set up inquiry into allegations of misconduct made against him; applicant sought declarations that he fulfilled the requirements to be admitted as a solicitor and that the Respondent had no jurisdiction to hear complaints against him; whether the applicant's privilege against self-incrimination had to be protected; whether the power to control and discipline apprentices in Solicitors (Amendment) Act, 1994 referred solely to such matters as courses and examinations; whether the respondent could have jurisdiction to enquire into allegations of misconduct outside the sphere of education; whether the Education Committee could rely on hearsay; whether a judicial review hearing could direct procedures in advance; whether the composition of the Education Committee hearing the allegations was contrary to the requirements of the Regulations; whether there should be lay participation on the Committee; whether a committee comprised of three solicitors would be capable of acting independently and impartially; Solicitors Act, 1954; Apprenticeship and Education Regulations, 1991; Solicitors (Amendment) Act, 1994.
Held: Respondent had jurisdiction to carry out the proposed inquiry; it was not the purpose of judicial review to direct procedures in advance; declaration granted that the committee of three solicitors was invalidly constituted and had no lawful authority.
Articles
First among equals? Irish language and

the law
Nic Shuibhne, Niamh
1999 (March) GILSI 16

Salaried partners: easy targets?
Twomey, Michael J
1999 (March) GILSI 20

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Dublin Stationery Office 1999
L240.1.C5

Negligence

Irish Nationwide Building Society v. Malone
Supreme Court: O'Flaherty J., **Lynch J.**, Barron J.
10/12/1998

Loan; mortgage protection assurance; appellant agreed to grant defendant and her husband a loan subject to condition that a mortgage protection assurance policy be obtained with an insurance company which it had nominated or approved; husband died before policy was issued; whether the appellant was negligent; whether appellant fulfilled role as insurance agent; whether the appellant was under an obligation to ensure the application for insurance progressed until it was completed.
Held: Appellant was negligent and did not exercise due care and skill as insurance agent; no contributory negligence; appeal dismissed.

Library Acquisition
Wignall, Gordon
Nuisances
London Sweet and Maxwell 1998
N38.8

Planning

Butler v. Dublin Corporation
Supreme Court: Hamilton C.J., **O'Flaherty J., Keane J.**, Murphy J., Lynch J.
22/01/1999

Judicial review; planning permission; unauthorised use; transient events; occasional use; material change of use; planning permission required for the staging of a pop concert at a sports stadium; whether there was a change of use which was material in planning terms; whether pop concert is a transient event for which planning permission is inappropriate; whether musical events were an occasional use before 1963 and therefore did not require planning permission; ss.3 and 40, Local Government (Planning and Development) Act, 1963; s.26(3A), Local Government (Planning and Development) Act, 1972; s. 27, Local Government (Planning and Development) Act, 1976; s. 91, Road Traffic Act, 1961; s. 107, Environmental Protection Agency Act, 1992; Litter Pollution Act, 1997.
Held: Appeal allowed; no planning permission required.

Cavan County Council v. Eircell Limited
High Court: **Geoghegan J.**
10/03/1999

Planning; exempted development; injunction; retention permission; whether court should exercise discretion to refuse injunction; Art. 9, Local Government (Planning and Development) Regulations, 1994; Clause 29, Part I, Second schedule to the Regulations; s.27, Local Government (Planning and Development) Act, 1976 as amended.
Held: Injunction granted.

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N83.9.C5

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Dublin Stationery Office 1994

Practice & Procedure

R. v. Minister for Health
High Court: **Morris P.**
10/02/1999

Evidence; tribunal; expenses; discretion; award of compensation made by Hepatitis C Tribunal; application to have case re-entered for the purpose of claiming travelling expenses; request refused; whether discretion of Tribunal to allow further evidence to be adduced was validly exercised; Health (Amendment) Act, 1996; Hepatitis C Compensation Tribunal Act, 1997.
Held: Tribunal had acted validly within its discretion; appeal refused.

Articles
Frequently asked questions on costs
Behan, Paul
1999 (1) P & P 6

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Breen, Faye
1999 (1) P & P 2

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M681.C5

Property

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Interests in goods
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London LLP 1998
N50

Road Traffic

D.P.P. (Dunphy) v. Morrissey
High Court: **O'Higgins J.**
[illegible]5/12/1998

Road traffic; case stated; public place; evidential burden of proof; driving under the influence of alcohol; charge of driving a mechanically propelled vehicle while incapable of having proper control due to the consumption of alcohol; District Court Judge dismissed charge on the ground that prosecution had not established beyond a reasonable doubt that the place where the Garda formed the opinion the Defendant had consumed alcohol, administered the breathalyser and effected the arrest was a public place; whether this decision was correct in law; whether the prosecution had adduced sufficient evidence to raise a *prima facie* case that it was a public place; whether there was an evidential burden on the Defendant to cast doubt on the prosecution case; Summary Jurisdiction Act, 1857; Courts (Supplemental Provisions) Act, 1961; Road Traffic Acts, 1961-1964.

Held: Prosecution adduced sufficient evidence to show all the elements of the offence; District Court Judge was not correct in dismissing case.

Statutory Instrument
Road Traffic (Public Service Vehicles) (Amendment) Regulations, 1999
SI 51/1999

Social Welfare

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Social Welfare (Consolidated Contributions and Insurability) (Amendment)
(No 4) (Credited Contributions) Regulations, 1998
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Social Welfare Act, 1998 (Part IV) (Commencement) Order, 1999
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Taxation

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Judgment delivered: 23/2/1999
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Theft of goods – custom duties – remission – special situation
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C-131/97 Annalisa Carbonari v Universita degli Studi di Bologna
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C-179/97 Kingdom of Spain v Commission of the European Communities
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Fisheries – conservation of maritime resources – inspection of fishing vessels – joint international programme adopted by the North-West Atlantic fisheries Organisation
Court of Justice of the European Communities

C-258/97 Hospital ingenieure Krankenhaustechnik Planungs-Gesellschaft v Landeskrankenanstalten-Betriebsgesellschaft
Judgment delivered: 4/3/1999
Public service contracts – effect of a directive not transposed into national law
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C-319/98 Commission of the European communities v Kingdom of Belgium
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Architectural Heritage (National Inventory) & Historic Monuments (Miscellaneous Provisions) Bill, 1998
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1st Stage – Dail

Censorship of Publications (Amendment) Bill, 1998
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Children Bill, 1996
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Report- Seanad

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Protection of Children (Hague Convention) Bill, 1998
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5/1999
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Services
(Amendment) Act, 1999
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Abbreviations

BR = Bar Review
CLP = Commercial Law Practitioner
DULJ = Dublin University Law Journal
GILSI = Gazette Incorporated Law Society of Ireland
ICLJ = Irish Criminal Law Journal
ICLR = Irish Competition Law Reports
ICPLJ = Irish Conveyancing & Property Law Journal
IFLR = Irish Family Law Reports
IIPR = Irish Intellectual Property Review
ILTR = Irish Law Times Reports
IPELJ = Irish Planning & Environmental Law Journal
ITR = Irish Tax Review
JISLL = Journal Irish Society Labour Law
MLJI = Medico Legal Journal of Ireland
P & P = Practice & Procedure
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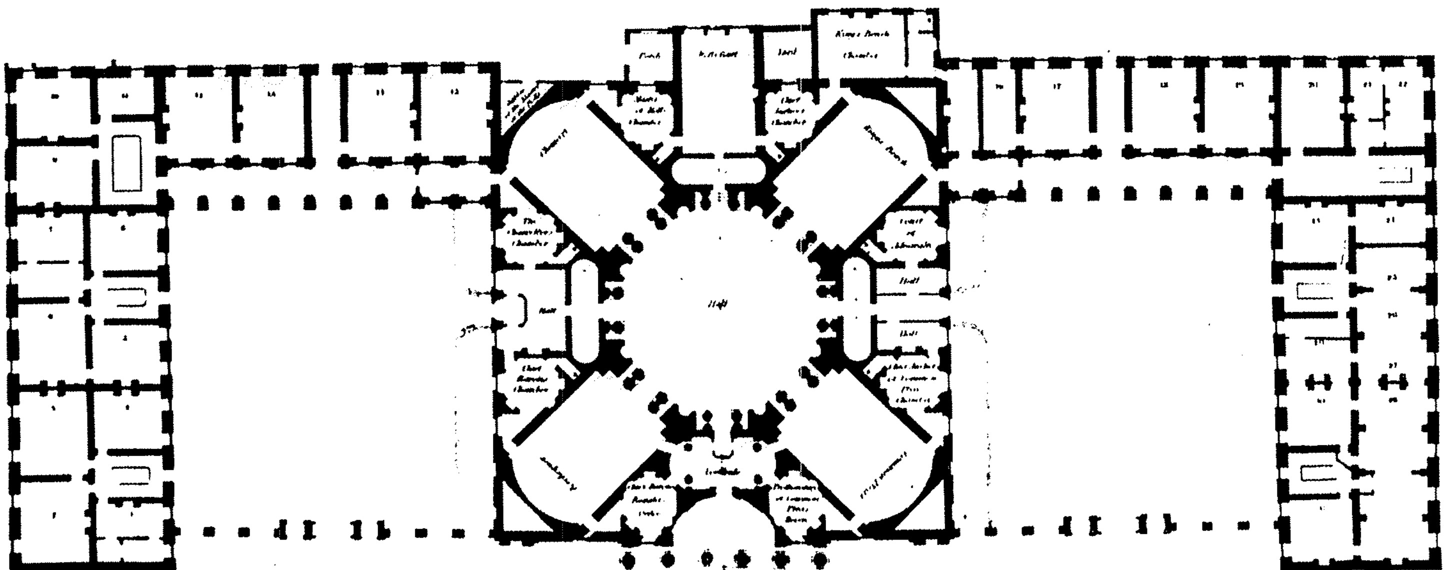


KING'S INNS NEWS

King's Inns is Reaching out . . . .

During the month of May King's Inns was pleased to be able to support the work of Smithfield based MACRO (Markets Area Community Resource Organisation) by providing a location for the mobile classroom for Life Education Centre (LEC).

LEC is a U.K. based charity offering a community response to the drug problem. Working in schools and with the support of local communities, LEC equips children from the age of three to fifteen with the knowledge, self-confidence and decision making skills that will enable them to make healthy choices for the future particularly with regard to the avoidance of drug use and alcohol use.

The first Life Education Centre was established in Australia in 1979 and was introduced to Great Britain in 1986 by HRH, The Prince of Wales. There are now 60 mobile classrooms in Britain working with over 1,000,000 children a year. The centre is being sponsored in Ireland by an Irish based charity CREW (Care Rehab Education and Work).

Children from all the local primary schools visited the mobile classroom stationed within the arches. All groups were led by their class teachers who had already conducted pre-visit discussions to ensure that the visit would be integrated with the school programme.

Camilla McAleese
Under-Treasurer

Barristers in the Making ......
On a sunny May day, a great burden has been lifted – the 1999 annual examinations are over.

Relief and Jubilation.

The Millennium Bug: Causes of Action and Legal Remedies

CIAN FERRITER, Barrister

1.0 Introduction

The Millennium Bug ("Year 2000 problem")[1] represents a unique challenge to the legal system. On the one hand, it is a widely-documented, specifically-timed and highly-preventable problem, factors suggesting a low likelihood of legal fallout. On the other hand, there is likely in fact to be breakdown in a significant number of commercial and consumer relationships with substantial economic and physical loss resulting, factors which suggest a litigation spree. Indeed, some US commentators predict that the potential legal costs of the Year 2000 problem in the US alone will run into trillions of dollars.[2]

However it will be submitted in this paper that while there will be inevitable legal claims arising from systems failures consequent on the Year 2000 problem, there will be a variety of stiff legal hurdles, on top of constricting commercial realities, to be overcome before a successful claim is brought home.[3]

2.0 What Damage is the Year 2000 problem going to cause?

The Year 2000 problem is going to impact across the entire social and economic spectrum.[4] In addition to the computer industry itself, critical areas include health and safety (hospital equipment, , security systems, fire and smoke alarms, gas detectors, military equipment, safety-critical workplaces etc), transport (air, sea and rail navigation systems), utilities (power stations etc.), landlord and tenant (heating, air conditioning etc systems provided as part of leased commercial premises), construction (design and implementation of engineering systems), banking (money-transfers, loans to Year 2000-exposed entities), insurance (exposure to Year 2000 claims), manufacturing (embedded systems in manufacturing processes), accountancy (auditor's disclosures of Year 2000 exposure, Year 2000 and due diligence), lawyers (advice on minimising exposure) as well as exposure arising from the universal reliance on software and hardware systems in all areas of commercial and professional life.

It is important to realise that in an age of commercial interdependency, exposure to the Year 2000 problem will not be avoided by merely having one's own house in order: any entity which is involved in a chain of value-adding supply may be affected by a Year 2000 breakdown at any link in that chain of supply. For example, if embedded systems in a manufacturing process fail, there may be a failure to manufacture goods, leading to failure to meet supply orders leading to consequential loss for vendors and end-consumers dependent on those goods. Similarly, if a financial institution's date-dependent client financial projections cannot be processed on its software systems, incorrect or misleading information, or no information at all, could be supplied to a client with possible consequential loss, and so on.

This paper focuses on the potential causes of action and legal remedies which will be available to a commercial entity ("the user") who sustains economic loss as a result of software, hardware or equipment ("the system"), bought under contract from "the supplier" failing due to Year 2000 non-compliance (i.e. the system's inability to process dates beyond 31 December 1999).

3.0 Causes of Action

Suppliers who supply non-compliant systems are obviously exposed to claims in contract and tort from the users to whom the systems were supplied and to claims in tort from third parties affected by the non-compliance.

Professional advisors may well be turned to, in the absence of a suitable supplier or producer to sue, when Year 2000 loss occurs, so that computer consultants, service contractors, accountants and lawyers will need to assess their exposure to Year 2000 claims.

In addition, directors of companies have an exposure if the businesses they manage suffer Year 2000 loss.

The potential causes of action in each of these categories are now considered.

3.1 User v. Supplier

The supplier may be liable to the user in contract if a system fails due to Year 2000 non-compliance. In the absence of an express warranty in the contract that the system is Year 2000-compliant it will be necessary to rely on the terms implied by the Sale of Goods and Supply of Services Acts 1893-1980 ("Sale of Goods Acts") or at common law.

The Sales of Goods Acts imply a term into a contract for the sale of goods in the course of business that the goods are of "merchantable quality" i.e. that the goods are "fit for the purpose or purposes for which goods of that kind are commonly bought and as durable as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all other relevant circumstances".[5] It is further implied in such contracts that the goods sold are "reasonably fit for the purpose for which they were supplied if the buyer identified that purpose unless the buyer did not rely on or unless it would have been unreasonable for the buyer to rely on, the seller's skill and judgment in this respect".[6] A further implied term is that the goods will correspond to their description.[7]

If the contract is one for the supply of a service, the following terms are implied: that the supplier has the necessary skill to render the service; that the service is supplied with due skill, care and diligence; that any materials used

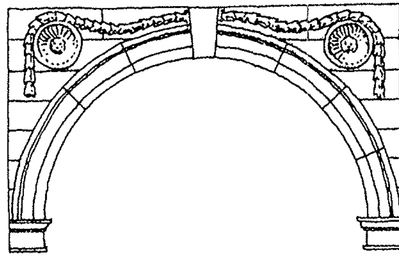
will be sound and reasonably fit for the purpose for which they are required and that goods supplied under the contract will be of merchantable quality.[8]

The implied terms as to goods carry strict liability, while the terms implied as to supply of services can be defended by the supplier surmounting the easier hurdle of demonstrating due skill and care. A key issue will therefore be whether the supply of the non-compliant system constituted a supply of a good or a service.

The English Court of Appeal decision in the case of *St. Alban's and District Council v. International Computers Ltd.*[9] held that computer software will be regarded as a "good" for the purposes of the English Sale of Goods legislation where it is supplied on a physical medium such as disks or tapes the title to which passes to the consumer. On this definition, software downloaded from the Internet or installed directly onto the user's system by the supplier may not be a good for the purposes of the acts, although Sir Iain Glidewell held in *St. Alban's* that a contract for the transfer of a software is subject to an implied term at common law that the program will be reasonably fit for achieving the intended purpose i.e. reasonably capable of operating successfully.[10] It remains to be seen what attitude the Irish courts will take to Year 2000 non-compliance in software cases.

The definition of merchantable quality builds in a test as to the expected durability of the good. Given the nature of the technology market, many systems when first released would have a limited life expectancy with the expectation that the system would be upgraded or replaced as newer technology emerges. A relevant issue in interpreting contracts in Year 2000 disputes will thus be whether it was anticipated that the system supplied would remain in use until after the Year 2000 or whether a reasonable observer of that that market would have expected the user to upgrade to a Year 2000-compliant system before the Year 2000.

Most contracts for the supply of computer systems will include an exclusion or limitation clause. The implied terms in contracts for sale of goods can only be excluded in commercial contracts if they are fair and reasonable.[11] In contrast, the terms implied in a contract for the supply of a service can be freely excluded in commercial contracts. The supply of service



v. sale of good issue will thus be critical here also, although it is open to the Courts to strike down exclusion clauses if they seek to exclude responsibility for a fundamental breach of the contract. Construction of limitation clauses could give rise to litigation to determine the extent to which consequential loss may be validly excluded.[12]

The supplier may be also be liable in tort if it is established that he owed the user a duty of care. A claim in negligence for damages for economic loss may subsist where there is a concurrent contractual relationship although the courts stray into this area somewhat reluctantly.[13] This may be helpful where the user has difficulties in relation to the limitation period for a contract claim, or cannot rely on the contract because of exclusion or limitation clauses but has relied on negligent misstatements from the supplier eg. assurances that the system is Year-2000 compliant.

Other potential causes of action against a supplier include a claim by a private consumer under the Liability for Defective Products Act 1995 or for destruction of data under the Data Protection Act 1988.

There have already been a number of Year 2000 claims filed in the U.S.[14] As most of these cases have yet to come to the hearing stage, and the courts have thus yet to set down markers for Year 2000 litigation, it is too early to gauge whether the litigation floodgates are likely to open there. However the subject-matters of the disputes give a flavour as to the types of claims the Irish courts may have to deal with:

Produce Palace International v. TEC America Corp. (the first "Millennium Bug" case) (retailers cash registry system which could not read credit cards with "00" expiry dates)[15]

Atlaz International v. Software Business Technologies[16] (non-compliant accounting software package)

Capellan v. Symantec[17] (entitlement claimed to free upgrade of allegedly non-compliant Norton anti-virus software)

Modern Drummer Publications v. Lucent Technologies Inc[18] (supply of non-compliant telecomms products in 1997 and no offer forthcoming to replace/repair free of charge)

Johnson v. Circuit City Inc.[19] (misleading advertising claim against retailer re sale of non-compliant products)

3.2 Third Party v. User/Supplier

Commentators in the US predict that the real source of Year 2000 litigation may well come from third parties, not connected with the original contract to supply the non-compliant system, who suffer consequential loss as a result of acquiring defective products or not being supplied with a good or service or being exposed to the fallout of the Year 2000 systems failures of others.[20] However, the Irish Courts wariness of pure economic loss claims in the absence of any special relationship between the plaintiff and defendant may curb such claims in practice.[21]

3.3 User v. Computer Consultant

If the user's system has been reviewed by a computer consultant who has failed to identify or to advise as to the existence of a Year 2000 problem there may be an action for breach of contract against the consultant under the terms of the consultancy contract. The test will be that of the implied term for supply of a service i.e. did the consultant provide his advice with due skill, care and diligence? The consultant may be similarly exposed in tort for negligent misstatement if he provided negligent information or advice upon which the user relied to his detriment.

3.4 User v. Maintenance Contractor

It is common practice for users to enter into a maintenance contract with an independent service provider who contracts to service and upkeep the user's computer system. Invariably the maintenance contractor will seek to exclude liability for any loss stemming from the users own action or negligence and in practice it is likely to be difficult

to construct a case that a maintenance contractor had a contractual duty to correct any Year 2000 problem on systems it was maintaining, absent an express undertaking to that effect. Again there may be exposure for the negligent misstatement of the maintenance contractor where there is detrimental reliance by the user. An interesting issue is whether the courts would hold that maintenance contractors had a general duty of care to advise their clients generally as to the potential impact of the Year 2000 problem, given the extent of many businesses' reliance on maintenance contractors to handhold them in relation to computer matters.

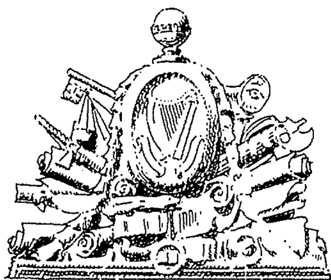
3.5 User/Third Party v. Auditor/Other Professional Advisor

Auditors owe a duty to the company to perform their duties with reasonable skill and care and will be liable to the company, and to third parties relying on the audited accounts, for any damages sustained as a result of their negligence.[22] It would appear that it is standard accounting practice to advert to the potential costs of the Year 2000 problem for a company in that company's audited accounts.[23] Auditors who do not give due consideration to the matter in auditing company accounts will leave themselves exposed to claims from third parties relying on the accounts e.g. parties relying on the accounts in assessing takeover terms.

Similarly, given the obvious legal repercussions of Year 2000 non-compliance for many businesses, solicitors will have to be particularly careful that they have advised as to the need for contractual and technical audits to assess the exposure of clients to Year 2000 claims and that warranties and exclusion clauses are appropriately drafted.[24]

3.6 Company Directors

Company directors owe a duty to the company to carry out their responsibilities with due skill, care and diligence.[25] If directors have been negligent in managing the risks to their company arising from the Year 2000 problem, and loss results to the company, the directors may be liable to the company (and not the shareholders[26]) in damages.[27] If the negligence in man-



aging the Year 2000 exposure amounts to "reckless or fraudulent trading" (within the meaning Sections 297 and 297A Companies Act 1963 as inserted by the Companies Act 1990), leading to the insolvency of the company, civil and possibly criminal liability may be imposed.[28]

4.0 Remedies for Economic Loss Resulting from Year 2000 non-compliance

Damages is the only remedy which will lie for economic loss after the event. It will obviously be preferable to have the problem rectified before the damage occurs.

Some words of caution. A user should not embark on rectifying his systems where they are under licence from the supplier as this may involve breaches of copyright, in the absence of a specific contractual authority to so rectify (a computer program is protected as a literary work under the European Communities (Legal Protection of Computer Programs) Regulations 1993 and thus cannot be adapted, save in defined circumstances). The user who decides to perform his own rectification work also runs the risk of compromising a claim if his rectification efforts prove unsuccessful as the supplier may claim that the system failure stemmed from the corrective action. It will thus be preferable in most cases to have the supplier fix or upgrade the non-compliant system.

4.1 Specific Performance/Injunctions

Supposing the supplier will not agree to rectify or upgrade his system, or will only agree to do so on unacceptable payment terms? It may be possible to seek an order for specific performance of the contract, by way of injunction, at this point to force a supplier to rectify a non-compliant system before the end of the year. Such an application will be very difficult to maintain as the general test applied in an application for specific performance is whether the plaintiff can readily get the equivalent of what he contracted for elsewhere; in effect, the test is whether damages is an adequate remedy.[29] Unless there is a real risk of personal injury as a result of the supplier's breach of contract, damages will be an adequate remedy in most cases although factors which may weigh in a plaintiff's favour might include the fact that the supplier is the only entity which possesses the source code and thus the only entity which possesses the solution to fixing the non-compliant software, or that there is a real risk of the company going out of business[30] through not being able to obtain a suitable "fix" for their system in the limited time span left. However, if the user is seeking to fix the problem himself and is seeking access to the supplier's source code for that purpose, a court may be reluctant to compel the supplier to hand over the source code where there is a claim that the code is a commercial secret and that release of the code could damage the supplier. Equally a supplier could claim that the release of the code would constitute an infringement of its copyright such as would not justify the granting of specific performance or an injunction.

Proving an actionable wrong in a specific performance application will also be subject to the difficulties of reliance on breach of implied terms, causation, mitigation and proof discussed below.

4.2 Year 2000 Damages Claims

Assuming that the user has been unable to take effective remedial action before his system fails as a result of Year 2000 non-compliance, he will be left to rely on an action in damages to recover the economic loss occurring. The user will have to overcome both commercial constraints and legal barriers to sustain such a claim.

4.2.1 Commercial Constraints

A few commercial realities may dictate the extent of Year 2000 damages claims. If systems are old and non-compliant, a company may be better off upgrading now, instead of sustaining commercial damage and embarking on costly, time-consuming and risky efforts to recover the damage

at law.

Many companies (particularly the larger "deep-pocket" enterprises) will have carried out a Year 2000 audit on both all of their own internally-exposed systems and all those in their chain of supply, and will have taken corrective action before the end of this year, with the result that they may have secured themselves against potential claims, notwithstanding that they are in a chain of supply that fails.

If a company has been so remiss in its Year 2000 compliance obligations that it causes substantial loss to its clients or customers, the company could well be out of business by the time a Year 2000 action is taken. The likelihood that insurance companies will not cover foreseeable Year 2000 losses increases the risk of such business failure. An insolvent company is obviously no mark for a damages claim. If a user is not a creditor of the failed supplier, there may be no effective legal remedy (such as the creditor's remedies of petitioning for liquidation, appointing a receiver, etc.).

Another potential constraint on bringing a claim stems from the global nature of the computer systems market. If a non-compliant system has been supplied by an overseas supplier, a potential litigant, before embarking on the litigation, will need to assess the likelihood of enforcing a judgement abroad should the plaintiff be successful in its action.

4.2.2 Legal Barriers to a Successful Claim

A stateable cause of action and a suitable defendant notwithstanding, a series of hurdles will have to be surmounted if a Year 2000 damages claim is to be successfully litigated as follows:

1. Is the claim within the limitation period?
2. Was the damage caused by the breach of contract/duty?
3. Is the damage too remote?
4. Did the plaintiff mitigate his loss?
5. Has the plaintiff waived the right to action the claim?
6. Has the Contract been frustrated?

Limitation Period

An action for breach of contract must be brought within six years from the date on which the cause of action accrues[31] (3 years in the case of personal or fatal injury).

The cause of action in a breach of contract accrues not when the damage occurs but when the breach occurred;[32] this may prove a crucial point in Year 2000 claims based upon breach of express or implied terms in a contract for delivery of a system or service because the breach will have occurred at the time of delivery of the system or service (when the issue of Year 2000 compliance may not have even been in the parties' minds) which in many cases will be over 6 years ago. A clause allowing the supplier to remedy a breach may delay the operation of the limitation period depending on how the clause is construed.

In contrast, it is well established that the cause of action in negligence arises when the damage is suffered and not when the act or omission complained of occurs.[33] The limitation period is similarly 6 years (3 years in the case of personal or fatal injury). The damage in Year 2000 negligence actions will not arise in most cases until after 31st December 1999.

The existence of a contractual relationship does not necessarily exclude a concurrent or independent action in tort. The escape hatch of a claim in tort may thus remove the contract limitation period hurdle in Year 2000 claims.

Proving Causation and Damage

In a claim for damages for breach of contract the plaintiff must establish a causal connection between the defendant's breach and the plaintiff's loss.[34] Any intervening acts which break this chain of causation will relieve the defendant of liability. A similar concept applies to claims in negligence.

The nature of the Year 2000 problem is such that there may be difficulties in establishing the precise cause of damage as there may be systems failures at a multitude of points in a commercial operation. For example, a network crash may be caused by a Year 2000 defect in the network operating software or a defect in a specific application or because of a defect in an embedded chip in the network hardware or a combination of all three, the cumulative effect of which is to cause breakdown leading to economic loss. Which supplier caused the damage in this scenario? Was it foreseeable that all three components of a system would fail? Is the damage ensuing too legally remote for a successful claim to be brought against any or all of the three suppliers?

Expert evidence will be crucial to assist the court in establishing the facts of the case. Indeed, the courts will need to decide at an early stage what the appropriate standards are in relation to a range of issues that will recur on Year 2000 claims including the following:

- What precisely is a year 2000 problem and in what circumstances was it foreseeable or preventable?
- When was it considered good industry practice to produce Year 2000 compliant systems or to embark on corrective action in relation to existing systems?
- What was the expected life span of a given system given the rate of technological development in both the supplier's and user's markets?
- Who is best qualified to give expert evidence on Year 2000 issues?

A clear paper trail will be necessary to show legal and technical audits of Year 2000 exposure and to demonstrate that those potentially at fault were identified all reasonable steps were taken to mitigate potential loss.

Remoteness of Damage

The doctrine of remoteness of damage in contract and its corollary of reasonable forseeability in tort operates as a policy restraint on damages claims for unexpected or unforeseen consequences of legally culpable actions. The classic test in *Hadley v. Baxendale* still applies to restrict claims in damages for breach of contract to the loss which was foreseeable at the time the parties made the contract.[35] Similarly claims for damages in tort are restricted by the Wagon Mound test that the damage be of such a kind that the reasonable man would have foreseen it. The remoteness test of reasonable foreseeability may apply to restrict claims made in respect of older non-compliant systems and also claims made by remoter links in a chain of supply.[36]

Duty to Mitigate Loss

Perhaps the biggest hurdle to mounting a successful Year 2000 claim will be the requirement that a party must seek to mitigate his loss. In contract, the test is whether the plaintiff could have avoided the defendant's breach of contract by taking reasonable steps.[37] The plaintiff can of course recover for the costs of the mitigating

steps taken but not for the loss resulting from an avoidable breach. The time from which the obligation to mitigate runs is when the plaintiff discovers that the defendant has broken his contractual undertaking. As an implied term for year 2000 compliance would apply in most cases from the date of delivery of a system, this means that the plaintiff should now be concentrating on mitigating his loss and seeking to recover the costs of mitigation. As mentioned above, it will be vital in any Year 2000 claim for the plaintiff to show a paper-trail demonstrating his efforts to identify the Year 2000 compliance of the system and his attempts at remedial action.[38]

Similarly, in negligence claims in tort the plaintiff will have to show that he took all reasonable steps to avoid foreseeable damage.

Waiver of Claim

The plaintiff may be prevented from relying on a cause of action if he has taken action which constitutes a waiver of the defendant's breach of the contract.[39] Users should be careful in discussing Year 2000 compliance with suppliers to avoid any acknowledgment that they accept the state of non-compliance of the system.

Frustration of Contract

If the damage sustained is of such a level as not to have been foreseen by even the most informed Year 2000 expert, the defendants may claim that the contract was frustrated through circumstances beyond the control of either party i.e. *force majeure*.[40] It is difficult to see such a claim being successful given the foreseeability of Year 2000 non-compliance in most cases.

4.3 Remedies against Directors

Companies which suffer substantial loss or go out of business as a result of the Year 2000 problem may have a remedy in damages against directors for breach of the duty of due care, skill and diligence, while creditors may have a remedy against directors for reckless trading.

Other remedies grounded in statute may available depending on the type of business activity and loss sustained.

5.0 Is Litigation the Answer?

Attempts have been made in the US (with the so-called "Good Samaritan" legislation[41]) and the UK (with the Action 2000 "Pledge 2000"[42] initiative) to curb potential litigation in relation to the Year 2000 problem. No such initiatives have been attempted in Ireland. However, there are sound reasons why litigation may not be the ideal way to resolve Year 2000 disputes.

There is likely to be commercial sensitivity for an organisation in disclosing, through litigation, that it has had Year 2000 problems and has suffered loss as a result. Such sensitivity applies with greater force to commercial organisations being sued for Year 2000 losses. There will be considerable commercial desire to resolve such disputes quickly and to move on, particularly as the parties may be involved in longer term trading relationships. The issues in such cases will also invariably be highly technical. Bearing all these considerations in mind, legal advisors should give thought to arbitration (including "fast-track" arbitration) as a means of resolving Year 2000 claims, perhaps using arbitrators with knowledge of the technical issues. The Bar Council and Law Society could usefully give consideration to drafting standard year 2000 Claims Arbitration Agreements, for situations where the contract does not contain an arbitration clause.

6.0 Conclusion

There is unlikely to be a litigation spree for economic loss arising from the Year 2000 problem. The commercial reality is that it is the "deep pockets" who are best prepared for the problem and thus the least exposed to legal claims. If a suitable mark is found, claimants are only likely to succeed in damages claims for economic loss resulting from Year 2000 systems failures where an express contractual undertaking has been breached or where a system has failed notwithstanding the claimant's reasonable efforts to bring the problem to the supplier's attention and to have the problem remedied.

It is tentatively submitted that there will be very few successful Year 2000 economic loss claims brought in respect of software, hardware or equipment purchased prior to 1997[43] unless there were particular representations made, or contractual undertakings given, as to Year 2000 compliance and reasonable efforts were made to mitigate the loss. Claims in respect of systems acquired since 1997 may be stronger, but will have to be vouched by convincing evidence that all reasonable efforts were made to mitigate the loss. More sustainable claims may stem from users attempting to recover the costs of remedial action taken to rectify non-compliant systems and against professionals providing negligent Year 2000 advice. •

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1. For a general discussion of the technical issues, see: Kennedy (1997) 2 *Bar Review* 328-329;many websites are devoted to the issue: see e.g. *www.year2000.com; www.forbairt.ie/y2k.*
2. e.g. Simon, *Wall Street Journal*, 6 Nov. 1997
3. A view shared by other commentators eg. Kelleher "Litigation and the Year 2000" 1999 *GILSI* 18; Mawhood "Establishing a Year 2000 Claim" 1998 (Oct/Nov) *Computers and Law* 25; cf Sinnett "St. Alban's and the Millennium Time Bug" Dec 96/ Jan 97 *Computers and Law* 7
4. Sources of legal advice on the Year 2000 issue abound on the Internet; among the more useful are: "Millenium Liability Briefing" at *www.tarlo-lyons.com* (UK); *www.ljextra.com/practice/computer/Y2K* (US); *www.year2000.com/archive/legalissues* (US)
5. Section 14(2) and (3) Sale of Goods Act 1893 as amended by Sale of Goods and Supply of Services Act 1980.
6. Section 14(4) Sale of Goods Act 1893 as amended by Sale of Goods and Supply of Services Act 1980.
7. Section 13 Sale of Goods Act 1893 as amended by Sale of Goods and Supply of Services Act 1980
8. Section 39 Sale of Goods and Supply of Services Act 1980
9. [1996] 4 All ER 461
10. see Sinnett "St. Alban's and the Millennium Time Bug" Dec 96/ Jan 97 *Computers and Law* 7
11. Section 55 Sale of Goods Act 1893 as amended by Sale of Goods and Supply of Services Act 1980
12. see Harrison "*Consequential Loss for IT Lawyers*" 1998 (Aug/Sept) *Computers and Law* 28
13. see McMahon and Binchy *Irish Law of Torts* (2nd edn.) pp.158 et seq.
14. see Westmacott and Goodman, "Year 2000 Litigation in the US" Dec 98/Jan 99 *Computers and Law* 38
15. Mich. Cir. 1997. The action was settled.
16. Cal Super. Ct., Marin Co., filed 2.12.97. Settled – SBT offered free fix and discount on upgrades.
17. Cal Super. Ct, Santa Clara Co., filed

19.2.98
18 NJ Sup. Ct. filed 29.1.99
19 Cal. Sup. Ct. filed 14.1.99
20 See articles listed at *www.year2000.com/archive/legalissues*
21 see McMahon and Binchy *Irish Law of Torts* (2nd edn.) pp.145 et seq
22 see Keane *Company Law in the Republic of Ireland* (2nd edn. 1991) pp. 365 et seq.
23 Brennan "Financial reporting and Disclosure aspects of Y2K" 1998 (Aug) *Accountancy Ireland* 40
24 see McMahon and Binchy *Irish Law of Torts* (2nd edn.) pp. 277-278
25 see Keane *Company Law in the Republic of Ireland* (2nd edn. 1991) pp 311 et seq.
26 Although Section 52 Companies Act 1990 imposes an obligation on the directors in the exercise of their functions to have regard to the interests of the company's members and employees.
27 See, re the UK position, Halberstam "Y2K: The Position and Duties of Directors" 1999 (Apr/May) *Computers and Law* 45
28 see Keane *Company Law in the Republic of Ireland* (2nd edn. 1991) Chapter 35
29 see *Chitty on Contract* (27th edn.) 27.001; it may be possible to claim specific performance on the basis of a breach of a contract to deliver "specific or ascertained goods" under Section 52 Sale of Goods Act 1893.
30 see *Chitty on Contract* (27th edn.) 27.011
31 Section 11(1)(a) Statute of Limitations 1957
32 see Brady and Kerr *The Limitation of Actions* (2nd edn.) p.46
33 see Brady and Kerr *The Limitation of Actions* (2nd edn.) p.60
34 see *Chitty on Contract* (27th edn.) 26.015 *et seq.*
35 see *Chitty on Contract* (27th edn.) 26.021-26.030
36 see Harrison "Consequential Loss for IT Lawyers" 1998 (Aug/Sept) *Computers and Law* 28
37 see *Chitty on Contract* (27th edn.) 26.050 – 26.061
38 see Ellacott "the Year 2000 Computer Bug" Dec 98/ Jan 99 *Litigation* 16 re the importance of suppliers ensuring that correspondence with users re Year 2000 compliance is conducted in such a fashion as to render it legally privileged.
39 see Clark *Contract Law in Ireland* (4th edn.) pp. 425-426
40 see Clark *Contract Law in Ireland* (4th edn.) pp. 441 et seq.
41 Year 2000 Information and Readiness Disclosure Act 1998; see Manchini and Blank "Year 2000 Statute in the USA" Dec 98/Jan 99 *Computers and Law* 36
42 whereby companies sign a pledge indicating an intention to redress and resolve all Year 2000 problems and to only pursue legal action as a last resort
43 1997 is chosen as a cut-off date as the Year 2000 issue first came to popular attention via the mainstream media in that year and it was the first year in which many major commercial operations started to turn their attention to Year 2000 compliance projects.

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Can Computers Catch Colds? Some Information About Computer Viruses

RORY MULCAHY, Barrister

In March and April of this year, one woman's name was on the lips of computer-users around the world. *Melissa.* This innocent-sounding young woman was, in fact, one of the most destructive computer viruses which had ever been allowed 'into the wild'[1]. This 'macro'-virus release caused pandemonium amongst some of the world's largest companies[2], and its release had not just nuisance value (as the virus caused information on pornographic internet sites to be spread by e-mail), but also posed a threat to security as the virus spread into other files and potentially distributed confidential documents over the web[3].

Computer viruses are not new, and the technology used to combat viruses now constitutes a major industry in itself[4]. But with 40,000 viruses already in existence[5] and yet more being dreamed up every day, the antidote will always be one step behind the disease. The release of these diseases has been treated as a 'computer crime' in many jurisdictions, including this one, and the European Parliament has acknowledged the seriousness of the threat in passing a resolution relating to combating computer terrorism. It defined 'computer terrorism' as

> *"computer crime, such as hacking or introducing computer viruses or Trojan Horses with the aim of destabilizing a state or bringing pressure to bear on public agencies."*[6]

What is a Virus?

A computer virus can be simply defined as a computer program which is designed to replicate itself. This program then attaches itself to existing programs and can be passed between computers when software (such as games) is shared or as e-mails are sent and delivered. Some viruses, known as 'worms' do not need to attach themselves to existing programs and can spread through a network without any further prompting. One such 'worm' caused the World Wide Web to be temporarily shut down causing damage estimated in the tens of millions. Its creator, Robert Morris, was the first person convicted under the US Federal Computer Fraud and Abuse Act 1986[7].

The virulence of a particular strain of virus can be assessed by examining the speed with which it spreads. The reason for the 'success' of the *Melissa* virus was the rate at which it was transmitted throughout the globe.

While the object of a virus program is merely to replicate itself, some can have more harmful side-effects, causing information to be damaged or destroyed, or breaching security[8]. A further variant of the simple virus is a polymorphic virus which mutates every time it copies itself making them more difficult to detect, and eradicate, and of course making their effect more unpredictable.

What then are the measures, legal or commercial, which can be taken to protect the ever-increasing store of information which is held on computers?[9]

Criminal Damage Act 1991

The Criminal Damage Act 1991 was passed on foot of recommendations made by the Law Reform Commission[10] and insofar as it acted on those recommendations, the Act has been well received[11]. However the LRC's report made no mention of computer crime, and it is not clear why the legislature chose to include any such offences in this Act. They may have been prompted by the English case of *R v Whiteley*[12]. This case involved a hacker who caused damage to a computer network by deleting certain files and adding to others. The case turned on whether such interference could constitute criminal damage. The Court of Appeal held that damage included not just physical harm but impairment of value and use. Therefore, where such impairment could be shown to have been caused by interference with computer programs or files, then the constituents of the offence of criminal damage would be present.

In any event, the inclusion of such offences in an act designed to deal with more traditional concepts of 'property' and 'damage' is part explanation for the ineffectiveness of the Act in relation to computer misuse[13].

The Act specifically defines 'data' as being 'property' for the purposes of the Act and defines 'data' as

> *"information in a form in which it can be accessed by means of a computer and includes a program."*

The Act also contains two different definitions of the term 'to damage', one relating to property other than data, and the other specifically to data.

> *" "to damage" includes –*
> *(b) in relation to data –*
> *(i) to add to, alter, corrupt, erase or move to another storage medium or to a different location in the storage medium in which they are kept (whether or not property other than data is damaged thereby), or*
> *(ii) to do any act that contributes towards causing such addition, alteration, corruption, erasure or movement."*[14]

The Act contains no definition of, amongst others, 'computer', or 'program'. The rationale for such an exclusion may be that the pace of development in the IT industry might render any such definition obsolete in a very short time, however one commentator has observed that the absence of specific definitions in a criminal offence may render it unconstitutional on grounds of ambiguity[15].

The 1991 Act creates two new offences involving computer misuse. Section 5 of the Act makes it an offence to attempt to gain unauthorised access to a computer[16]. Section 2(1) of the Act is the section

which could be utilised to prosecute those responsible for the introduction of computer viruses. It provides:

> *"A person who without lawful excuse damages any property belonging to another intending to damage any such property or being reckless as to whether any such property would be damaged shall be guilty of an offence."*

Given the presence of criminal sanctions to combat the spreading of computer viruses, why then has there been so little activity in bringing about convictions for computer crimes. Most of the reasons lie in the nature of the crime itself.

First, there are no geographical barriers in this type of crime. A criminal need not be in the vicinity or even in the jurisdiction to 'hack' into a computer. With computer viruses, the problem is compounded by the difficulty in following the chain of infection. Just as the medical profession struggle to find Patient Zero as a new disease spreads, and with every infection becomes more difficult to source, so the origin of a virus may prove more and more difficult to trace.

Secondly, the victims of crime, usually businesses large and small, will, for commercial reasons, be unwilling to report that they have been the subject of an attack. Lack of confidence in a company's security could ultimately do more damage than the virus which initiated it.

Thirdly, the investigative techniques which apply in relation to traditional cases of criminal damage are inadequate to deal with computer crime. Where Gardai might expect with other crimes to follow a chain of physical evidence which leads them to a suspect, in cases involving the use of a computer, the evidence, if any, is hidden in lines of computer code, and often the damage itself is no more tangible. The Gardai, in general, do not have, and could not be expected to have the sophisticated skills required to track this kind of crime on a regular basis. If it is intended to use the criminal law to deal with such activities, then those qualified for the task of pursuing the criminals must be employed.

All this is not to say that computer criminals are immune from the law. One David Smith has already been charged in connection with the *Melissa* virus, and he faces up to forty years in jail[17]. And in the UK, Christopher Pile was sentenced to eighteen months in prison for distributing the *Pathogen* virus in 1994[18], a virus which caused damage that one company alone estimated at £500,000.

In truth, in the face of the ineffectiveness of the criminal law, other methods of dealing with computer misuse have rapidly developed and an old medical maxim has been the industry's watchwords in combating the hackers and crackers.

Prevention is Better than Cure

While the development of anti-virus software continues apace[19], such software is necessarily a step behind the creators of the viruses. Consequently, many large organisations, and more frequently small ones, are developing security protocols to limit their possible exposure to infection.

Some of these measures include the erection of 'firewalls' around computer networks, which monitor everything that enters the system, and prevents potentially damaging material from gaining access to their network; regulating the use of games and the Internet on a company's equipment, to limit exposure to potential viruses; limiting the size of documents which may be received on the company's system, though is not often practical or even effective, as virus programs need not be large.

One of the best defences against viral attack is the use of software which allows the recipient of a file to view the file without causing it to be executed. Such software is available free from companies like Microsoft.[20]

Conclusion

While many companies and individuals are now availing of some security measures, some have none, and of those that do, many are taking inadequate precautions[21]. This is typically the case with smaller firms and private individuals.

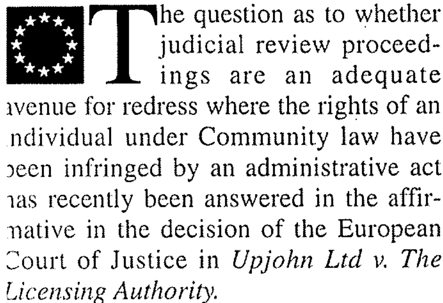
This raises an interesting question. In the absence of finding the original source of a virus, is there any possibility of attaching tortious liability to a person, or corporate body, who causes the virus, by their negligence, to be introduced onto another's system? In an increasingly aware and computer-literate society, it can be argued that the failure to implement proper procedures with regard to computer security might lead to a reasonably forseeable consequence of material damage being caused to those with whom one shares electronic information. •

1 One Department of Defence funded body in the US issued a global virus warning only its second in 10 years in respect of *Melissa. The Irish Times,* 29 March 1999.
2 Even the mighty Microsoft Corporation was forced to stop all incoming and outgoing e-mail for a week-end. *Ibid.*
3 *The Irish Times*, 2 April 1999.
4 Anti-virus programs like Norton Anti-Virus, McAfee Anti-Virus and Norton Anti-Virus are a commonplace on desktop computers.
5 Although only a fraction of these are 'in the wild' i.e. exist outside laboratories and constitute an actual threat to computer-users.
6 European Parliament Resolution on combating terrorism in the European Union. OJ no. C 055, para D, 24/2/1997.
7 Information Technology Law in Ireland. Kelleher & Murray, Butterworths 1997. Another variant is the 'Trojan Horse', a seemingly harmless program which, when run, may cause damage or destruction.
8 The *Melissa* virus for instance, only caused damage indirectly, by overloading mail servers as it automatically sent out 50 e-mails from each infected user, thereby affecting 50 more. The rate of infection (and disruption) then increases exponentially.
9 See generally the excellent text, Information Technology Law in Ireland, Kelleher & Murray, Butterworths, 1997.
10 LRC Report on Malicious Damage 1988.
11 Criminal Law Cases and Materials. Charleton, Butterworths, 1992 @ p.475.
12 (1991) 93 Cr App Rep 25.
13 There has, as yet, been no reported case of a conviction under the relevant sections of the Act.
14 s. 1(1).
15 Murray, Computer Misuse in Ireland. (1995) ILT 114.
16 The most familiar type of computer crime, hacking, or more correctly, cracking.
17 *The Irish Times*, 3 April 1999.
18 Computer Terrorist or Mad Boffin, Jones (1996) 146 NLJ 46.
19 Visit www.McAfee.com for a look at the latest anti-virus software available to the ordinary user. In purchasing most anti-virus software, the purchaser is also able to purchase monthly upgrades which will deal with any newly developed viruses. Most companies update their software at least quarterly and often monthly.
20 Visit www.cert.org for information.
21 Typically, by using out-dated anti-virus software.

Judicial Review Proceedings and the Principle of Effective Protection of Community Rights –

Upjohn Ltd v The Licensing Authority[1]

FAYE BREEN, Barrister



The question as to whether judicial review proceedings are an adequate avenue for redress where the rights of an individual under Community law have been infringed by an administrative act has recently been answered in the affirmative in the decision of the European Court of Justice in *Upjohn Ltd v. The Licensing Authority.*

In affirming the adequacy of judicial review proceedings in the protection and enforcement of Community rights, the ECJ drew a parallel between the process of review exercised by it in the review of actions, decisions and legislative measures taken by EU authorities and by national courts of administrative and legislative acts in judicial review proceedings. The court specifically held that it is not imperative that the route of appeal from an administrative decision provided by national law consist of a *de novo* appeal or a reassessment of the merits of the decision. In short, judicial review proceedings shall suffice.

Facts of *Upjohn Ltd v The Licensing Authority*

Upjohn Ltd marketed Triazolam, a prescription drug for the treatment of insomnia.

Directive 65/65 allows the competent authority of a member state to revoke authorisation to market a medicinal product within that member state in certain circumstances. Despite a number of expert reports which indicated that Triazolam was safe in restricted dosages and that its benefits outweighed the risks and which were presented to the competent authority in the UK, namely the Medicines Control Agency (MCA), the market authorisations relating to Triazolam were revoked.

The said directive provides that decisions of the competent authority to suspend or to revoke market authorisations should be open to challenge by way of legal proceedings. It does not specify the rules for the exercise of this right to appeal, and leaves it to member states to provide their own system of review.

The UK Medicines Act of 1968 at section 102 provides for appeal of decisions of the MCA by way of judicial review. During these proceedings Upjohn Ltd sought the guidance of the European Court of Justice as to the way in which the national court ought to proceed in examining the case.

Judgement of the European Court of Justice

One of the questions referred to the European Court of Justice by the Court of Appeal of England and Wales was, as understood by the court, whether Directive 65/65 and, more generally, Community law empowered the court in judicial review proceedings to substitute its assessment of the facts, and, in particular, of the scientific evidence, for the assessment made by the competent authority. In other words, was the national court entitled to consider the merits of the decision to revoke authorisation or was it constrained to reviewing the decision-making process according to the normal principles of judicial review?

The European Court of Justice considered that where a Community authority is called upon to make a decision in relation to a complex matter it has consistently been held by the Community courts that the authority is given a wide measure of discretion. In reviewing the legality of the exercise of this discretion, the European courts will be confined to examining whether it kept within proper bounds and whether it contains a manifest error.

The parallel national courts should not be required to conduct a more extensive review than that conducted by the European courts. However, they must apply the relevant principles and rules of Community law when reviewing the legality of the exercise of discretion.

The court therefore answered the question referred to it in the negative, considering that it is not necessary that the appeal mechanism provided by national law where Community rights have been compromised by an administrative act should entail a full reassessment of the evidence giving rise to the decision.

Background and Analysis

There is a well-embedded principle of Community law that it is for national law to classify the nature of rights afforded under Community law within its own legal system. Further, it is for national law to specify the courts and

procedures by which these rights are to be enforced.

Article 5 of the EC Treaty places a duty on national courts to ensure the legal protection of rights which individuals derive from Community law. The European Court of Justice has consistently emphasised in cases such as *Peterbroeck v Belgium*[2] that it is primarily for the national courts to determine how the rights derived from Community law are to be protected.

National law does not have a free rein, however. The domestic remedy provided for the redress of breaches of Community law must be consistent with two cardinal principles; the principle of equivalence i.e., that the domestic rules applied to breaches of Community law are no less favourable than those applied to a breach of national law, and the principle of effectiveness which requires that the domestic remedy must not render impossible or excessively difficult the exercise of rights conferred by Community law.

The principle of effectiveness was perhaps summed up by the European Court of Justice in *Ebony Maritime v Prefetto Della Provincia*[3] where it was held that the penalties chosen by the national courts for infringement of Community law must be "effective, proportionate and dissuasive".

Where it is considered that a decision of an administrative body has breached the rights of an individual under Community law, the route of appeal from that decision is through judicial review proceedings. The obvious limitation of judicial review proceedings is that the High Court in exercising its powers of judicial review is not concerned with the merits but with the legality of the decision which is subject matter of the judicial review.

The question which then arises is whether judicial review proceedings which will not entail a full review of the substantive issues giving rise to the making of the decision are inadequate to protect an individual's rights and fall foul of the principle of effectiveness[4]. The European Court of Justice in *Upjohn Limited* has answered this question in the negative.

The Court has drawn a clear comparison between the discretion which is afforded to a Community institution in making decisions especially those of a complex nature, and that which is afforded to a tribunal whose decisions are the subject of review by way of domestic judicial review proceedings. The European courts are reluctant to interfere with that discretion and are concerned more with the legality of the decision making process than with the merits of the decision itself.

The court cited a number of cases relating to the standard of review it has applied to Community decisions, including that of *Balkan-Import Export v Hauptzollant Berlin-Packhof*[5]. There it was held that the Commission enjoyed a wide measure of discretion as to the evaluation of a complex economic situation and the European Court of Justice confined itself to examining whether the decision contained a manifest error or constituted a misuse of power.

Similarly in *Ohrgaardand and Delvaux v Commission*[6] the applicants were challenging a refusal of the Commission to promote them to the post of principal translator. The court considered that the appointing authority had a wide discretion in evaluating the interests of the service and the merits to be taken into consideration. The court therefore concluded that its powers in relation to review of that decision were confined to examining whether the administration kept within proper bounds and did not exercise its power in manifestly erroneous manner.

It is clear that the principles relating to the review of Community decisions reflect those applied on a domestic level in judicial review proceedings. The European Court of Justice in *Upjohn Ltd* has utilised this correlation to determine that judicial review proceedings are not inconsistent with the principle of effective protection of the rights of individuals under Community law.

Rather than analysing the actual quality or standard of review which is afforded in domestic judicial review proceedings and assessing whether it is adequate and appropriate to protect the rights of individuals under Community law, the judgement in *Upjohn Ltd* adopts a simpler approach, propounding the principle that if the European courts do not offer a full reassessment of administrative decisions then this cannot be expected of the national courts in equivalent situations.

The Irish Dimension

Upjohn Ltd v The Licensing Authority was opened in the recent Irish case of *Orange Communications and The Director of Telecommunications and by order Meteor Communications Limited*[7]. It was argued before Macken J. by the Plaintiffs that European law envisaged an appeal on the merits of a decision of the Director of Telecommunications to refuse to grant a license to the Plaintiff. The Defendants replied that Upjohn Ltd was authority to the effect that the only requirement under European law was that a decision to revoke a license should be open to challenge by way of legal proceedings.

In her judgement Macken J does not focus on the principle of effective protection of Community rights but does say that she considered it unlikely that the appeal envisaged by European law was one which allowed the court to place itself in the position of substituting its opinion for that of the Director.

Conclusion

The decision of the European Court of Justice in *Upjohn Ltd* has clearly answered the question as to whether judicial review proceedings are an effective route for redress for an individual whose rights under Community law have been breached by an administrative act.

National law need not provide a standard of appeal which exceeds that afforded by the European courts and so the Court has decided that the forum of judicial review proceedings does not fall foul of the principle of effective protection. •

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1 Judgement of the European Court of Justice delivered on the 21 January 1999.

2 1995 ECR I-4599. See also Case C-2/88 Imm Zwartveld (1990 ECR I-3365).

3 1997 ECR I-1111 paragraph 35. See also Case C-190/95 *Draehmpaehl v Urania Immobilienservice* (1997 ECR I-2195).

4 Advocate-General Ruiz-Jarabo de Colomer stated in cases C-65/95 and C-111/95 Singh Shingara (1997 ECR I-3343) that effective protection must allow a full review of the administrative act at issue. However, prior to Upjohn Ltd, this question has not been fully addressed by the ECJ.

5 1976 ECR 19, paragraph 8.

6 1983 ECR 2379, paragraph 14. See also Case C-225/91 Matra v Commission (1993 ECR I-3203) and Case C-157/96 National Farmers Union and Others (1998 ECR I-2211).

7 Judgement of Mrs Justice Macken of the 18th March 1999.

MAREVA INJUNCTIONS AND RELATED INTERLOCUTORY ORDERS

BY THOMAS B. COURTNEY

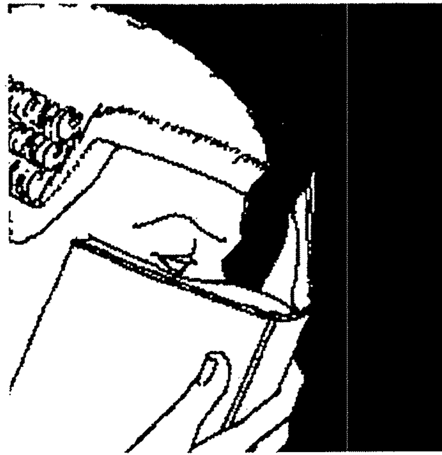
Butterworths, £75.00

It is perhaps surprising to find an Irish legal text book, which deals with the relatively limited area of law of Mareva injunctions, running to over five hundred pages. To most practitioners a book on interlocutory applications generally would be more welcome. That of course does not of itself detract from the text, yet it does highlight the relative paucity, until recent years, of legal works of Irish origin.

The foregoing observation (and it is not intended as anything other than an observation) seems somewhat trite when one delves into the work. There is no doubt that this is a scholarly work which is made easy to follow by a structured layout in which the chapters are divided into clear and concise subheadings.

Mareva injunctions have been granted in this jurisdiction since shortly after they were 'rediscovered' in the UK in the mid- 1970's. The author charts their development up to the present day. There is a comprehensive examination of the Supreme Court judgments in the leading case of *O'Mahony v. Horgan* (1995) with a comparison of the approach adopted by our courts with the approach followed in other common law jurisdictions. Indeed, the necessity of establishing a 'nefarious intention' on the part of the defendant, most recently re-iterated by Laffoy J. in *OBH Enterpreises v. TMC Trading International* (November, 1998), in contrast to a perhaps more objective approach in other jurisdictions highlights the danger of placing too much reliance on foreign authorities. After a fairly slow start there is now developing a comprehensive range of written judgments covering many aspects relevant to this field of law. At the same time, Mareva judgments of their nature tend to be delivered *ex tempore* and, very frequently, in an unwritten form. Fortunately, Mr. Courtney has managed to identify many of these judgments as is evidenced by the list of instances in which Mareva orders with world-wide effect have been granted (see p. 272).

The author also considers the possible infringement of the Constitution inherent in certain interlocutory orders. While the Mareva injunction



has survived constitutional attack (County Glen v. Carway, 1995), other more draconian orders, such as Anton Pillar orders, may have a rougher passage. Such a challenge may be a port of last call (or first call!), when a defendant's case is not otherwise complicated by having any merits. In such circumstances, it is useful to have critical examination of these constitutional aspect, such as is provided by this text.

While the main thrust of the book is directed towards Mareva injunctions, other interlocutory applications are considered (as the title suggests). The work does not however, extend to interlocutory applications generally; the type of applications dealt with are confined to those cases where either the freedom of the person or his right to deal with his property is curtailed. Under this rubric there is covered, for example, the statutory powers conferred on the court to freeze assets representing the proceeds of crime by the Criminal Justice Act, 1994 and the Proceeds of Crime Act, 1996, to a consideration of the X case (where the power of the court to restrain a person from leaving the jurisdiction was considered) at the other end of the spectrum.

Mr. Courtney is the author of many articles on diverse topics appearing in periodicals as well as, of course, the author of the highly respected work entitled 'The Law of Private Companies' which is to be found on the shelves of every practitioner interested in commercial law. This work is no less erudite although it is probably directed towards a narrower audience. Nevertheless, that audience, comprised mainly of legal practitioners in the commercial field, will find Mr. Courtney's latest text of real assistance.

–Hugh O'Neill, SC

PSYCHIATRY AND THE LAW

BY PATRICIA CASEY AND CIARAN CRAVEN

Oak Tree Press 1999, £65.

Psychiatry and the Law is a unique comprehensive text on all relevant issues concerning the interaction between psychiatry and criminal and civil law issues. Psychiatry lends itself to and inter-disciplinary book such as this. Psychiatry normally springs to the mind for the lay reader an immediate association with the criminal law on insanity. This is incidentally dealt with comprehensively in Part 5 of the text under a wider heading of criminal responsibility. While it is very useful to have access to an up to date analysis of the law in the area of criminal insanity from the M'Naghten's Rules to the special verdict "of guilty but insane" as well as related areas such as the fitness to plead.

However, this text clearly demonstrates the relevance of psychiatry in both criminal and civil law in a much wider area than simply the law on criminal insanity. The book is usefully divided up into six parts commencing with an excellent introduction from the point of view of a non-medical reader to psychiatry including a review of the scientific basis of psychiatry in Chapter 2. This is of particular interest to the legal reader when one is considering the evidential value of psychiatry as a science.

While Tom Cooney and Orla O'Neill wrote an interesting inter-disciplinary critical analysis of the law in respect of civil commitment. The current text under review is descriptive and practical covering a wide area of topics. Chapter 5 considers memory and this is of particular interest to legal readers in terms of testing and verifying evidence of events that may have occurred several years in the past for which a defendant may have a completely different or no recollection of the events that a plaintiff has memory of. The authors fairly point out that the veracity of statements and evidence given are central to decisions made in the Courts. The others conclude that memory is a complex process and that the phenomenon known as false memory syndrome is still under scientific investigation and research is casting doubt on the ability to recover memories of previously forgotten material from the distant past.

Each chapter has a brief summary of the contents and conclusion which is

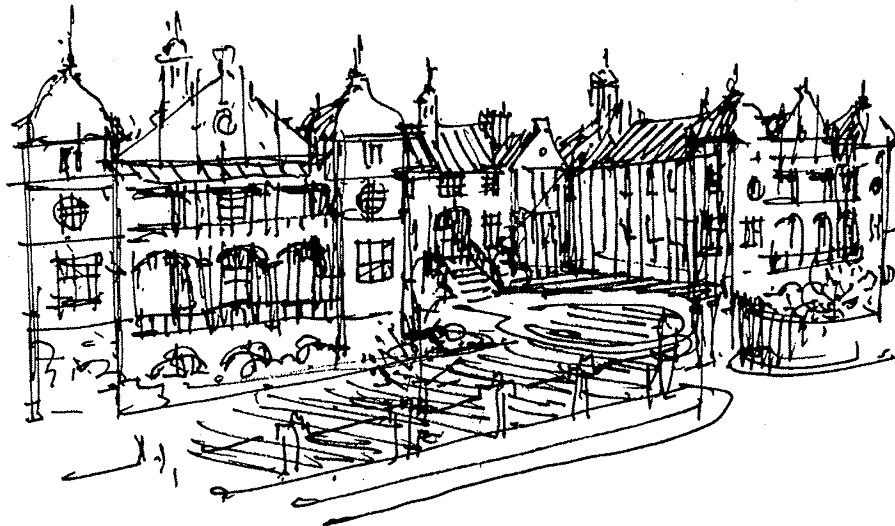
also extremely helpful for the reader. The others write in a lucid accessible form and consider areas hitherto not adequately analysed adequately elsewhere. One of these areas are claims for compensation arising out of psychiatric disorders. Many lawyers are familiar now with post traumatic stress disorder known as PTSD. It would appear that these type of claims have been on the increase in recent years and therefore it is important for the lawyer to have an understanding of the methodology of psychiatry in assessing the validity of such emotional disorders, e.g. following a personal injury. It is quite clear that psychiatric illness can follow personal injury. The authors interestingly point out that the evidence indicates a poor outcome for such disorders even though there is a widely held view that such a person may be malingering and once that litigation is over the symptoms suddenly disappear. There is also a brief consideration of suicide in relation to its predictability, its prevention and potential for negligence claims to be taken against a doctor or hospital in the event of a completed suicide.

There is an excellent treatment of the psychiatric trauma that can be suffered by the victims of disaster and crime including the victims of violent crime and sexual abuse and the long-term effects that have been documented as a result of such traumas. Lawyers who practice in family law will find excellent reference material in respect of personality disorder and other disorders and civil annulment. There is a significant section in the text devoted to disposing capacity of persons and this will prove useful to any practitioner advising in probate matters where testamentary capacity for example is of critical importance.

Part 5 entitled "Criminal Responsibility" covers a broad canvass including psychiatric disorders and crime, the law on criminal insanity as well as fitness to plead. While readers hoping to find critical analysis of the efficacy and state of our law may not be happy, those seeking accurate classification and analysis of the several psychiatric disorders will find this portion of the text relevant. The current law on civil commitment which is of course likely to be substantially reformed within the next few years is nonetheless is very helpfully summarised. Consent to treatment and to research which can raise difficult ethical issues is succinctly covered and also the important subject of confidentiality in the practice of psychiatry is reviewed very competently.

This text book can be recommended to any law practitioner as an excellent reference book as a first stop for an up to date analysis of how the law and psychiatry interact in the civil and criminal law. It is the type of textbook that lends itself to periodic updating every few years. It should also be pointed out that in the reviewer's opinion psychiatrists equally will find this text useful as many are familiar with the Courts as expert witnesses in a variety of civil cases as well as in criminal law matters. The authors are to be congratulated in producing a relevant academic yet practical text for the assistance of legal practitioners as well as psychiatrists and those in the medical profession in general. It is hoped that law publishers in general will continue to support specialist text such as this which are relevant in particular to our jurisdiction as UK text on such specialist areas tend to be of limited value due to the substantive statutory and other divergences in both neighbouring jurisdictions.

–Jarlath Spellman, BL



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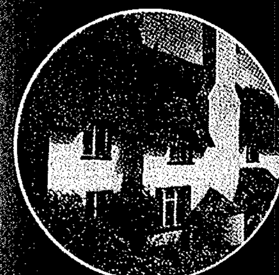

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