Criminal Injuries Reform: The Assembly Verdict

As reported in previous editions of The Writ, the Society had made submissions to the Northern Ireland Assembly, explaining in detail the reasons why the Society was opposed in principle to the Government proposal to introduce a tariff-based compensation assessment system in Northern Ireland.

The Assembly met in plenary session on 26th November to debate the matter, and in particular a Report on the proposed legislation prepared by a special ad hoc Committee of the Assembly, which had reviewed the legislation, and received written and oral submissions from various interested parties (including the Society).

The Assembly endorsed the Report recommendations which received unanimous cross-party support. The Assembly recommendations to the NIO are as follows:

Recommendation 1: The proposal for a “bereavement support payment” to be made, in recognition of the grief and sorrow caused by the death of a victim of violent crime, to qualifying claimants, should be incorporated into Northern Ireland’s compensation system for criminal injuries.

Recommendation 2: That the proposal for wider eligibility criteria to apply in cases where a person is claiming compensation for psychological injuries should be incorporated into Northern Ireland’s compensation system for criminal injuries.

Recommendation 3: That representation and the provision of advice to victims should be by the legal profession - not Victim Support Northern Ireland.

Recommendation 4: That the Secretary of State should examine other areas where Victim Support Northern Ireland may be able to play a more increasingly pro-active role in supporting victims of violent crime.

Recommendation 5: That the Secretary of State should not, in determining an award, have regard to a person’s criminal record, where that persons actions, that maybe indicative of that record, cannot be shown to be responsible for the act of criminal violence that resulted in the injuries, for which compensation is being sought.

Recommendation 6: That paid legal assistance should continue to be provided to persons who make successful applications for compensation.

Recommendation 7: That a system of compensation whereby awards are determined by a Tariff should not be introduced in Northern Ireland.

Recommendation 8: That the Secretary of State should not, in determining an award, have regard to any payments made in respect to private healthcare or those received out of private health insurance.

Recommendation 9: That the Secretary of State should, where a victim is unable to work, award compensation for loss of earnings and earning capacity from the date of the injury.

Recommendation 10: That the proposed legislation should not be introduced to Parliament in its current form.

In addition the Assembly took the view that the proposed removal of the right of appeal to the courts was fundamentally flawed, and made a further point noting explicitly:

“....the core recommendations set out in the Law Society’s supplementary memorandum of evidence. This calls for the establishment of a working party with a general remit to examine the compensation process. The key objective of this remit would be to bring about systematic improvement by addressing the problems of delay and ensuring transparency, communication and loser liaison between agencies within the system. The Committee encouraged the Northern Ireland Office to engage with the Law Society and give due consideration to their proposal”.

Responding to the Assembly debate, the President, Mr. John Neill, welcomed the clear and unequivocal endorsement by the Assembly of the Society’s position, saying: ‘Unfortunately the government has shown no willingness to date to engage in a meaningful dialogue with the Society, and indeed has given every signal that non-negotiable decisions have been made, and that the consultation exercise is a meaningless formality. The message to the Government from almost all consultees and now the Assembly is clear. We hope that the Government will listen to the voice of the Assembly, think again, and take up the Society’s recommendations for a working party, led by a senior judge, to examine ways in which the present process could be improved without penalising victims’.
Settling Scores

**Will a recent Court of Appeal decision lead to more caution over advice on outcomes?**

On 8 June 2001 the Court of Appeal (Schiemann and Kay LJJ and Sir Murray Stuart Smith) gave judgement in *Griffin v Denise Kingmill and DJ Freeman & co (A Firm)* and *Peter Clark HHJ (unrep)*. It is an interesting and important judgement which deals with the nature of the duty counsel and solicitors owe to lay clients in giving advice about the likely outcome of litigation.

**Background**

The facts were simple. In 1988 the claimant, who was 12 years old, was going home from school when she was knocked down by a motor car. She suffered devastating injuries. The first defendant, a solicitor whose practice subsequently merged with that of the second defendant, was instructed to investigate with a view to recovering damages against the driver of the car. She did so. In 1989 the driver’s insurers made an offer of settlement of £50,000. The third defendant, who was then a barrister specialising in personal injury cases, was instructed to advise on whether the offer should be accepted. He was told that the claim was privately funded and that the claimant’s parents had very little money but were rearranging their finances with a view to qualifying for legal aid. He advised in writing. The opinion was short. He briefly analysed the evidence, and concluded:

‘I cannot hold out any reasonable prospect of establishing any liability on the part of any driver for this accident.’

The first defendant apparently agreed with this advice. She noted that legal aid was not available and that the offer should be accepted. Acting on the advice from the first and third defendants the claimant accepted the offer. It was agreed that, on full liability, the claim would have been worth at least £500,000. Sir Murray Stuart Smith thought that it would have been worth nearer £1m. Since the claimant was an infant, the settlement had to be approved. Master Turner approved it. A lot of the available evidence was not put before the Master at the approval hearing. The claimant subsequently contended that the advice to settle had been negligent and that the action had really had considerably greater prospects of success than the third defendant had advised. The Court of Appeal concluded that the third defendant’s analysis of the evidence was wrong, and that had it been corrected, advice to settle for £50,000 would or should have been given.

**Standard Advice**

The leading judgement was given by Sir Murray Stuart Smith. He pointed to Lord Diplock’s speech in *Saif Ali v Sidney Mitchell & Co (1980) AC 198 at 220*, and went on:

‘The circumstances in which barristers and solicitors have had to exercise their judgement vary enormously: on the one hand decisions have frequently to be made in court with little time for mature consideration or discussion. That is a situation familiar to any advocate. It is one in which it may be very difficult to categorise the advocate’s decision as negligent even if later events proved it to have been wrong. Or in a very complex case it may be that in advising settlement too much weight is given to some factors and not enough to others. Here again a difficult judgement has to be made; and unless the advice was blatantly wrong, i.e. such as no competent and experienced practitioner would give, it cannot be impugned and the prospects of successfully doing so would seem very slight.’

This, with respect, is very confusingly put. The only test which applies, to courtroom and paper decisions and in simple and complex cases alike, is whether the advice which is criticised is advice which no competent and experienced practitioner would give.

Claimants criticising advice given in complex cases do not have to prove that the advice given is blatantly wrong any more than claimants criticising advice in simple cases do. Of course increasing complexity will make negligence more evidentially difficult to show, but the test the evidence has to satisfy remains the same. But this case, said Sir Murray Stuart Smith was, ‘...essentially a simple case. It was a case which was typical of many personal injury cases where, if the claimant’s evidence, or that on his or her behalf is accepted, the claim will succeed and if the defendant’s account is accepted the claim will either fail or there will be substantial contributory negligence. Where there is such a conflict it is very difficult, if not impossible at an earlier stage of the case, as (the advice to settle) was, to be sure which evidence will be preferred.’

**Counsel’s responsibilities**

In a case such as this, which depended on assessing which evidence was likely to be preferred, Sir Murray Stuart Smith said that:

‘All that can be done is to point out the fact and the significance of the conflict of evidence and then make some attempt to evaluate the strengths and weaknesses of the conflicting account. It would take very cogent reasons indeed to say that it was overwhelmingly likely that a particular witness’s account would be preferred and another’s rejected, and consequently that the claim had no reasonable prospect of success... In a case such as this, logical and sensible reasons have to be given for rejecting the favourable evidence of a witness. If the reasons do not bear examination they are not such as can be expected from a competent and experienced practitioner.’

The court was anxious that its judgement should not be taken as requiring counsel to sit on the fence. It pointed out that the fence was not necessarily a safe place to be. Kay LJJ said:

‘Litigants do require clear advice. There is little point in obtaining the opinion of counsel, if counsel is not prepared to give the client the benefit of his experience and expertise. Nothing in the conclusions I have reached in this case would discourage the giving of such robust advice provided it was given with proper care. Indeed an indecisive opinion in circumstances which would lead a reasonably competent practitioner to give clear and positive advice might in itself be viewed as negligent.’

Unsurprisingly, the court emphasised that a fuller, more reasoned opinion would be easier to defend than one which consisted of thinly reasoned assertions. Kay LJJ put it like this: ‘...counsel need do no more than refer to those parts of the evidence in their

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opinion that justify their conclusion on material matters. The absence of a reference to a piece of evidence clearly does not in itself lead to any inference that it has been over-looked. If, however, that evidence is such that it would appear to be against counsel's conclusion then a failure to explain why the point had been rejected may lead to a conclusion that insufficient or inappropriate weight has been given to the point.'

This is common evidential sense and says nothing new.

**Solicitor's role**

The first defendant did not contend that reliance on counsel's advice exculpated her, and Sir Murray Stuart Smith said that she was right in this. He went on:

'In my judgement the first defendant's recommendation to accept £50,000 was negligent. It flowed from an unjustified rejection or assessment of the evidence of one witness and the failure to appreciate the weakness of the evidence of another witness and a failure to appreciate the alternative line of argument based upon that second witnesses evidence. An experienced and competent personal injury solicitor ought not to have recommended acceptance of the offer. So a solicitor in the first defendant's position is bound to take an independent view of the evidence, disregarding counsel's advice if necessary.'

**Relevance of funding**

The funding position is summarised above. The third defendant noted that legal aid was not available (but not, apparently, that it might be in future), and evidently considered it relevant to the acceptability of the offer. How it acted on the mind of the first defendant is not clear from the judgement. The third defendant contended before the Court of Appeal that it was relevant that the case was privately funded and the parents had limited means. Sir Murray Stuart Smith disagreed, saying:

'...what the parents wanted was to be advised on the prospects of success, and in particular whether they had reasonably good grounds for getting more than £50,000. It was for them to decide what money they would risk to achieve it. In any event the claimant would have been eligible for legal aid when the regulations were altered as everybody knew they shortly would be.'

**Decision not to prosecute the driver**

The driver of the car which knocked down the claimant was not prosecuted. It was contended that this supported the view of the case taken by the defendants. Sir Murray Stuart Smith, unsurprisingly and obviously correctly, again disagreed.

Where there is conflict of evidence and no independent witness, it would be understandable that the police or prosecution service might not have the confidence of satisfying the criminal burden of proof. A vast number of running down cases succeed although there is no prosecution: they also succeed on occasion when the defendant driver has been acquitted of a criminal charge.

**Significance of the Master's approval**

It was not contended that the Master's approval meant that it was an abuse of the process of the Court to challenge the acceptability of the settlement. That would have been an interesting, if doomed, argument. But it was contended that the endorsement of Master Turner, who had himself been an experienced personal injury practitioner, showed that the advice was such that a reasonable practitioner could give. The court rejected this, Sir Murray Stuart Smith pointing out that several important documents, containing evidence relevant to the prospects of success, were not before the Master. He went on:

'It is impossible to say what view the Master would have taken if he had seen these important documents. But in any event a judge or a master approving a settlement is greatly influenced by the view of solicitors and counsel where, as in this case, they were known to be experienced. I do not think it was at all surprising that in the space of a relatively short appointment Master Turner failed to spot the fallacious argument for rejecting the approach of one witness or a gross overestimation on the strength of another witness account.'

This is strange stuff. It strongly implies that even if all the relevant material had been before the Master, he could still have endorsed the settlement. And if endorsed in those circumstances has no, even evidential, significance because of the weight which will inevitably be given to the urgings of counsel, the question which should be asked is what is the point of approval hearings at all?

**Conclusions**

Griffin will make barristers and solicitors more cautious. It will tend to make barristers less decisive and therefore less useful. It will probably make opinions longer and more tediously discursive. It will tend to encourage a wait and 'see what emerges and see what the judge makes of it' approach to litigation.

It will rightly remind practitioners that it is for privately funded clients, not lawyers, to make decisions about whether and to what extent they want to risk their money on litigation.

And it is likely to cause child settlement hearings to be longer and more detailed and less of a formal rubber stamping than they had previously been.

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**Practice points**

- Before advising that an offer of settlement is accepted, conduct a detailed and even-handed review of the evidence, and be prepared to justify the decision later.
- A solicitor will not necessarily escape liability by relying on counsel's advice on settlement.
- The solicitor has a duty to assess and advise on the acceptability of an offer independently.
- If a client is privately funded, the funding arrangements are irrelevant to the advice on settlement you should give. It is for the client to decide what risks he wants to run. Your job is to tell him what you think those risks are.
- Draw no comfort from endorsement of the settlement at a child or other approval hearing. It does not mean that you cannot be sued for recommending the settlement.

This article first appeared in the Solicitors Journal 7 Sep 2001 and is reproduced here with the editor's permission. The Solicitors Journal is a Sweet & Maxwell publication. [Article Written by Charles Foster, a barrister practising from 6 Pump Court, Temple, London, EC4Y 7AR]
Solicitors Prepare for Sahara Mountain Trek in Aid of Action Cancer

Local Solicitor Janice McGlone of Donard King & Co and Adam Spence of Donaldson McConnell & Co are preparing to embark on the journey of a lifetime. In February 2002 they will be part of the Action Cancer Sahara Mountain Trek to raise funds for one of Northern Ireland’s leading Cancer Charities.

Adam and Janice will be two of 60 hikers who will trek together through the rugged beauty of North Africa. For six days, the group will travel across the Anti Atlas mountains, visiting the villages of the Berber People who inhabit them.

Adam said “Participating in the Trek is a physical and financial challenge for us both. We are exercising daily to build up our fitness levels and we also have a goal of £3,800 to raise. To date the legal profession have been extremely generous and we have nearly reached our goal. We are hoping to hold a pub quiz at the end of November, and all are welcome to come along. There will be advertisements for it in both the Bar Library and Law Club”.

Money raised from the Trek will go towards Action Cancer’s early detection services for men and women, support services and research programmes.

If you feel you could sponsor or support Janice and Adam in any way, please contact both via their respective offices, or send your contribution directly to 48 Hilden Court, Lisburn, BT27 4YN.
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Our Present is Your Future

Law Society (NI) Financial Advice Ltd has launched a new corporate identity. The new image - incorporating the slogan ‘Our present is your future’ - was revealed at an event at the Waterfront Hall, attended by leading members of the legal profession from all over Northern Ireland.

As one of the leading independent financial advice organisations in Northern Ireland, the re-branding is aimed at consolidating the company in the marketplace and refocusing its strategy towards its main target client base in the legal profession.

Carol Malcolmson, Managing Director of Law Society (NI) Financial Advice Ltd said, "We are now in our twelfth year of business, a business with a unique link with the legal profession, providing financial advice to solicitors and their clients. Now, facing a new era, we intend building on our success delivering quality unbiased advice resulting in a high level of customer satisfaction."

John Neill, President of the Law Society; Colin Haddick, Chairman of Law Society Financial Advice Ltd. and Alan Hewitt, Junior Vice President of the Law Society pictured at the launch of the Company’s new corporate identity at the Waterfront Hall.
Pro Bono Scheme

A chance to give something back

It is a year since Mr. Ronnie Appleton QC launched the Northern Ireland Lawyers Pro Bono Unit. The Unit is a joint venture sponsored by the General Council of the Bar of Northern Ireland and the Law Society of Northern Ireland.

The objective of the Unit is to provide Pro Bono free legal advice and representation in deserving cases where Legal Aid or other funding is not available and where the Applicant is unable to afford legal assistance.

The Unit has been set up as a company limited by guarantee and is registered as a charity. Mr. Appleton QC chairs the Management Committee. It is his view that although lawyers have in the past often given their services without payment to those with worthy causes, both branches of the legal profession in Northern Ireland have joined to establish a formal scheme whereby those without funding can obtain representation and advice from solicitors, barristers and QC’s.

The scheme was set up in response to concerns expressed by lawyers about the number of people who slipped through the Legal Aid net. The Management Committee with Mr. Brian Garrett as Vice-Chairman and representatives from both the Bar Council and Law Society believes that the Unit will make a real contribution to tackling specific instances of injustice. However, they feel that the scheme is no substitute for a properly funded Legal Aid system which must remain the principal means for assisting those with insufficient means to obtain legal services.

Advice and representation is provided by barristers and solicitors who have volunteered to join the panel and who cover the full range of legal specializations. Each has offered their services free of charge up to 3 days or 20 hours each year.

The cases most likely to meet the criteria of the Pro Bono Unit will be appeals, applications for leave to appeal, judicial review applications, specific steps in proceedings, tribunal hearings and advisory work. Cases that raise a specific issue of principle or test cases are particularly welcomed.

91 barristers from across Northern Ireland, including 26 QC’s, have volunteered for this scheme which will formalize and complement a long tradition of barristers individually acting without a fee in deserving cases.

The response from solicitors has been immense. Over 100 firms of solicitors have volunteered to participate. The formal scheme builds on the well established commitment to the provision of Pro Bono advice by solicitors at local level which has always formed part of the professional ethos of solicitors here.

Anyone wishing to obtain further information should write in the first instance to The Northern Ireland Lawyers Pro Bono Unit, PO Box 414, Royal Courts of Justice, Chichester Street, Belfast, BT1 3JP. Telephone number: 028 9056 2385

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Letter to Editor

Dear Sir

I refer to Mr John W D Pinkerton’s article in September’s Writ which was his perspective on issues within Registry of Deeds (RoD) and the Land Register (LR), both registries of Land Registers of Northern Ireland (LRNI). While his article had many interesting points contained within there were a few areas where the information supplied was incomplete. Clarification of these areas would allow your readers to be more fully informed of the total picture.

Relevant Background Information

The Land Registers of Northern Ireland started their computerisation programme back in 1999 with Syntegra under a Private Finance Initiative (PFI), the ensuing partnership programme was branded Landweb.

The main objective of the computerisation programme was to alleviate the difficulties that Compulsory First Registration (CFR) would introduce while facilitating the Joined Up Government initiative to have all public services online by 2005.

This included the conversion of the Land Registry data into electronic format, a considerable undertaking involving the conversion of over 400,000 paper folios and to date over 4,000 maps.

In the early part of this year the RoD was also added to the overall programme to ensure that we could meet the electronic government targets for 2005.

Customer Liaison

Even before the original PFI contract was signed we actively engaged feedback from a range of LRNI’s customers via surveys, mailshots and focus groups, to ensure that all parties had an opportunity to comment on our proposals and to be aware of any impact they may have on them. Indeed, much of our original planning changed to take LRNI customer concerns into account. We have even presented update sessions at 2 of the last 3 Law Society Annual Conferences. This is a process that continues to this day, indeed only last month we provided information seminars to over 130 solicitors on the latest development of Landweb Direct - the internet based service we are delivering for direct access to LRNI records.

We are also embarking, within the next month, on a full survey of all LRNI customers into their requirements of the service for the future. This will provide us with a constructive set of requirements to help further improve the service LRNI offer to their customers. I would strongly recommend that your readers take the time to reply to this very important survey.

Register of Deeds

The RoD programme has throughout sought and gained input from the law searcher community, to ensure that as far as is possible we encapsulate their requirements within the overall design. This includes the ability to print results, which was delivered in early October. Indeed, the overall searching mechanism is going through an acceptance process with law searcher representatives to ensure the output is suitable for their needs. We are even planning a further release soon to encompass feedback given to us following extensive use of the facilities.

Land Registry

The introduction at this point of a few statistics will perhaps help your readers to understand the current work programme within the LR. Last year certain types of application to LRNI grew by over 25% in volume from the previous year, to a new record level. At the same time certain types of application into the Register by solicitors saw error levels in excess of 20%. The timing if this was actually fortunate as the Landweb programme by the introduction of computerised services and new working practices allowed LRNI to achieve an 18% year on year growth in productivity.

I have to state that from a personal perspective I find that to be a laudable achievement at a time of great change. There are few organisations who can manage such increases in productivity in such a short space of time. Unfortunately the growth of transactions due to an increase in the housing market outstripped the productivity increase and backlog grew as a consequence, however without such productivity improvements the backlog position would have been far worse.

However, LRNI being the first rate organisation they are, have not simply sat on their laurels during this period. They have tasked Syntegra with helping to introduce new productivity tools which will specifically target the backlog over the coming months. I can confirm that a great deal of resource is being focused on this issue.

One such resource is the Landweb Direct internet capability the address of which is www.lrni.gov.uk. This is the online system that enables LRNI customers to access electronic Land Registry information directly at LRNI premises and will ultimately provide the following features over the internet into their offices:

• Direct access to maps and folios;
• An integrated Mapbase, accessible via property or map criteria;
• Access to maps from folios, and vice versa;
• On line payment.

However even now the internet service provides a range of Forms, Precedents, Guidelines and a fees calculator. If greater use were made of this information store by LRNI customers, this would really help to reduce the error rates being experienced by LRNI and would in itself help to alleviate the backlog issue.

Customer Contact

As mentioned earlier it is very important for LRNI and Syntegra to understand LRNI’s customers needs and to receive as much feedback from the LRNI customer base as possible. Again we have a feedback mechanism in place for this via our website or by sending email to feedback@lrni.gov.uk. Additional information about new releases and improvements will be available via the Landweb website: www lrni.gov.uk.

I trust that this will clarify the situation regarding the computerisation programme and backlog position within LRNI, a little more fully than perhaps it has been previously recorded.

Yours sincerely

Craig Apsey
Syntegra Landweb Programme Director
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WEB WATCH

Busy lawyers in Northern Ireland often find themselves with even more work to do when they volunteer to become committee members of one or more of the many solicitors’ interest groups regularly featured in The Writ. A considerable administrative burden often besets these noble volunteers particularly those with secretarial responsibilities having to circulate minutes, draft letters and so on.

Nowadays, the Internet can do much to reduce this unwelcome burden. Documents can be sent to all groups members at once in just a few seconds by use of the cc or bcc options in email clients such as Outlook Express. Bcc stands for blind carbon copy and should be used when the sender wants to keep all other addresses used confidential and unseen by the other recipients. The newly formed Irish Society for Computers and Law works entirely through email and has yet to send out any document to a member through the post. Some groups have gone as far as setting up their own email list via a web site. This method of message and document distribution is preferred because it doesn’t require the input of anyone individual member before circulation takes place. Instead, each member is given a username, password and email address. All emails sent to the address are then automatically re-distributed to other members. Mailing list hosts as they are called, often charge for this service. A few do not however. Two of the best free services are provided by Coolist (www.coolist.com) and Yahoo!

barryjphillips@hotmail.com

Council Dinner Guests

Annual B.S.A. Dinner

Sat 19th January 2002
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MOX PLANT LEGAL CHALLENGE
The Irish Government has warned it will challenge the British Government by bringing a case before the European Court if necessary concerning the UK decision to expand nuclear processing at Sellafield.

A decision to approve the opening of a mixed oxide plant on the site triggered the Irish Government’s statement.

PROTECTION FOR CONTRACT WORKERS
The European Court of Justice has ruled that women workers may not be dismissed because they are pregnant, and have the same rights as permanent employees when they are on short-term contracts.

ABORTION PROPOSAL AND TREATY OPT OUT
In the face of disagreement from the Labour party the Irish Government has insisted that its proposed constitutional amendment will not require a change in the 1992 Maastricht protocol on abortion.

GENE PATENTING PROVED BY EUROPEAN COURT
A challenge by the Netherlands to the directive on the legal protection of biotechnological invention which has been dubbed the “patenting of life directive” has been dismissed by the court which said that the directive provided sufficient protection to prevent the human body becoming invention and consequently safeguarded human dignity. The directive, promoted to protect patent and encourage medical research has been attacked as allowing companies to control genes and DNA sequences.

RIGHT TO OFFEND, SHOCK OR DISTURB PROTECTED BY EUROPEAN HUMAN RIGHTS CONVENTION
Judge Wildhaber, President of the European Court of Human Rights, at a University College Dublin lecture indicated that the freedom of expression protected by the Convention was extensive, and allowed the media to be more critical of politicians than private individuals.

The Judge, however, also indicated that the Court in its decisions had been more restricted in relation to the criticism of members of the judiciary which “had to enjoy public confidence” which required protection “against destructive attacks that were essentially unfounded particularly as “Judges were subject to a duty of discretion which prevented them from replying”.

COMMISSION DECISION-MAKING ON PEACE FUNDS CRITICISED
Advocate General Jeane Mischo has opined that the decision-making process of the Commission providing finance for the peace programme was flawed. The funding exercise involved a redistribution of Commission allocations which were otherwise available for other countries expenditure.

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LEGAL AID WITH A DIFFERENCE

At the recent launch in Queen’s of the latest edition of Brice Dickson’s book, “The Legal System of Northern Ireland”, 30 copies of the book were donated through the Northern Ireland Voluntary Trust to a range of voluntary and charitable organisations in Northern Ireland. They were a gift from the publishers, SLS Legal Publications, and the Legal Information Forum.

The book is a clear and comprehensive guide to all those seeking an explanation of legal terminology and procedures and is aimed at law students and the general public. However, it also provides an invaluable collection of facts and information and will be the first port of call for anyone with a query about the Northern Ireland legal system.

Copies (price £25) are available from SLS Legal Publications, School of Law, Queen’s University, Belfast BT7 1NN. Tel 028 9033 5224; Fax 028 9032 6308; DX 4330 NR Belfast 34.

Pictured: Lord Justice Campbell (Chairman of SLS Legal Publications), Professor Brice Dickson (Chief Commissioner, Northern Ireland Human Rights Commission), Miriam Dudley (Director of SLS Legal Publications), Linda McAuley (BBC Northern Ireland), Les Allamby (Law Centre(NI)) and Marie Abbott (Programme Manager, Northern Ireland Voluntary Trust)
Many solicitors admit being strangely drawn to this column. But after reading it and thinking 'that nearly happened to me,' how many actually change the way they work?

The important point is not to develop a macabre interest in other people's misfortunes but to learn from their mistakes. The aim should be to take steps to avoid falling into the same traps.

Sadly these warnings are not always heeded. Solicitors are making the same old mistakes time and again. Here are some common examples:

- The final document, be it a lease, will, witness statement or commercial agreement, does not reflect the client’s instructions;
- Cheques are drawn for incorrect amounts, in favour of the wrong person, or sent to the wrong address.
- Time limits are not identified or are simply overlooked.
- Files are sat on, clients affairs are not progressed, resulting in delay, loss and anger.
- Important facts or information are not communicated to the client, preventing the client from making an informed decision - 'Had I been told that, I would never have bought the property'.
- The client is not correctly identified. (Watch out for this in corporate and commercial matters).
- No steps are taken to define what the solicitor will or will not be doing for the client, and no retainer letter is sent.
- No record is kept of advice given to a client. The client then denies ever having received the correct advice, and says that if he had he would have acted differently;
- Staff including partners, are not supervised properly and are left to their own devices. This results in the ‘rain maker’ or maverick (often left alone because he or she ‘brings in the money’) racking up claims and acting at the ‘flaky end of respectability’;
- Work is not delegated in a structured manner, but is dumped on other members of staff, normally junior fee earners. This often results in junior staff being given unrealistic workloads and matters outside their expertise. When something goes wrong it is of course ‘their fault’ and the problem is ‘solved’ by sacking them.

Solicitors take on matters which they do not have the resources or expertise to handle. In addition they fail to keep abreast of case law, statutes or regulations that have a fundamental impact on the area of law that they practice.

A complete lack or organisation within the firm, caused by an absence of systems and procedures. This results in lost files, deeds, wills and documents. How much time do you and your staff waste time looking for such items?

All of these scenarios have caused, and continue to cause claims. So if you recognise them, you need to do more than thank your lucky stars that you haven’t had a claim. You need to take action now.
EMPLOYMENT LAWYERS’ GROUP (NI)

Hon. Sec.  Eamonn McArdle, Bar Library, Royal Courts of Justice, Chichester Street
Voice Mail:  (028) 9056 2282
Fax:  (028) 90231850
E-mail:  eamonn.mcardle@ireland.com

Chairperson  Orla Murray
Hon. Treasurer  June Turkington

Website:  www.legal-island.com/elg.htm

Lunchtime Seminar

Discrimination: A review of the latest caselaw

Speaker:  Beverly Jones, of Jones and Cassidy Solicitors
Date:  Friday, 7 December 2001
Time:  1.00pm (coffee and sandwiches served from 12.30pm)
Venue:  Law Society Lecture Theatre, Law Society House, Victoria Street, Belfast
Cost:  Members £3, Non-members £6.

Booking forms and cheques, made payable to The Employment Lawyers Group (NI), should be sent to:
Ms June Turkington, Legal Directorate, Central Services Agency, 25-27 Adelaide Street, Belfast, BT2 8FH

Booking Form

Name ________________________________
Firm ________________________________
Address ________________________________

I enclose remittance of £ __________________

Notice

Next Meeting: Barry Mulqueen BL will give our next talk on ‘Restrictive covenants and confidentiality in contracts of employment’ on Friday 8 February 2002, usual time, usual venue.
ELG Election Profile of Incoming Officers

Orla Murray LLB has been elected Chairperson of the Employment Lawyers’ Group. Orla is a Senior Legal Assistant in the Departmental Solicitor’s Office and specialises in employment, anti-discrimination and human rights law.

Eamonn McArdle BA, BL, Dip Laws(Labour Law), has been elected Honorary Secretary of the Employment Lawyers’ Group. A former journalist and trade union activist, he practises as a barrister in the Industrial and Fair Employment Tribunals.

June Turkington MA(Cantab)LLM has been elected Honorary Treasurer of The Employment Lawyers’ Group. June is a Solicitor in the Legal Directorate of the Central Services Agency and specialises in employment and discrimination law within the health and personal social services sector.

General Insurance Council Standards (GISC)

Following a decision of the Competition Commission Appeal Tribunal (CCAT) in relation to appeals against GISC membership by ABTA and The Independent Insurance Brokers group, solicitors will not be obliged to join GISC at present. The Tribunal took the view that GISC’s requirement was a restrictive practice.

In their decision the CCAT struck down a rule which would have prevented GISC members dealing with non-GISC members eg solicitors, providing general insurance services.

This decision should be drawn to the attention of any insurance companies which require solicitors with whom they are dealing to be members of GISC.

Membership Renewal

Membership fees are now due for 2001-2002. Members are invited to renew their membership for the forth-coming year. New members are welcome. Please return the form below completed together with cheque for £10 made payable to ELG (NI) to: June Turkington, Legal Directorate, Central Services Agency, 25-27 Adelaide Street, Belfast BT2 8FH

Membership Form

I enclose cheque for £10.00 made payable to ELG (NI)

Name ____________________________________________

Address ____________________________________________

Telephone No: (work) _____________________________ E-mail _____________________________
NIYSA CHRISTMAS DISCO

O’Neills Bar
4 Joys entry
(off high Street)
Belfast
Friday 14th
December 2001
9.00pm – to late

Admission £5.00

BRITISH COUNCIL VISIT

Dinner -
Belfast Castle
20th February 2002

The annual visit from European students to Northern Ireland for a week long study tour will take place in February next year. The NIYSA will host a dinner at Belfast Castle on Wednesday 20th February. A limited number of places will be available to our members (all solicitors under 36).

If you are interested in attending please contact:

Nuala Sheeran
Mills Selig
21 Arthur Street
Belfast
BT1 4GA

Tel: 028 9024 3878

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Dublin 2

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or (00 3531) 6789701
Fax: (00 3531) 6766702

The British Council
Visits Northern Ireland
Young Solicitors Association
We wish to announce that our conference in 2002 will be a joint conference with the Southern Young Solicitors. The conference agenda has yet to be finalised. The Conference fee will be in line with previous years and will be approximately £140.00.

Anyone interested in reserving a place should complete the booking form below. Numbers are strictly limited and early booking is advised.

**Booking Form**


(Please complete in type or block letters)

Name ____________________________________________

Firm Name _______________________________________

Address _________________________________________

________________________________________________

Cost (approx £140.00) ________________________________

Tel (inc. code) __________________ Fax __________________

e-mail ____________________________________________

I will be sharing with ________________________________

I wish to book for the NIYSA Annual Conference. I prefer a double/twin room (Please circle your preference). I accept that all payments are non-refundable and that my booking is subject to availability and to written confirmation by the Organisers.

The remaining balance shall be payable by me to the NIYSA on request. I shall be responsible directly to the Hotel for any incurred room tab on check out.

Note* We regret that we cannot accept bookings at the Conference Hotel for single rooms or single nights. All bookings must be made through NIYSA.

Please tick if vegetarian [ ]

Signed ___________________________ Date ____________________

Please return completed booking form and £40.00 deposit cheque in an envelope marked “NIYSA Conference” to: Nessa Agnew, Vice-Chairman, NIYSA, c/o Joint Legal Services, SEELB, Block 1, Grahamsbridge Road, Belfast BT16 2HS.
Statutory Sick Pay (SSP) is something of a misnomer. While it may be regulated by statute, the primary obligation to pay lies with the employer rather than with any government agency. The current rate payable is £62.20 per week, calculated on a daily basis. It is payable for a maximum period of 28 weeks.

To qualify for SSP, the person claiming must be an employee, and be incapable of working for a period of four or more consecutive days. After a claim, the SSP can be backdated to the start of the period of illness, except for the first three days. These are known as waiting days. It is only on the fourth consecutive day of illness that an employee qualifies for SSP. Separate periods of incapacity which are less than eight weeks apart may be treated as one period, which removes the need for a second three day waiting period. Employee is given the usual meaning, as is incapable of work. It should be noted that employees earning less than the lower earnings limit of £72.00 are not eligible for SSP, nor are employees who have less than three months service. This can cause problems where an employer disputes the length or nature of the employment, although a term of the contract which expressly or implicitly seeks to rule out SSP will clearly be illegal.

To make a claim, employees must first inform their employer that they are sick and incapable of work, either in writing within seven days, or by any method set by their employer (whether in the contract of employment or under a collective agreement, for example). Late notification may bar a claim, unless the employer accepts that there are good reasons for the delay. The employer cannot set very strenuous tests for an employee to notify the employer of sickness. For example, the employer cannot ask that the employee report in person, or more than once a week, or on a particular printed form. After seven days, an employer may well ask for a medical certificate, and it is up to the employer whether or not to accept whatever medical evidence the employee provides. An employer who does not accept an employee’s medical evidence may try to obtain her/his own medical evidence, or failing that can ask the Inland Revenue Medical Service to perform an examination. If the employer decides the employee is not eligible, the employee may want to challenge this decision. In this case, or when the employer simply refuses outright to pay SSP, there are remedies for non-payment.

**Challenging a Statutory Sick Pay decision - the Inland Revenue**

It is a comparatively little known fact that to force payment of SSP, or to appeal a decision not to grant SSP, an employee can involve the Inland Revenue. Where payment has been refused, employees should receive an SSP1 form from their employer stating the reasons for this. The employee should complete the rest of the form, and submit it to the local DHSS office and/or the Inland Revenue National Insurance contributions office, which decide on entitlement. If the employer refuses to give out a copy of the SSP1 form, the employee can apply in writing, passing on any reasons which the employer has given for refusing to provide SSP and specifying the period for which entitlement is at issue. This should be done within six months of the earliest date for which SSP payment is in dispute.

The Inland Revenue may ask for further information from either employer or employee before deciding the claim, and may attempt to negotiate a settlement between them. Failing that, it will issue a decision. Such a decision is legally binding. Should an employer continue to refuse payment, the Inland Revenue may pay the employee instead, and will almost certainly take action against the employer for that refusal. Equally, should an employer be unable to pay due to insolvency, the Inland Revenue may pay in its place.

Either party can appeal against the decision, in writing and with reasons, within thirty days of notification of the original determination. The Inland Revenue will seek to settle the appeal with the consent of the parties, and will encourage the parties to reach an agreement but, failing that, the commissioners will determine the matter. Normally general commissioners hear the appeals, but the appellant can ask that the special commissioners, who will be legally qualified adjudicators rather than lay persons assisted by a clerk, hear the appeal. Although they usually sit in Belfast, it is possible to apply to the clerk for a hearing to be held locally if there is a serious illness or disability.

Further appeals from this decision will be on purely legal points, and should be made to the High Court. The time limits for lodging such an appeal against a decision by the general commissioners is 30 days from the day the employee was told of the decision, rather than the date when written notice arrived. In an appeal against a decision of the special commissioners, it is 56 days. There is a fee for lodging such an appeal, so it is advisable that anyone wishing to appeal get some sort of legal advice before doing so.

The employer should pay SSP on the first payday after the notification of the final decision, or refusal of leave to appeal, or the expiry of the time limit for appeal. If an employer has dismissed an employee solely or mainly to avoid having to pay SSP, the employer remains liable to pay for the full length of entitlement, or until the contract of employment would have ended naturally.

**Alternative route - unlawful deduction from wages**

Under the Employment Rights (Northern Ireland) Order 1996, wages are given a wide definition. Article 59(1)(b) specifically includes SSP within that definition, so that a failure to pay SSP qualifies as an unauthorised deduction from wages. An employee could therefore go to the industrial tribunal within three months of the last non-payment. The tribunal, if it finds in favour of the employee, should make an order for payment of the full amount, or such amount as the Tribunal finds to be unjustly deducted.
(Article 56 and 57, ER (NI) O 1996).

It is also possible to argue that the non-payment is a breach of the employment contract, being a condition of the contract implied by statute. If the employee is still employed, the remedy for breach of contract would be in the County Court. With the limits of small claims actions now being £2,000, this avenue may in practice prove to be a quicker remedy than an industrial tribunal. The risks of a possible counter claim by an employer and of losing the court fee however means that taking a claim for unlawful deduction of wages in the tribunal is the safer route.

Unfair dismissal

It should be noted that employees who have been continuously employed for a period of one month do not require the normal period of service of one year to claim unfair dismissal if they are dismissed for assertion of a statutory right. Thus employees who either are dismissed because the employer has infringed the right of the employees not to suffer unlawful deductions from wages or are dismissed for bringing proceedings employees are dismissed for bringing proceedings for enforcing the right could claim unfair dismissal if employed for more than one month. It should be noted that such an employee could claim unfair dismissal regardless of whether or not s/he actually has the right or whether or not the right has actually been infringed as long as s/he acted in good faith. To be protected, the employee does not actually have to specify the right, it is sufficient if s/he made it reasonably clear to the employer what the right claimed to have been infringed was. (See Article 135 of the Employment Rights (NI) Order 1996).

Conclusion

SSP lies somewhere between true benefit and contractual right, hence these overlapping means of enforcement. While a lawyer’s first instinct may be to go to the industrial tribunal or Small Claims Court, there is a way to avoid these in favour of the less adversarial Inland Revenue route.

Helen O’Hara, Intern
Law Centre (NI) Western Area Office
Employment Unit
The Land Registries -
What we can do to help

There could not be too many solicitors who have not been affected by the downturn in the performance of both the Land Registry and the Registry of Deeds as a result of their major IT initiatives and the timing of the introduction of CFR. However, if the further roll-out of CFR and the introduction of the Ground Rents Act can be delayed until the Registries have been properly resourced and are able to cope then we should hopefully see a marked improvement in performance. Things are already beginning to look up in the Registry of Deeds.

Not all the blame for poor performance can be laid at the door of the Registries, however, and it has been publicly acknowledged by the Law Society that there is a significant element of “contrib.” on the part of the solicitors’ profession. This should not come as a great surprise to anyone as this topic has been covered before and it must be acknowledged by the Registries, however, and it has been publicly acknowledged by the Law Society that there is a significant element of “contrib.” on the part of the solicitors’ profession. This should not come as a great surprise to anyone as this topic has been covered before.

The remaining 14% of rejections is largely attributable to bad administration and includes the following:

- Wrong fee
- Cheque not signed/not enclosed
- Form 2 not enclosed

There is, in my opinion, a direct correlation between the amount charged for conveyancing and the rate of rejection of applications for registration. If you:

- do your conveyancing at the gallop because you have charged a fee that is totally uneconomic; or
- employ an unqualified person who may well be highly intelligent and enthusiastic but who none the less does not have the skill or experience to do the job properly and you do not devote any time to training or supervising that person; or
- you do not have the necessary skill or knowledge yourself to do the job, then mistakes are bound to happen. Also, if you are a solicitor specialising exclusively in litigation and you do the occasional conveyance, either as a favour to an existing client or because you feel you cannot let any work escape your grasp, then not only are you more likely to clog up the system with duff deeds and duff applications but you are also stacking up trouble ahead for yourself. Unfortunately the maxim "horses for courses" does not always apply because the low cost, high volume "conveyancing mill" firms are just as likely to generate mistakes due to lack of solicitor involvement.

I do not have an up-to-date breakdown of the sort of errors experienced by the Land Registry but I am sure it is safe to say that they follow a similar pattern to the Registry of Deeds. According to the Land Registry, "since 1999, 4,782 applications have been rejected by L R staff." If that means from the start of 1999 then that is 140 rejections per month but if it means from the end of that year then it is a more staggering 217 per month. Either way, the time spent by staff rejecting these applications has cost the Registry some £71,730.

"To err is human" and even the Registries would agree that it would be impossible to eradicate mistakes entirely. However, by spending a little more time (for which we should be charging appropriately) in the preparation, execution and dating of deeds and in the preparation of memorials and in checking that the application form is properly filled in and that the correct fee is enclosed, life would be considerably less fraught for both practitioners and the Registries.

John W. D. Pinkerton
Chairman
Non-Contentious Business Committee

LIFE SENTENCE
(NORTHERN IRELAND) ORDER 2001

The Northern Ireland Prison Service, Legislation Branch, have produced a useful guide to the Life Sentence (Northern Ireland) Order 2001. This is being made available to current life sentence prisoners and other interested parties.

Copies can be obtained from the
Prison Legislation branch
Northern Ireland Prison Service
Headquarters
Dundonald House
Upper Newtownards Road
Belfast
BT4 3SU

Tel: 028 90 522922
fax 028 90 525824
E-mail: info@niprisonservice.gov.uk.
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Tel: 028 9752 8427
Mobile: 07831 530178
Fax: 028 9752 1256

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generations. If you would like
more information or our legacy
leaflet, please ring Leo.

Tel: (028) 9080 3342
Web site: www.actioncancer.org
Charity Reg No: XN48533
DETECTION SUPPORT RESEARCH
**Missing Wills**

**RE: Mr. Cecil Ellis, Deceased**
Late of 34 Ulsterville Grove
Portadown
County Armagh
Deceased: 10th August 2001

Would any solicitor who is aware of a Will made by the above named deceased, please contact Conor Downey, Bogue & McNulty, Solicitors of Unit 8 First Floor, Legahory Centre, Craigavon, BT65 5BE.
Tel: 028 3834 9911
Fax: 028 3834 9920

**RE: Gerard McCabe Deceased late of 79 Moneyslane Road Ballyward**
Castlevellan Co Down

Would any person having knowledge of the whereabouts of the Will of the above named Deceased
Please Contact:-
Colman R Hanna
Solicitors
11 Causeway Road
NEWCASTLE
Co Down
BT33 0DL
Tel: 028 4372 3232
Fax: 028 4372 3352

**RE: Archibald McKay Deceased**
Late of 238 Shore Road, Belfast, formerly of 3 Ventry Street, Belfast, previously of 35 Oxford Street, Belfast, and with an address at 203/205 Torr Road, Cusherdun, Co. Antrim.

Would any person having knowledge of the whereabouts of a Will of the above -named deceased please contact
Napier & Sons
Solicitors
1/9 Castle Arcade
Belfast
BT1 5Df
Tel: 02890 244602
Fax: 02890 330330

**RE: Walter Campbell Deceased**
Late of 10 Princess Way, Carrickfergus, County Antrim

Would any person having knowledge of the whereabouts of the Will of the above named deceased please contact
Stephen Perrott & Company Solicitors
49c High Street, Holywood
Co. Down
Tel: 028 9042 8330
Fax: 028 9042 8306

**RE: Albert Ernest Baxter Savage Deceased**
Late of 9D Kilbroney House, Greenway, Belfast

Would any person having knowledge of the whereabouts of the Will of the above named deceased please contact
Stephen Perrott & Company Solicitors
49c High Street, Holywood
Co. Down
Tel: 028 9042 8330
Fax: 028 9042 8306

**RE: James Wilson Louden Savage Deceased**
Late of 84 Coleraine Road, Maghera County Londonderry

Would any person having knowledge of the whereabouts of the Will of the above named deceased please contact
Stephen Perrott & Company Solicitors
49c High Street, Holywood
Co. Down
Tel: 028 9042 8330
Fax: 028 9042 8306

**RE: John Cochrane Moon Deceased**
Late of 17 Windy Hill Road, Limavady.

Would any person having knowledge of the whereabouts of a Will of the above named person please contact:
F. J. Orr & Co (Norman Scott)
Solicitors of 14 Montgomery Street
Belfast
BT1 4QT
Telephone No: (028) 9023 0101
Fax No: (028) 9023 3021

**RE: MARGARET GERTRUDE WRIGHT, DECEASED**
Late of 61 Carland Road, Dungannon, County Tyrone

Would any person having knowledge of the whereabouts of any Will of the above named deceased dated after 2nd August 1996 please contact
Crooke McAlister Solicitors
70 Hollywood Road, Belfast, BT4 1NT
Telephone number: 028 9047 3673
Fax number: 028 9047 3419

**Land Certificate**

**Folio No 11**
County down
Registered owner - Teresa Lively
Land of Croan

TAKE NOTICE that any person having custody of or information as to the whereabouts of the Land Certificate relating to the above mentioned Folio should forthwith produce said Certificate or communicate such information to the undermentioned Solicitors.

AND TAKE FURTHER NOTICE that unless the said Land Certificate is so produced or adequate information as to its whereabouts is so communicated within three weeks of publication of this notice, a duplicate Land Certificate may be applied for.

Fisher & Fisher
Solicitors
9 John Mitchel Place, Newry, County Down BT34 2BS

Estate of Patrick Joseph Matthews Deceased
Date of Death - 21st August 2001
Take notice that any person having custody of or information as to the whereabouts of the title documents relating to property at 8 Cottage Road, Clontigora Newry Co Down
Please contact Ciaran Rafferty Solicitors of 98 Hill Street, Newry, Co Down BT34 1BT
Tel: 028 3026 1102  Fax: 028 3026 0757
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PORTADOWN B62 3NG

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Legal Services Dept

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Applicants must, at 17th December 2001:
• be solicitors entitled to practice in N.I
• have experience in conveyancing and/or contract work

The Council reserves the right to invite for interview only those applicants who appear best able to satisfy the requirements of the post.

Application forms, job descriptions and conditions of employment may be obtained from the Human Resources Section, The Cecil Ward Building, 4-10 Linenhall Street, Belfast BT2 8BP.

Completed application forms must be returned no later than 4pm 17th December 2001.
New Books in the Library

3) Dane & Thomas: How to use a law library; an introduction to legal skills. 4th ed. Sweet & Maxwell. 2001
MacDonald: Tolley’s managing e-mail and internet use. Tolleys. 2001

SELECT SITES

PROFESSIONAL BODIES
The Law Society of Northern Ireland
http://www.lawsoc-ni.org
The home page for this site provides browsers with brief details of the work of the Law Society of Northern Ireland. It allows access to a number of downloadable information leaflets aimed at members of the public. A search facility offers the opportunity to focus on particular areas of interest, with hits sorted either by date or by score. An archive of The Writ from March 2000 is a useful feature for the public and practitioner alike. In addition, a comprehensive list of links is a good starting point for those interested in legal research.

The Bar Library
http://www.barlibrary.com/
The Bar Library provides traditional “library facilities” as well as being the working environment for almost 500 barristers and must cater for all their office and ancillary requirements. The website explains the role of the barrister as well as providing access to the Bar Directory. It also has quite a vast list of links for news groups, search engines and a list of web addresses for caselaw, government departments and journals.

The Law Society of Ireland
http://www.lawsociety.ie/
This site provides an overview of the work of the Law Society and of the legal profession in Ireland. This easy to navigate site has information on the work of the Council and committees, a list of personnel contact names, information on member services and how to qualify as a solicitor in Ireland. It also has access to The Gazette, the journal of the Law Society from 1999 to the present day. The Links page is also worth looking at, as it provides an extensive guide to useful Internet sites of interest to legal practitioners.

The International Bar Association
http://www.ibanet.org/
The International Bar Association is the world’s largest international organisation of Law Societies, Bar Associations and individual lawyers engaged in international practice. The site has extensive information for the practitioner, although some information is password protected. Certain issues of International Bar News, the journal of the IBA are available on the site as well as a list of recent press releases and new publications some of which can be downloaded free of charge. There is also a “Reading Room” which allows the user to search for specific publications by author, title or keyword.

The Law Society of Scotland
http://www.lawscot.org.uk/
The Law Society of Scotland website provides a useful facility for members of the public to search for any of the 8422 practicing solicitors based in any of the 2237 firms in Scotland. For the solicitor, commonly used practice rules are available for downloading and printing. Another useful feature is a link to up to the minute information on computer viruses from an anti-virus company.

E-MAIL DIRECTORY
4TH EDITION
We are now producing a new edition of the directory which costs £5 and would be grateful if you could let us know whether your e-mail address has changed.

The invitation still stands for any new contributors - in return for giving us your address we will send you your first copy free.

Law Society Library Email:
hsemple@lawsoc-ni.org

Copy deadline for December
Friday 7th December 2001

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