

THE BAR

REVIEW

Journal of The Bar of Ireland



THE BAR
OF IRELAND

The Law Library

Volume 21 Number 3
June 2016



Employee privacy



Professional Support Lawyer (PSL) Opportunities

Maples and Calder is a full service leading international law firm, advising financial, institutional, business and private clients on the laws of Ireland, the Cayman Islands and the British Virgin Islands.

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- Liaising with fee earners, and contributing as and when required to the production and/or proof-reading of articles, briefings, newsletters or other materials for circulation to clients.
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Published on behalf of The Bar of Ireland
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Bigger awards are not the problem

Other factors are to blame for the rise in insurance premiums.

There has been much public debate in recent weeks on the issue of increasing motor insurance premiums, and much intensive lobbying by the insurance companies on this issue. This topic is the subject of an article jointly written by Aedamair Gallagher and myself in this edition of *The Bar Review*. While the case has been made that there has been a significant increase in the number and size of awards, and in legal costs, in recent years, all is not as it seems. There has been a very modest increase in the number of personal injuries claims notified to the Injuries Board, a very modest increase in the size of awards made by the Injuries Board, a substantial fall in the number of personal injuries cases commenced in the High Court and a small increase in the number of personal injuries cases commenced in the Circuit Court (the Court figures relate to 2014 – the most recent data available from the Courts Service). In fact, as the Injuries Board has recently pointed out in its Annual Overview for 2015, while the number of new claims submitted to the Board in 2015 compared with 2014 increased by 6%, this reflected “increased economic and social activity” and was “not unexpected given there are more people at work, higher traffic volumes and higher footfall in public areas”. The average compensation award made by the Board in 2015 was a modest 1% increase on the average in 2014. While the total amount awarded by the High Court in personal injury cases in 2014 was an increase on the total amount awarded in 2013, this is generally believed to have arisen as a result of an increase in clinical negligence claims and awards.

More significant factor

A much more significant contributory factor to the increase in motor insurance premiums in the last 12 months may well be that adverted to by Minister Noonan in a speech to the Dáil on April 20, 2016. Due to intense competition in the insurance market in recent years, insurance companies focused on maintaining market share by charging lower premiums. This was financially sustainable during reasonable investment returns but ceased to be so with recent reversals in investment markets. The Minister has established a working group to look into this entire area and Council of The Bar of Ireland has written to the Minister seeking to participate in that group.

Legal Services Regulation Act

Recent comments by Isolde Goggin, Chairperson of the Competition and Consumer Protection Commission (CCPC, formerly known as the Competition Authority), attracted prominent coverage in *The Irish Times*. Those comments were surprising and in many respects uninformed. After several years of seeking proper consultation in relation to the Legal Services Regulation Bill, the Minister and her officials, in the period after June 2014, did consult with Council of The Bar of Ireland, and did allow us to make submissions in relation to the Bill in its various iterations. However, the Legal Services

Regulation Act, as ultimately enacted, implemented many of the recommendations previously made by the CCPC in its 2006 report. We are unaware of any impediment to the CCPC making its views known to the Minister at any stage of the legislative process. The Bar of Ireland makes no apology for representing the interests of its members and, more importantly, their clients, in the process leading to the enactment of the legislation.

Legal costs

Members will have seen some coverage surrounding the recent publication of a report by the National Competitiveness Council (NCC) entitled ‘Costs of doing business in Ireland 2016’. Some prominence was given in the media to the NCC’s finding that legal service prices at the end of 2015 were 5.8% higher than 2010 levels. It should, however, be noted that this finding was based on a survey to which there were merely 16 respondents and covers solicitors’ fees only. Barristers’ fees were not included. The publicly available material discloses very substantial decreases in professional fees paid by State bodies to barristers in the period 2006 to 2013, of between 26% and 50%. There have been no increases to date in such fees. The NCC did recommend greater use of information technology and improved case management. Those recommendations are to be welcomed but it must be appreciated that their implementation will require significantly greater resources to be provided to the Courts Service and the judiciary. In this context, in his recent speech at the World Bar Conference in Edinburgh, Mr Justice Frank Clarke made the point that the cost of running a common law court system, such as we have, is approximately one-quarter to one-third of the cost of running a Continental/civil law court system. That is not something which is ever adverted to when comparing the cost of the court system in Ireland with other jurisdictions.

The World Bar Conference afforded the opportunity for heads of international Bar associations to agree a new Edinburgh Declaration to commit to the rule of law and to encourage support for publicly funded access to justice, reaffirming the principles set out in the Edinburgh Declaration of 2002. Copies of the Edinburgh Declaration 2016 and of the papers delivered at the conference are available at lawlibrary.ie.

Director’s report

I urge all members to read the report of the Director, Ciara Murphy, on ‘Implementing the Strategic Plan (January – March 2016)’. I am hopeful that the answers to many questions members have about the work and finances of The Bar of Ireland will be found in this report (accessible on the website and in hard copy as distributed around the Law Library).

I am delighted to draw members’ attention to the recent establishment of a discovery counsel database, as is described in more detail in the Young Bar column. This is an important initiative, which I hope will have the support of the entire Bar.

David Barniville SC

Chairman, Council of the Bar of Ireland



Your *Bar Review*

Given the impetus created by our re-launch, now seems an opportune time to set out in detail the procedure for submitting articles or news items to *The Bar Review*.

If you have already written an article or if you have a story idea, please send me a brief email with a synopsis of the piece and why it is of importance to legal practitioners. I will then submit that idea at the next meeting of the Editorial Board. The Board meets six times a year and is particularly keen on encouraging topical articles which explore issues that have an impact on the day-to-day practice of being a barrister. The guidelines for articles are set out on the Law Library website under Bar Review and it is particularly important that articles do not exceed 3,000 words.

We also have a 'Closing Argument' section, which offers contributors an opportunity to 'sound off' about a particular legal issue, and we are delighted to receive submissions for this column. The maximum length of this piece is 700 words. We also feature interviews with people in the law and items of historical interest.

I am always happy to receive or to discuss potential submissions with colleagues and can be contacted at ebrennan@lawlibrary.ie.

News items and photographs should be submitted to rfisher@lawlibrary.ie.

The *Review* is for all members and I urge you to get involved.



Eilis Brennan BL,

Editor

ebrennan@lawlibrary.ie

A new future for JILL



The first day of January 2016 was a significant date in the history of the JILL database and marked a milestone in its development. On that day an agreement was reached between The Bar of Ireland and Justis Publishing to combine the JILL archive of unreported judgments with Justis Irish Cases (JIC) to form one comprehensive, searchable database of Irish case law.

The JILL database of unreported judgments, with content dating back to 1931, was developed by The Bar of Ireland in the 1980s when no other similar resource existed. The exclusive access provided to the JILL proved advantageous for our members vis-à-vis non-members of the Bar. The JILL began life in print, whereby copies of the unreported judgments were compiled into what became known as the Red Volumes. In 1983 it was decided to automate the process. As a result of a report written in 2004, it was decided to host the JILL with a commercial database provider, Context (now Justis Publishing), to ensure that the Law Library would continue to take advantage of improved search capabilities and advances in technology. As legislation and case law are now universally accessible, the competitive advantage provided by the JILL decreased. The JILL, however, remained the most comprehensive collection in digital format and in order to ensure its continued development, negotiations began with a number of parties.

An agreement was reached with Justis Publishing, a company that has invested heavily in search technology so as to allow greater exploitation of content. Results will no longer be exclusively text based, but vast amounts of information will be condensed into one visual image to ensure enhanced understanding and more focused results. Justis claims that its new platform JustisOne "will revolutionise how lawyers analyse relevant cases".

The JILL and JIC will be combined on the newly developed JustisOne platform on a commercial basis. The Bar of Ireland will maintain an association with the product, which may result in an income stream shared between both parties.

International advocacy

The Advanced Advocacy courses involve co-operation between barristers from around the world.

The first of this year's Advanced Advocacy courses began with a truly international flavour on April 20. Following an advocacy conference in Belfast, 11 members of the International Advocacy Training Council arrived in Dublin to assist with the course. Coming from Hong Kong, South Africa, England, Australia and Malaysia, they offered a refresher course for our training faculty, followed immediately by two hours of case analysis, led by the Irish trainers, for participants. This year's case was a theft case. All of the participating barristers were between two and seven years in practice.

On the following Sunday, the course moved to the King's Inns for a full day of advocacy training using the same case study. Participants examined and cross-examined various witnesses in the case, and each short performance was videotaped and reviewed in order to improve their advocacy skills. The courses have had extremely positive feedback, from first-year volunteers who help with the logistics of running this event, to busy practising barristers who finally get

the chance to rehearse and discuss specific questions and why one approach might be better than another. All of the trainers have confirmed that they learn as much as the participants. In addition to the witness handling sessions, there were lectures on examination-in-chief and cross-examination techniques, voice coaching and what judges want to hear. The day ended with a relaxed, collegial dinner in the Benchers' Room.

It is thanks to the Advocacy Committee, trainers, participants and first-year volunteers that it was such a fulfilling day. Particular thanks are due to Mr Justice Tony Hunt, who gave a valuable contribution from the other side of the bench and generously answered the multiple questions that followed from a day of trying to assess how a judge might react to various arguments!

The next course will be at the end of the long vacation, and will be tailored to more senior members of the Bar. Keep an eye on *In Brief* in July for further details.



Pictured at the Advanced Advocacy course in April 2016 are members of the Advanced Advocacy faculty, along with visiting International Advocacy Training Council trainers. Front row (from left): Michael Dillon BL; Marguerite Bolger SC; Lord Robert Walker; Dep. HCJ Audrey Campbell-Moffat SC; and, Niamh Hyland SC. Back row (from left): David Leung SC; Barry M Ward BL; Mary Rose Gearty SC; Anna Annandale SC; Timothy Bruinders SC; Andrew Beck BL; and, David Nolan SC.

Calcutta Run



Above: Members of the Bar getting ready for the Calcutta Run. Right: winner Richard Musgrave BL pictured with the trophy.

A total of 114 members of the Bar took part in the Calcutta Run on May 21. Runners and walkers of all ages and fitness levels pounded the pavements of Dublin city centre for this fantastic event, raising money in the process for GOAL and the Peter McVerry Trust. Congratulations to all who took part, and particularly to the winner on the day, Richard Musgrave BL.



Book award for barrister



Doreann O'Mahony BL, author of *Medical Negligence and Childbirth*, has won the award for Legal Book of the Year 2016 at the AIB Private Banking Irish Law Awards. These Awards, now in their fifth year, celebrate the outstanding achievements and exemplary practices of leading law firms and legal practitioners across the country. The Awards were presented at a black tie gala dinner hosted by Miriam O'Callaghan on May 6 in Dublin.



Children and Family Relationships Law in Ireland Practice and Procedure

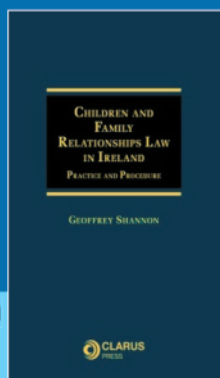
by Dr Geoffrey Shannon (Solicitor)

The new legal regime of children and family law examined, analysed and explained



Approx 500 Pages

Hardback €199 | Publishing June 2016



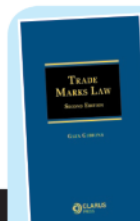
The recently commenced Children and Family Relationships Act 2015 is the most comprehensive amendment to the law on children and family relationships in many decades.

Children and Family Relationships Law in Ireland: Practice and Procedure, examines, analyses and explains this new legal regime.

A wide-range of new issues are addressed, including:

- parental rights in diverse family arrangements;
- parentage in cases of assisted reproduction;
- the "best interests" principle;
- joint adoption for civil partners/co-habiting partners;
- the formalisation of the relationship between a child and their de facto parent;
- different pathways to guardianship;
- expanding the duties, obligations and rights of guardians and further bolstering the rights of children;
- automatic guardianship for certain non-marital cohabiting fathers.

The Children and Family Relationships Act 2015 is far reaching and fundamentally changes family law in Ireland. *Children and Family Relationships Law in Ireland: Practice and Procedure* is the first book to address these far reaching changes.



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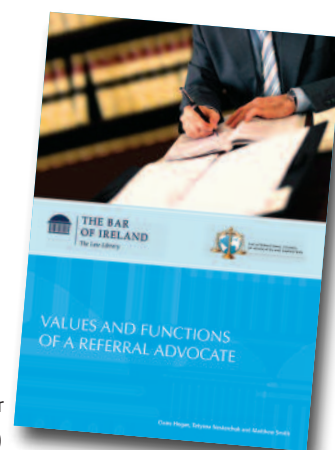
VAS at The Wheel

Courtesy Robbie Fry Photography



Voluntary Assistance Scheme (VAS) Co-ordinator Libby Charlton BL (right) and Shirley Coulter, Director of Communications & Policy at The Bar of Ireland, recently exhibited the VAS at The Wheel Annual Conference Expo in Croke Park. This event, attended by over 400 delegates, provided an ideal opportunity to raise awareness of the invaluable free legal advice and support provided by the VAS to the charity and NGO sector. The exhibit was met with an overwhelmingly positive reaction from all those in attendance.

Values and Functions of a Referral Advocate launched



In 2014 the International Council for Advocates and Barristers (ICAB) commissioned a body of research with a view to restating and underpinning the principles of the independent bar. This work was undertaken by three barristers – Claire Hogan BL from Ireland, Tetyana Nesterchuk from England and Matthew Smith from New Zealand. Following presentation and debate of the research at the World Bar Conference in September 2014 the final version has been published. The Bar of Ireland is pleased to present each member with an individual copy of this excellent work, which sets out a detailed analysis of the true meaning of an independent advocate, by reference to the existing profession in each of the jurisdictions concerned. All members should have received a copy of the booklet with this edition of *The Bar Review*.

LLM in Public Law

The LLM in Public Law suite of programmes offered by the School of Law, NUI Galway examines emerging and topical issues in public law from a national, international and comparative perspective. Legal practitioners undertake the programme to develop or update their knowledge of public law and their legal research skills. Legal practitioners can opt to take the LLM part-time over two years or full-time over one year.

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Young Bar Committee update

The Young Bar Committee has been active lately, meeting other young bar associations, examining how the delivery of discovery services can be improved, and highlighting EU law opportunities for young practitioners.



Claire Hogan BL

World Bar Conference: Edinburgh, April 14-16

The World Bar Conference 2016 was hosted by the Scottish Faculty of Advocates. Topics varied from the values of the independent referral bar to the impact of technology on the profession. Our Chairman, David Barniville SC, addressed delegates on the challenges faced by the Irish Bar, and the Legal Services Regulation Act 2015. Gráinne Larkin BL gave a well-received speech on the topic of women at the Bar, and informed delegates about our female membership survey and pilot mentoring scheme. Mark Mulholland QC, former Chairman of the Bar of Northern Ireland, gave an interesting speech on standing up for the rule of law in the context of the prosecution of the 1916 Rising volunteers. Lieutenant William Wylie KC, aware that the accused were coming before an *in camera* court without legal representation, created opportunities for the volunteers to speak in their own defence. Wylie's actions led to reprieves from the death sentence for many of the accused, including one volunteer who was previously his instructing solicitor. He was glad of this stay on the basis that the man still owed him fees!

Junior counsel from South Africa, England and Wales, and Northern Ireland addressed the Conference on the issue of the future of the independent referral bar from the junior point of view. Our young bar counterparts were interested in the recent formation of our Young Bar Committee, Young Bar Hub and CPD events focused on challenges that face junior members. Ron Paschke of the South African Bar spoke about the risk that barristers' work will be taken over by robots. Thankfully, he conceded that: "Other researchers, more credibly, conclude that lawyers' jobs are at low risk of automation in the next 20 years". We are hopeful that the future of the Young Bar and the Bar in general is safe, at least for the time being...

Rachel Baldwin BL

Eve Bolster BL

Ellen O'Callaghan BL

Sean O'Quigley BL

Discovery and the Junior Bar

Discovery and document review projects remain an important source of income for young barristers. The Young Bar Committee recently launched a discovery counsel database on the Bar of Ireland website. The database is being advertised to solicitors, with the aim that it will be their first port of call in accessing the talent offered by the Young Bar.

In January, the Young Bar Committee hosted a well-attended conference on discovery. John McLaughlin BL delivered a helpful paper providing practical tips for young members seeking to join ediscovery projects. Sinead Drinan BL delivered an excellent paper on the principles of privilege. Aoife Beirne BL described the management of teams of discovery, and how to ensure consistency in projects.

Defining the terms of engagement for discovery work is important, but is often overlooked. The Young Bar Committee has provided a checklist of the issues on its database page.

Chief among these, as emphasised by Karyn Harty of McCann Fitzgerald, is confidentiality. Other important issues to agree upon are hours per week and the hourly rate.

Eoin Martin BL

European opportunities

On February 25, the Irish Society for European Law (ISEL), in conjunction with the Young Bar Committee, hosted an event entitled 'EU Law: Areas of Interest for Junior Practitioners'. The event was chaired by the Hon. Mr Justice Gerard Hogan, and the speakers were Noel J. Travers SC, Joanne Finn, Partner in Eugene F. Collins, and Anne Fitzpatrick BL.

It was emphasised during this CPD event that junior practitioners should consider whether there may be a European aspect to any case in which they are asked to act. Young practitioners should also consider availing of the many opportunities to work for one of the EU institutions, for example as a *référéndaire* or stagiaire.

The ISEL is pleased to extend its offer of a reduced rate of membership of €30 for those less than five years in practice until July 31, 2016. Membership entitles one to attend all of the ISEL's events in 2016 free of charge. To avail of the special rate, please email youngbar@lawlibrary.ie.

Aoife Beirne BL

Volunteers required for afterschool club

Would you like to be involved in this fantastic initiative in Dublin's inner city?



Emma Keane BL

The Robert Emmet Community Development Project (RECDP) works with families living in an underprivileged area in Dublin's South West inner city. It runs an afterschool club in Usher Street for a group of children aged between eight and 11 years old. A number of members of the Bar volunteer to assist the children with their homework and more volunteers are required between 3.00pm and 4.00pm for one day per week.

The children are nominated by their school, St Audoen's, as being the most in need of the service. They are provided with a nutritious meal on arrival at the club. Then, after homework, they partake in games and group activities, such as cooking, artwork, drama, swimming, yoga, and even fencing. The RECDP was previously located in the Mendicity Institution on Island Street. Despite moving location, the club is still affectionately

referred to by the children as 'The Mendo'. When interviewing the children for this article, they were bursting to tell me why they love the Mendo. It was described as "the funnest homework club", "awesome", and in the words of one little girl, "not just good like my brother told me it would be, but extra good". On being asked about their favourite aspects of the club, a number of the children referred to artwork, cooking (especially chocolate chip cookies), drama, and "the dinners". One girl mentioned that she loved the dinners because they were "actual dinners, not just toast". Some children pointed out that they just do not have a person to help with homework at home.

If you would like to take part in the Afterschool Club, or to make a donation to the RECDP, you can send an email to info@recdp.ie.

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Insurance premiums and legal costs

A closer look at the facts contradicts recent headlines and points to the true causes of insurance premium rises.



David Barniville SC
Aedamair Gallagher

Allegations

Insurance Ireland, the body representing 95% of the domestic and international-based insurance sector in Ireland, has in recent weeks been actively propagating the message that increasing insurance costs, particularly motor insurance premiums, are attributable to a higher number of claims, excessively high court awards and rising legal costs. It is claimed that costs are “too high” and “account for more than 60% of the compensation awarded”.¹ It is accepted that motor insurance premiums are rising (reportedly by between 20% and 35% in the past 12 months).² But there is simply no foundation in the allegations that these hikes are directly attributable to increasing numbers of claims, increasing awards or increasing legal costs.

In late 2015, Maurice Priestley, in his capacity as the former Interim CEO of the Personal Injuries Assessment Board (now known as the Injuries Board), stated that the number of personal injury claims litigated in court fell in 2014, revealing that the scale of rising insurance premiums is “at odds” with the

Board’s own data and does not demonstrate a link between insurance claims and increased premiums.³ With only a reported 10% of claims being dealt with through the courts, one would have to ask where the insurance industry is getting its data.⁴

Of most concern is the €1 billion difference which has been highlighted between the premium income of Irish insurers and published awards, revealing serious data inconsistencies that need to be addressed. As Dorothea Dowling, former Chairperson of the Motor Insurance Advisory Board and former Chairperson of the Injuries Board, has said, we are simply being asked to “take the industry’s word for it” and that is not good enough.⁵

With only a reported 10% of claims being dealt with through the courts, one would have to ask where the insurance industry is getting its data.

The allegations and counter allegations have been much debated in the media over the past few weeks.⁶ Perhaps the most interesting and measured contribution to the debate came from Michael Noonan TD, the Minister for Finance, in a speech to Dáil Éireann on April 20, 2016, where he referred to various potential contributory factors to rising motor insurance premiums and announced the establishment of a working group to look into this.

Financial mismanagement

The costs associated with personal injury claims are usually front and centre when it comes to laying blame for premium hikes, but indications of poor business acumen and financial mismanagement in the insurance sector would suggest that there are other, more serious, factors at play.

During the period 2012–2014, the insurance sector was effectively operating on a boom-bust model. According to the Central Bank: “A number of insurance companies took a very optimistic view of future economic outlook, built up unsustainable overheads and followed an imprudent pricing and underwriting approach which resulted in companies’ business plans becoming less resilient to downside risks such as an increase in frequency and severity of claims”.⁷ The spectacular demise of Quinn and Setanta made it clear that insurance companies were competing far too aggressively and at the expense of profitability. They simply were not charging enough, resulting in losses of almost €500 million in three years – losses which inevitably fell to the consumer.⁸

A policy review

In his speech to the Dáil on April 20, 2016, Minister Noonan identified a range of possible factors which may have contributed to the increase in the cost of motor insurance in Ireland in the past 12 months. Among the reasons noted by the Minister are the frequency and scale of claims, the cost of claims and the operation of the insurance market. The Minister noted an increase in the frequency of claims over the past year, which he was advised was associated with improving economic conditions, and also referred to an increase in the number of large claims. Reference was also made to increases in the jurisdiction of the Circuit Court since February 2014, which the Minister said may possibly be leading to increased legal costs, the alleged increased engagement of solicitors in handling of claims, and a recent decision of the High Court (upheld on appeal by the Court of Appeal)⁹ on the real rate of return in a catastrophic injury case.

The Minister referred to advice received from the Central Bank on some of these areas, and to the advice he had received that competitive conditions in the Irish insurance market and insurance companies’ focus on maintaining market share had provided an impetus to lower premiums, which was sustainable while there were positive investment returns but was no longer so due to lower returns. Significantly, the Minister reported that he had established a review of policy in the insurance sector in consultation with the Central Bank and other Departments and agencies, the first phase of which is to examine the framework for motor insurance compensation in light of the collapse of the Setanta insurance company. This work is being conducted by a joint working group comprising officials of the Department of Finance and the Department of Transport. The Minister reported that the group had already met with a number of “key stakeholders” with an interest in the insurance compensation framework in Ireland including the European Commission, the Irish Brokers Association, the State Claims Agency, the Central Bank, Insurance Ireland and the Accountant of the Courts of Justice.

Council of The Bar of Ireland has welcomed the establishment of this working group and agrees with its principal objective, which is to identify the features of a motor insurance compensation framework that is “comprehensive, effective, affordable and consumer focused”. It is noted that the outcome of this work will be used as part of a wider review of policy in the insurance sector,

which will examine the factors contributing to the cost of insurance. Officials in the Department of Finance working with the Central Bank have apparently already met a number of stakeholders, including officials in the Department of Jobs, Enterprise and Innovation and the Injuries Board. It is understood that a consultation process in this area will continue over the coming months, which will extend to other stakeholders “in due course”.

Following publication of his speech, Council of The Bar of Ireland wrote to the Minister on April 26, 2016, informing him of its interest in contributing to the consultation process and in providing appropriate input and assistance to the working group. Council felt that as the body representing the overwhelming majority of barristers in practice in the State, who work for claimants and insurance companies in these cases, and in the interests of ensuring a full, thorough and balanced examination into the alleged contributing factors to the increase in the cost of motor insurance, it would be appropriate, and of assistance, to consult with The Bar of Ireland. It is hoped that such consultation will take place.

The costs associated with personal injury claims are usually front and centre when it comes to laying blame for premium hikes, but indications of poor business acumen and financial mismanagement in the insurance sector would suggest that there are other, more serious, factors at play.

According to the Injuries Board, access to data is essential to ensuring a comprehensive understanding of the claims environment and of the factors impacting on premium increases. Council of The Bar of Ireland shares the view of the Injuries Board in its recently published Annual Overview for 2015 that: “Greater transparency and data sharing by key stakeholders is vital in ensuring an appropriate policy response to the upward trajectory of insurance premiums”.¹⁰ Council also agrees with the sensible comments of the recently appointed Chief Executive of the Injuries Board, Conor O’Brien, concerning the information gap that still exists in terms of data from the insurance companies. In announcing the Board’s Annual Overview for 2015 on April 1, 2016, he said:

“A comprehensive understanding of the broader personal injury environment requires the publication of data relating to cases that are settled outside of the Board’s model. Bridging this significant information gap should be in the best interest of all stakeholders and an important step in better understanding any claims-related factors impacting on insurance premium increases.”

The true position

Since a fair amount of the public debate on this issue has focused on an allegedly significant increase in the number of claims in the past 12 months or so, and on an alleged increase in the cost of such claims, and since these issues have featured as potential contributing factors to the increased cost of

motor insurance, it might be helpful to refer to some of the published statistics in these areas. The Courts Service, the Injuries Board and the Central Bank have all recently published important material on these areas.

First, on the question of an increase in the number of claims, the Injuries Board recently published the outcome of its Annual Overview for 2015. This showed an increase of 6% in the number of new claims submitted to the Board in 2015 compared with 2014 (33,561 new personal injury claims in 2015 compared with 31,576 claims in 2014). The Board noted that this “reflects increased economic and social activity and is not unexpected given there are more people at work, higher traffic volumes and higher footfall in public areas”. That explanation for the fairly small increase in the number of claims mirrors the view of the Central Bank in its “Bodily Injury Thematic Review” published in November 2015. Noting that at that stage the insurance industry was observing an average increase of 8.3% in the number of private motor insurance injury claims from 2013 to 2014, the Central Bank observed that such increases were “in line with increases in motor fuel sales and road traffic fatalities in the same period”, reflecting higher traffic volumes year on year. These views were also reflected in Minister Noonan’s speech on April 20, 2016. The Courts Service Annual Report for 2014 (published in June 2015 and the most up-to-date figures available) considered the impact of the increase in the jurisdiction of the Circuit Court in personal injury cases from €38,000 to €60,000 with effect from February 2014. In summary, there were 7,047 personal injury actions commenced in the High Court in 2014 with 9,852 such actions commenced in the Circuit Court. This represented a 26% decrease in such cases commenced in the High Court and a 16% increase in the Circuit Court, compared to 2013. While the Courts Service Annual Report for 2015 is not due to be published until later this year, and until then the figures for 2015 will not be available, it is likely that the figures for 2015 will show an increase in the number of Circuit Court personal injury cases commenced and probably a decrease in the number of High Court cases commenced compared with 2014. To date, however, the publicly available material does not show anything like the sort of explosion of claims or proceedings commenced as one might have imagined from some of the public comment made in recent months.

A similar picture is presented from the published material available on the number and level of awards. In its Annual Overview for 2015, the Injuries Board noted that it made 11,734 awards for personal injury compensation and awarded a total of €268.4 million in compensation in 2015 compared to 12,420 awards and €281.2 million awarded in 2014. Although the number of awards and the amount awarded by the Injuries Board fell in 2015 compared with 2014, the Board stated that the reduction in awards did not reflect any change to underlying claim volumes but was due to the timing of awards, with some claims from 2015 running into 2016. The Board projected that by the end of 2016, the number of awards annually would average 12,000 over the three-year period 2014–2016. No significant increase in the number of claims is evident from these figures.

On the question of average awards by the Board, it was noted that these remained consistent in 2015 with the previous year. The average compensation award made by the Board in 2014 was €22,642 with a “modest” 1% increase in 2015 to €22,878. The Courts Service Annual Report for 2014 showed that for that year, the total amount awarded by the High Court in personal injury cases was €154,915,926, with the highest amount awarded being €9 million. The total awarded in 2014 by the Circuit Court in personal injuries cases was

€13,794,354. For 2013, the total amount awarded in personal injury cases in the High Court was €134,119,921 and in the Circuit Court, €13,243,153. It should be noted, however, that there has been a major increase in clinical negligence claims and awards in the past two years. These cases are primarily heard and determined in the High Court and since they do not have an impact on motor insurance claims, cannot be a contributing factor to the increase in motor insurance costs. In its November 2015 Report, the Central Bank looked at the costs of claims in private motor injury cases and noted that the average cost for each accident year was approximately €23,400 for 2012 rising to €25,200 for 2014, being an 8% increase from 2012 to 2014. It noted that there was some evidence of a continuation of this trend into 2015. It is hard to see this as explaining the reported increases of up to 35% in the cost of motor insurance premiums in the past 12 months. Doubtless, all of this will be considered by the working group established by Minister Noonan.

The Bar of Ireland has established a sub-committee of its Policy and Research Working Group to continue to review this area and to assist in its contributions to the working group recently established by Minister Noonan.

Damages higher in Ireland?

An argument often made by the insurance industry is that damages awarded to injured claimants are higher in Ireland than in other jurisdictions. This, the argument goes, means that awards in Ireland (whether by the courts or by the Injuries Board) are higher than they ought to be and are, therefore, excessive. The example often given is in the case of damages awarded for whiplash injuries. It is said that such cases are often settled (by insurance companies) for up to three times the amount for which they settle in the United Kingdom. A number of points can be made in response to this argument.

The first is that under our system, a person who sustains genuine personal injuries is entitled to be properly compensated for those injuries whether by settlements entered into by insurance companies or by awards made by the Injuries Board or by the courts. There are very few cases which are purely whiplash injuries without other injuries and symptoms. An injured claimant is entitled to be compensated for all of his or her injuries.

Secondly, in the case of awards made by the courts, these are made by judges who are independent and have no vested interest in the outcome of the case. They are independent of the insurance industry and they are independent of claimants. They make awards based on what they assess to be fair and appropriate compensation to reflect the level of injuries disclosed in the evidence before them. If either side is unhappy with the level of an award, that party may appeal. The newly established Court of Appeal has been very active in reviewing awards of the High Court. The Court of Appeal stated in a recent judgment: “It is important that compensation when awarded by the Court in respect of pain and suffering should be reasonable and proportionate in all of the circumstances”.¹¹ The Court further stated that: “Damages awarded for pain and suffering must be reasonable having regard to the injuries

sustained [and] must also be proportionate to the awards commonly made to victims in respect of injuries which are of significantly greater or lesser import".¹² The concept of reasonableness and proportionality is inherent in the exercise undertaken by a court in assessing the appropriate level of damages in any case.

Thirdly, while it may be that in some cases, the level of damages awarded in respect of particular injuries in Ireland is greater than might be awarded in another jurisdiction, that is not so in respect of all types of claims. For example, damages for pain and suffering in catastrophic cases is capped by our courts at €450,000,¹³ whereas in other jurisdictions (such as Northern Ireland and England and Wales), the general damages in equivalent cases can be higher. It should be said that these cases involve the most seriously injured claimants coming before the courts. In this context, it is noted that the Injuries Board is in the process of conducting a review of its Book of Quantum, which provides a guideline of injuries and value ranges of damages appropriate to particular injuries. As Minister Noonan pointed out in his speech to the Dáil, the Book of Quantum is not a recommendation for compensation levels but is rather a reflection of the prevailing level of awards being made by the courts, settlements entered into by insurance companies and by the State Claims Agency, and awards made by the Injuries Board. Its purpose, therefore, is not to lead to an increase or decrease in the level of awards, but rather to ensure that the awards are reflective of compensation levels in these areas. Part of the difficulty, however, is in obtaining information from insurance companies on settlements entered into by them. It is that absence of data that led to the Chief Executive of the Injuries Board recently calling for publication of data relating to cases settled by insurance companies.

The Bar of Ireland has established a sub-committee of its Policy and Research Working Group to continue to review this area and to assist in its contributions to the working group recently established by Minister Noonan.

Legal fees in general

According to the recent report of the National Competitiveness Council (NCC), an economic advisory body to the Government, legal costs are 5.8% higher than 2010 levels, having failed to "adjust downwards to the degree that might

have been expected given economic circumstances".¹⁴ It ought to be highlighted that the legal services data used in this analysis relate to solicitors' fees only and are based on 16 respondents to a CSO survey.¹⁵ Professional fees payable to barristers are not captured by the report.

Contrary to popular belief, barristers' fees have fallen significantly. During the period 2006-2013, published figures from the various State agencies, who are the biggest consumers of barristers' services, show that professional fees in respect of barristers saw average decreases of between 26% and 50%.

Counsel's fees represented 19% of the total budget of the Legal Aid Board in 2006, but fell to 11% in 2013. A 34% decrease in total fees paid to counsel occurred during this period, despite increases in the number of applications and cases handled. During the period 2008-2014, the DPP showed an average decrease of 30% in counsel fees and, according to the Annual Reports of the Attorney General and Chief State Solicitors Office, fees paid to counsel showed a decrease of 45% or more during the same period.

These reductions are replicated in other areas of publicly funded work for barristers and are mirrored in other areas of private work.

The Legal Services Regulation Act

How will the new Legal Services Regulation Act, 2015 affect the situation? The Act will introduce a new costs regime that will ensure greater clarity of the principles to be applied by Legal Costs Adjudicators in assessing costs. The new system will require greater efficiency and transparency within the Office of the Legal Costs Adjudicators, greater visibility for clients in advance in terms of the costs of litigation, more detailed information on fee notes, a greater obligation to update costs information as a case progresses, and a facility for clients and opposing parties to challenge costs by means of the new adjudication system, replacing taxation. While not necessarily an issue for those acting on the defendant/insurer side, where scales of fees are routinely imposed by insurance companies on their own solicitors and barristers, the new costs regime will be important in terms of the plaintiffs' costs.

Overall, the new system is likely to be positive and should ensure a reasonable and proportionate means of assessing legal costs.

Whether that will please the detractors is anyone's guess.

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No Bills initiated in Dáil Éireann during the period

March 17, 2016, to May 4, 2016

No Bills initiated in Seanad Éireann during the period

March 17, 2016, to May 4, 2016

No Bills amended during the period

March 17, 2016, to May 4, 2016

For up-to-date information please check the following websites:

Bills & Legislation – <http://www.oireachtas.ie/parliament/>

Government Legislation Programme updated 22nd September 2015 – http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/

Always a barrister

Peter Sutherland spoke to *The Bar Review* about migration, European integration, the vital role of the law in decision-making on these issues, and the influence of the Bar on his career.



Ann-Marie Hardiman
Journalist and sub-editor at Think Media Ltd

In a career that began at the Bar in Dublin, and progressed through the posts of Attorney General and European Commissioner, to GATT and the World Trade Organisation, and on to BP and Goldman Sachs (see panel), Peter Sutherland has worked at the highest levels of government, business and international diplomacy. It's perhaps no surprise then, that when then United Nations (UN) Secretary General Kofi Annan was looking for someone to take on the role of Special Representative for Migration and Development in 2005, he turned to the man for whom European and global integration has been a personal crusade. In what he refers to as "a co-ordinating role", Peter works with the myriad agencies involved to try to formulate coherent and cohesive policies in this complex area.

"Under the instructions of the Secretary General, I helped to co-ordinate with the Global Migration Group, made up of all of these agencies. I also set up the Global Forum on Migration and Development, which meets regularly during the year to try and co-ordinate policy, as well as holding a major five-day session annually, in which up to 150 countries participate."

This is a *pro bono* role, in which Peter is supported by a small team working out

of London, New York and Geneva. Further cementing his commitment to this area, he is also on the advisory board of the International Organisation of Migration (IOM), and is President of the International Catholic Migration Commission (ICMC), one of the bigger NGOs working on the ground in this area.

The thorny question of how to alleviate the current crisis, while formulating policies on migration for the longer term, is currently exercising the most influential minds in Europe. For Peter, the answers lie in the law – both existing and long-established statutes, and the need for new legislation and agreements.

Crisis of our generation

The current refugee crisis, which has seen millions of people fleeing conflict in Africa and the Middle East, and has been referred to as the defining crisis of this generation, on a scale with the aftermath of the Second World War, naturally dominates Peter's work. His role is also very much concerned with how countries and communities deal with these issues in the long term, particularly the issue of economic migrants.



“The overwhelming majority of migrants are economic migrants and economic migrants seem to be defined (there’s no official definition) as ‘everybody who isn’t a refugee’. Many economic migrants are ‘survival migrants’, who we would consider to be refugees from natural disasters, for example. They don’t have the rights which are given to refugees under the 1951 Convention, who are entitled to claim asylum.”

Having been involved in this area for over a decade now, was he shocked by the scale of the current crisis, or did he feel that it was inevitable?

“Everybody instinctively knows that the huge disparities in wealth in different regions – poverty, natural disaster and climate change – were all going to drive huge movements of people. It became obvious to me when I started studying this, that it was going to be [the case]. I’ve been visiting camps – I’ve been in Bangladesh and Sicily in the last few weeks – and it’s obvious when you’re on the

Ireland’s role in the migration crisis

“With an expanding economy and the rapidly dropping rate of unemployment, I think that we are well placed to continue to contribute to the taking of migrants. I think we can do more. Again, it’s a question of publicly articulating in European fora our sense of obligation to deal with this crisis – the crisis of our generation. And I think we have [that sense of obligation]. I think the fact that we haven’t given rise to a racist party within Ireland is a positive – it’s an expression of Irish commitment. Ireland has always been good in terms of those who are in great disadvantage because we’ve had our own experiences of it.”



As part of his work as Special Representative for Migration and Development, Peter has visited a number of migrant camps throughout the world, including in Calais (top) in September 2015, and in Athens (above) in May 2016.

ground that this issue is irreversible. There is no way of creating islands of isolation from the movement of people, no matter how hard some try, and even if you didn't have a humanitarian bone in your body you would recognise that the practicalities of the world in which we live require us to live with interdependence in the area of people as well as in the area of goods and services."

We have a collective and global responsibility with regard to those who are escaping persecution – refugees – to grant them asylum. That, I think, is a definable obligation. It was created in 1951 as a direct response to the failures in this area which had taken place during the Second World War, in particular the persecution of Jews.

Answers lie in the law

The thorny question of how to alleviate the current crisis, while formulating policies on migration for the longer term, is currently exercising the most influential minds in Europe. For Peter, the answers lie in the law – both existing and long-established statutes, and the need for new legislation and agreements.

"We have a collective and global responsibility with regard to those who are escaping persecution – refugees – to grant them asylum. That, I think, is a definable obligation. It was created in 1951 as a direct response to the failures in this area which had taken place during the Second World War, in particular the persecution of Jews. Much of the current debate is around how you implement that obligation. Do you allow the total responsibility to rest with those countries closest to the area that is giving rise to the refugees? The Dublin Regulation, which requires the country people first go to, to be the place where they apply for asylum, creates an unfair burden, and a lot of the European debate is around this."

The other issue, of so-called economic migrants, is far more complex, and requires a range of measures.

"If people are survival migrants, we have an obligation to create some form of humanitarian visas, at least providing temporary protection. At the same time there is an entitlement to enforce a rule of returning illegal migrants to where they came from. That requires bilateral agreements with the countries of origin of these people, for example with countries in North Africa where there is stable government, to enforce the non-movement of irregular migrants, with the *quid pro quo* being an increasing number of regular migrants being authorised and some degree of financial contribution, as is being made for example with Turkey."

The recent agreement between Turkey and the EU, whereby migrants arriving in Greece will be returned to Turkey, epitomises many of the complexities of the current situation. Peter, like many others, has serious concerns.

"It is not clear whether the legalities of refugee law are complied with in returning people to Turkey. You can only do so on the basis of a prior

A glittering career

Peter Sutherland was born in Dublin in 1946 and educated at Gonzaga College, University College Dublin and the King's Inns. He practised at The Bar of Ireland from 1969 to 1981. In 1981 he was appointed to the post of Attorney General by then Taoiseach Garrett FitzGerald, a post he held through two governments from 1981 until 1985. In 1985 he was appointed EU Commissioner, and served as Commissioner responsible for Competition Policy until 1989, and also as Education Commissioner for one year. He served as Chairman of Allied Irish Banks until 1993, before becoming the founding Director General of the World Trade Organisation, a post he held until 1995. He has served as Chairman of BP, of the London School of Economics and Political Science, and of Goldman Sachs International, a post he retired from in 2015 to take up the role of United Nations Special Representative of the Secretary General for Migration and Development on a full-time basis.

assessment before any return as to whether or not their claims are merited or not merited in Greece. You can only do so if you have in place legal mechanisms to ensure that they will be properly treated in Turkey. The devil is in the detail here, and in the implementation. All of this is intimately connected with legal entitlements."

For him, this is the crux of the issue: how we interpret the laws that we have, and whether we bow to pressure to change them. He is adamant that we should not.

"The Danish Prime Minister has suggested that we should look again at the definition of a refugee. I don't believe that at all because the intention of such a move would not be to widen the responsibility for and definition of refugees, it would be to contract it. I think we hold firm to what we have and apply it. The uproar around the Turkish Agreement proves that this is still a major force for good."

Political reaction

There has been vocal resistance in some countries to the idea of accepting large numbers of migrants. For Peter, this has to be seen in its historical and political context.

"In the 1990s and the first decade of this millennium, we saw the enlargement of the European Union and the collapse of the Iron Curtain. That created huge movement of people in Europe, which created in its train political resistance and, in some countries, 'nativist' policies – a nationalist response to the movement of people. Then you place on top of this the conflict that has spread across North Africa, which has led to huge numbers of refugees. They're not as huge as many of those expressing populist xenophobic views would express. They are handleable, but there is a sense of an overwhelming number that creates a political reaction, some of it extreme and utterly reprehensible in my view."

How do we deal with this opposition in Europe and in our own communities? "It is, as we've found, very difficult. Ultra-nationalist, and often xenophobic and racist, parties have an appeal – they've always had an appeal. The only way to contest it is with facts. The reality is that migrants are good for economic growth. They work in larger numbers, they have lower unemployment rates and they embrace education. The world of the migrant has always been a positive to societies where an attempt is made to integrate them."

Home life

Peter has been happily married to Maruja for over 40 years and they live largely in London. They have three children, a daughter and two sons. Both sons studied law, and one is now based at the European Commission in Brussels, while the other works in financial services. His daughter studied economics and is based in Dublin. When not working to resolve the migration crisis, he plays “lousy golf”, watches rugby, reads a lot, and pursues an interest in 17th Century Spanish art.

On this question of integration, Peter agrees that more needs to be done on all sides.

“We need integrated public policy responses at national level. Often the policies in regard to migration are left in the hands of departments of justice or home affairs, who feel their primary responsibility to be border control. This requires holistic policy thinking and that’s what the Global Forum is about – trying to bring together social affairs, social welfare, health, education, everything. If you don’t do that you’re going to end up in trouble. There is obviously also a high responsibility on the part of migrants to adhere to and accept the values of the society into which they come.”

The European project

The migrant crisis is just the latest in a long line of issues – from the financial crisis to the Greek crisis and now ‘Brexit’ – that are putting considerable pressure on what might be called the European project. I ask Peter if he thinks European integration is under threat. He does, and sees the possible exit of Britain from the EU in particular as “a grave risk ... both from my point of view as somebody who believes in the nobility and political purpose of European integration, and as an Irishman who believes it is imperative for the future of our country. It’s not the institutions in my view that are a causative factor here, it is the reaction of some member states who do not embrace the European Union – the Central and Eastern European countries and their attitude even to European law in some cases is highly questionable.”

He says he has no idea how the impending UK referendum will go, but sees it as crucial, and sees Ireland as having a role.

“The British debate in a sense is a necessarily cathartic moment – in establishing whether Britain is in or out of Europe. I think Ireland has to be publicly vociferously in favour of an integrated Europe and the continued integration of the European Union, even when sometimes we have to say hard things.”

Bringing down the walls

From his work as EU Commissioner, where he was instrumental in setting up the ERASMUS foreign exchange programme among EU universities, to the setting up of the World Trade Organisation, and his current role, Peter’s career has been about breaking down barriers: to trade, to travel, to the movement of people. Indeed, former US Trade Representative Mickey Kantor called him “the father of globalisation”. This is clearly an issue of utmost importance to him, and has been since the beginning of his career, when he worked with the late Garret Fitzgerald to advance European integration.

“We believed in it and Garret subsequently sent me to Brussels to be Commissioner because of that belief. I’ve always believed in the two principles of the dignity of man and the equality of man, which are at the core of what

both the UN and the EU stand for. And I think that they both essentially stand against the type of thinking that mentally or physically draws lines on maps and creates borders between people. I just don’t agree with that type of thinking, and that has driven me from the beginning.”

Once again, he speaks of his interest in and dedication to the law as crucial in advancing this work, even influencing his preferred portfolio as EU Commissioner. “When I took the role of Commissioner, I read the Treaty of Rome before I went for an allocation of portfolio, and I discovered to my surprise that the legal power of the Commissioner for Competition was greater than in any other area in the European Union. That brought together in my mind Jean Monnet’s ideas of institutions playing crucial roles in the integration process, with the Constitutional aspects, which I was familiar with as a former barrister and Attorney General.”

The project continued after Peter left the EU Commission for first GATT and then to set up the WTO, which he describes as “a highly legally based attempt to further a process of integration, which I fundamentally believed in”.

I’ve always believed in the two principles of the dignity of man and the equality of man, which are at the core of what both the UN and the EU stand for. And I think that they both stand against the type of thinking that ... creates borders between people.

The Bar

Perhaps unsurprisingly, he credits this dedication to the law, and the development of the ability to pursue these projects, to his time as a barrister in Ireland.

“Whatever limited ability I have to articulate issues in a coherent way are directly related to my experience as a barrister.”

Although he says that most of his stories about life at the Bar are “unrepeatable”, the memories are overwhelmingly positive.

“I had a very active career at the Bar. I was involved in the Arms Trial within a couple of years of joining. I was in some of the bigger trials at a relatively early age and took silk early and I was always a courtroom lawyer. I couldn’t keep myself out of court!”

This love of the courtroom extended to Peter’s time as Attorney General, and he appeared for the State in a number of high-profile cases.

I ask him if, given how much he enjoyed his career there, it was difficult to leave the Bar, even for such wonderful opportunities as came his way.

“I never thought I was leaving the Bar – I still fancy myself going back and doing a case!”

Peter remains a Bencher of the Middle Temple in London, and was a member of the New York Bar Association.

He says he would be afraid to offer advice to new entrants to the legal professions: “It’s changed so much. I walked into the Law Library one day a couple of months ago – I happened to be in town for an hour – and it was a different world.”

Employee monitoring, privacy and data protection¹

Recent cases highlight the need for employers to be extremely careful about how they monitor employees.



Cliona Kimber BL

Introduction

A recent case before the European Court of Human Rights (ECHR), *Barbulescu v Romania*, has set the cat among the pigeons on the perennial hot topic of employees' entitlement to privacy in the workplace.

Widespread media reports would give employers to believe that unfettered monitoring of employee emails and internet use is now acceptable, and that engaging in personal email or messaging during working hours is legitimate grounds for dismissal. However, this is simply not the case, and employers must beware. An employer who monitors indiscriminately and imposes disciplinary sanctions as a consequence can, in fact, expect to find themselves in legal difficulties due to the data protection and privacy rights of employees. Furthermore, employees are increasingly becoming aware of their rights in this regard and resorting to litigation to protect them. This article will take a practical look at what is permitted, and the enforcement actions that can be taken to protect rights.

Technological ability of employers to monitor employees

While employers have always been interested in monitoring employees' activities, and have used a variety of means to do so, technological change has increased both the incentives and the means. Many employers can monitor their employees' current internet usage or email communications, particularly where the employee is using a company computer or device. If employees are using a mobile phone provided by their employer, the employer can then examine text messages, voicemails, and/or listen to telephone conversations.

Employers can record the key strokes made by their employees at their computer, the number of calls made by employees in a call centre, and whether or not they hang up or deal properly with the customers calling. They can also record the

searches conducted by employees on internet search engines. In addition to monitoring of activities on computers, technology allows employees' movement to be monitored by GPS so that the employer can see where the employee is going. This type of technology is particularly applicable to employees who are not bound to the workplace but are engaged in delivery, field work or in types of work taking them to a variety of locations. Technology also allows employers to detect whether an applicant for a job, if they apply online, uses a browser enabler, which could indicate a disability.

Employers are facilitated by means of tracking of access panels or other methods of entering selected places in the workplace by requiring the entry of a password, the swiping of an identification card, or fingerprint or iris identification, in establishing employees' whereabouts in the workplace. In this manner, these access panels can determine whether an employee is on their break in the canteen, in the toilet, or in break areas, smoking rooms or other areas throughout the workplace, which can only be accessed by access panels or signing on cards.

Barbulescu v Romania

This case concerned a Romanian engineer, Barbulescu, who was in charge of sales in his workplace. In July 2007, he was asked by his employer to set up a Yahoo Messenger account for the purpose of responding to clients' enquiries. The employer gave notice to its employees at the beginning of July that internet use would be monitored (although this was disputed by Mr Barbulescu). In the period July 5-13, the employer monitored Mr Barbulescu's Yahoo communications. This identified that Mr Barbulescu had been using the internet for personal purposes, contrary to the company's rules, which prohibited personal internet use. Mr Barbulescu initially denied any personal use, but the employer produced a transcript of his communications and, following a process, dismissed him. Mr Barbulescu sought to argue that his employer had violated the Criminal Code and the Romanian Constitution by violating his correspondence, and ultimately brought a complaint to the ECHR. He argued that emails are protected by Article 8 of the Convention relating to respect for private life and correspondence.

The ECHR first referred to previous jurisprudence and held that, on the face of it, telephone calls from business premises are covered by the concepts of 'private life' and 'correspondence' for the purposes of Article 8, and that emails, and information



derived from monitoring employee usage, would be similarly protected. The ECHR also relied on previously established case law that in the absence of notice about monitoring, employees would have a reasonable expectation as to the privacy of their calls and emails.

It went on to state, however, that it needed to examine whether a fair balance had been struck between Mr Barbulescu's right to respect for his private life and correspondence, and his employer's interests. It found that such a balance had been struck, and that therefore Mr Barbulescu's claim should fail (although one judge dissented in strong terms). It relied *inter alia* on the following factors:

- (i) the domestic courts had also found that Mr Barbulescu had used the company's computer for personal use during working hours, and that there had therefore been a disciplinary breach of the employer's rules;
- (ii) the employer had only accessed Mr Barbulescu's account on the basis that the information in question was assumed to relate to Mr Barbulescu's professional activities, given the clear rule against personal use and Mr Barbulescu's statement that he had not made personal use of the account – it had not accessed any other documents or data on Mr Barbulescu's computer and its monitoring was therefore limited in scope and proportionate;
- (iii) the domestic courts had not placed any weight on the contents of the specific messages – they had only considered activity on that account to the extent that it proved the breach of company rules;
- (iv) it was not unreasonable for an employer to want to verify that employees are completing their professional tasks during working hours; and,
- (v) Mr Barbulescu had failed to convincingly explain why he had used the Yahoo account for personal purposes.

On the face of it, while this case might appear to give employers some confidence about their ability to engage in wide monitoring of employee emails and internet use, in fact, the ability of employers is much more limited. In the first place, the ECHR

judgment was heavily dependent on the facts; the ECHR was willing to find that a blanket ban on personal internet use was sufficient in this case to weigh the employer's interests evenly against the claimant's right to private life and protection of correspondence. This was so, even though it was in dispute whether the employee had been properly notified that monitoring would take place. However, as a matter of law, part of the rationale for permitting the legality of the monitoring was that the employee had been notified of the monitoring, and that it was limited in scope. The ECHR also noted that the monitoring had only taken place after Barbulescu had denied to his employer that he had been using the account for personal use. Second, the Court of Justice of the European Union (CJEU), interpreting European Union (EU) data protection legislation, has taken a much stronger line in relation to privacy and data protection rights of EU citizens, legislation that is copper fastened by the approval of the new General Data Protection Regulation, which will come into force in two years' time.

Is surveillance in line with EU law on privacy and data protection?

The ascendance of data protection law at EU level has placed informational privacy in the workplace at centre stage. Data protection legislation at EU and member state level is some of the most important privacy legislation passed in recent years. Data protection principles place stringent restrictions on the obtaining, recording and holding of personal information on individuals, and the principles apply four square to employers as 'data processors'. The radical impact of EU data protection law was revealed to the world at large in a trinity of cases in 2014 and 2015 – *Digital Rights Ireland*;² *Google Spain*;³ and, *Schrems*⁴ – in which the CJEU affirmed the primacy of privacy and data protection rights, arising from not only Directive 95/46, but underlying privacy rights of the individual as recognised in human rights instruments. The impact of these decisions, and the bold restatement of the fundamentals of privacy have, however, yet to be fully decided in the context of worker and employer relationships.

Privacy and data protection are protected in the EU in a number of legal instruments, which are the basis for Irish law in the Data Protection Acts 1998–2003, including the Data Protection Directive 95/46/EC, passed by the EU legislature under what is now Article 16 (2) TFEU.⁵ The substantive data protection provisions are contained in Article 6 of Directive 95/46/EC, requiring that personal data be:

1. Obtained and processed fairly and lawfully.
2. Stored for specified and legitimate purposes, and not used in a way incompatible with those purposes.
3. Adequate, relevant and not excessive in relation to the purposes for which they are stored.
4. Accurate and, where necessary, kept up to date.
5. Preserved in a form that permits identification of the data subjects for no longer than is required for the purpose for which that data is stored.

Data protection within the EU has now been consolidated into a single applicable law, the General Data Protection Regulation (GDPR), which also significantly expands the duties and obligations on data processors, which includes employers. While formally adopted on April 14, 2016, by the EU Parliament, it will not come into force for two years from its publication in the *Official Journal of the European Union*. Privacy and personal data are also protected in the Charter of Fundamental Rights of the European Union, Article 7, Respect for private and family life, and Article 8, Protection of personal data, as well as the Treaty on the Functioning of the European Union, Article 16 (1). It is no surprise, therefore, that there should be recent case law placing strong emphasis on privacy rights from the CJEU.

Digital Rights Ireland v Minister for Communications

In the first of the series of privacy cases, the CJEU placed a strong emphasis on the right to privacy. In *Digital Rights Ireland v Minister for Communications*,⁶ the European Court of Justice found that the Data Retention Directive was incompatible with the Charter of Fundamental Rights, in particular both Article 7 and Article 8.⁷ This Directive provided that member states were required to store all citizens' telecommunications data for a minimum of six months and up to 24 months. The Court was concerned with the particularly sensitive nature of the data being retained. The Court was also concerned at the sheer scope of the surveillance, noting that data was being retained of people who were not criminals and people who had obligations of professional secrecy.

Google Spain v Gonzalez

In *Google Spain and Google Inc v González*,⁸ the CJEU found that an individual had a right pursuant to the Data Protection Directive and general principles of privacy law that are part of the EU, to have data taken down and kept down from the internet by Google. The CJEU confirmed that the right to privacy and the right to the protection of personal data are fundamental rights of the EU. In particular, the Court ruled that Directive 95/46 seeks to ensure a high level of protection of fundamental rights, including the right to privacy, and underlined the importance of the Charter in interpreting the Directive. It ruled that the onus is on the data processor to comply with the principles of data processing, in particular that personal data are processed fairly and lawfully, that they are collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes, and that they are accurate.⁹ Although the case concerned the activities of internet search engines, in a passage that must apply with equal force to employers, the Court held that the economic interest of the search engine operator did not outweigh the rights of the individual, having regard to the potential seriousness of any breach.

*Maximillian Schrems v Data Protection Commissioner*¹⁰

In its judgment of October 6, 2015, *Maximillian Schrems v Data Protection*

Commissioner,¹¹ the CJEU invalidated the so-called 'Safe Harbour Decision'. This judgment had a seismic impact on how EU undertakings, including employers, have to handle personal data flows to the US. The dispute had its source in Directive 95/46/EC (the 'Data Protection Directive'), which states that personal data may only be transferred to countries outside the EU where the country provides an adequate level of protection for personal data. The European Commission had deemed the US a Safe Harbour Decision, validating data transfers to companies located in the US. In the aftermath of the revelations made by Edward Snowden about the surveillance practices of the US, Mr Schrems complained that the US did not offer adequate protection of personal data against state surveillance and therefore that transfers of data by Facebook to the US were in breach of EU law. The CJEU therefore declared the Safe Harbour Decision invalid. The case is notable for its extremely strong statements emphasising the rights of citizens to privacy and data protection, and the fact that these rights are supported by fundamental legal principles in the EU legal order.

Summary

These judgments of the CJEU must be taken into account by employers in Ireland in monitoring and surveilling their employees, and in processing their data, as workers are likely to challenge employers who breach their rights.

In the *Digital Rights*, *Google Spain* and *Schrems* cases, the CJEU has taken a much stronger line on privacy and data protection than the ECHR in *Barbulescu*. The use of personal data in Irish law is governed by the Data Protection Act 1988 as amended by the Data Protection Act 2003, which was enacted in order to fulfil Ireland's obligations under Directive 95/46/EC. Irish law must therefore be interpreted in line with EU law. Irish employers are data processors and controllers, and therefore come within the scope of the Data Protection Acts, and must deal with data and information on their workers in a manner that conforms with the privacy rights of employees and the data protection principles in national and EU law. These principles, as the CJEU has held, are fundamentally about the protection of the privacy of the individual and what is done with information that is collected and stored about them. This leads to the conclusion that *Barbulescu* may not be strict enough, and that more would be demanded of employers by EU law, in terms of safeguards and notifications to employees before monitoring took place. It is likely, therefore, that employees who are monitored while at work or acting in the course of their employment, or have their data protection rights breached, will resort to legal action to protect those rights.

What are the possible avenues for action?

Challenging monitoring and surveillance

(a) Complaints and enforcement notices under the Data Protection Acts

The first method of challenging monitoring and surveillance is to make a complaint to the Data Protection Commissioner under Section 10 of the Data Protection Act 1988. The Commissioner will first try to arrange an amicable resolution between the parties so that a hearing and determination is not needed, but should this not be possible, the Commissioner may then launch a full investigation, and ultimately issue an enforcement notice. Failure to comply with this notice is an offence.¹²

*Dublin Bus v The Data Protection Commissioner*¹³ was an appeal on point of law from an order of the Circuit Court in which the High Court upheld an enforcement notice issued by the Commissioner. A plaintiff in a personal injuries case sought a copy of CCTV footage of her accident, which had been shown by the appellant to her solicitors; it was accepted that this was sought for the purposes of aiding her

litigation. The appellant refused on the basis that the purpose of her request under the Data Protection Acts was only for the purposes of litigation. The High Court noted that Irish law allowed no discretion as to disclosure and that the data subject was entitled to the data as of right.

(b) Prosecutions under the Data Protection Acts

There can also be prosecution under the Data Protection Acts, as it is an offence under sections 21 and 22 of the Data Protection Act to disclose data without consent. Section 29 provides for the prosecution of company directors where an offence by a company is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, the company directors or other officers. In November 2014, two successful prosecutions of the directors of private investigator firm M.C.K. Rentals Limited took place.¹⁴ The investigators had obtained access to personal data on behalf of their clients, various credit unions, which had been kept by the Department of Social Protection and by the Health Service Executive. M.C.K. Rentals Limited t/a M.C.K. Investigations pleaded guilty and the two directors of M.C.K. Investigations were separately charged with 23 counts of breaches of Section 29 of the Data Protection Acts for their part in the offences committed by the company.

These prosecutions are highly significant, as they show clearly that not only will companies be liable for breaches of the Data Protection Acts, but also that company directors will be personally liable under criminal law and can be convicted for

breaches. The ramifications of these prosecutions for the use by employers of firms of private investigators are clear, and great care will have to be taken by employers not to run the risk themselves of breaching the Data Protection Acts, exposing themselves to actions for breach, or a charge that they have not engaged in fair procedures in a disciplinary or dismissal action.

(c) Legitimacy of surveillance as a challenge to a fair dismissal

The statutory tribunals set up to adjudicate on employment rights have considered from time to time whether the legitimacy of surveilling or monitoring of employees can make a dismissal unfair. In *O'Connor v Galen Ltd*,¹⁵ for example, the claimant had been dismissed by the respondent on the alleged grounds that he had submitted false or misleading expense claims for travel allowance and toll charges. A tracking device was placed by the respondent on the claimant's company car, and in conjunction with the observations of a risk management company hired by the respondent to observe the claimant, it appeared that the claimant had remained in the vicinity of his home on occasions when he had claimed to have travelled on behalf of his employers.

The Employment Appeals Tribunal (EAT) was critical of the surveillance methods employed by the respondent and found that the procedures used by the respondent rendered the dismissal of the claimant unfair under the Unfair Dismissal Acts 1977 to 2007.¹⁶ The Workplace Relations Commission, into which the EAT has been consolidated, will now consider these types of claims.

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- Examines discipline and dismissal of employees for internet abuse, the law of ownership, and theft of confidential information by employees as well as remedies such as internet takedowns, Google Spain removals, and injunctive relief.
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- Contains up-to-date case law in common law jurisdictions worldwide, EU, European member states, and international courts in this nascent area of law.

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(d) Surveillance as breach of contract

It is also arguable that a breach of privacy is also a breach of implied terms of good faith inherent in a contract of employment. It seems logical then that the over-intrusive surveillance of an employee could so damage the employment relationship as to breach the employment contract, a point explored in *Sweeney v. Ballinteer Community School* [2011] I.E.H.C. 131, a bullying and harassment case in which part of the personal injury was attributed to the placing of a teacher under the surveillance of a private investigator. With the advent of social networking, surveillance is by no means limited to the physical following and photographing of a subject. Employers will need to take care, therefore, to avoid claims for personal injuries that might be exacerbated by intrusive monitoring.

Section 7 of the Data Protection Act 1988 expressly provides for situations where breach of data protection rights amounts to a legal tort, confirming that a duty of care can exist between a data controller or processor and a data subject.

The parameters of Section 7 of the Data Protection Act were considered by Feeney J. in *Collins v FBD Insurance Plc.*¹⁷ The plaintiff was awarded €15,000 in damages in the Circuit Court; the defendant then appealed to the High Court on the basis that there had been a breach of the plaintiff's data protection rights, but that no damage had flowed from that breach. The Court held that the function of Section 7 was to provide a duty of care to the extent that the same could not already be found in the common law and that damages were not available for mere distress; instead, a claimant must show that he has suffered damages within the traditional definitions. This decision may no longer be correct, following the CJEU cases set out above and in light of analysis of the UK case *Google Inc v Vidal Hall*,¹⁸ in which the Court of Appeal accepted that a breach of data protection rights could give rise to an action in tort. What is notable about this case is that it interpreted section 13(2) of the DPA, the UK implementing legislation, more expansively than the Irish courts, relying expressly on article 23 of the Data Protection Directive and holding that article 23 was not confined to pecuniary loss and included non-pecuniary loss such as distress, and therefore that UK implementing legislation could not be so confined. The ruling of the Court of Appeal on this point is currently on appeal to the UK Supreme Court.

Conclusions

Given the high level of protection, the question is whether and in what circumstances surveillance of employees can take place in the workplace. In light of the case law set out above, the main factors in evaluating privacy are as follows:

- employers must acknowledge that employees have a reasonable expectation of privacy;
- privacy can only be curtailed by bespoke policy with specific rules on email, instant messaging, social networks, internet surfing, etc., and a comprehensive policy on employee monitoring that explains what is monitored and how;
- employees must be made aware of the employer's policies, both in terms of the rules that apply during working hours, and outside working hours, and in terms of any restrictions on the use of company equipment;
- employees should preferably give their explicit consent to these policies;
- the enforcement of an employer's internet policies must be governed by the principles of necessity and proportionality, and must be specific and targeted – continuous monitoring of internet use or emails will not be permissible; and,
- monitoring will have to be for a specific, defined purpose and comply with data protection laws.

In summary, an employer who engages in unbounded monitoring and surveilling of their employees is increasingly likely to be challenged legally by their employees. Employers will have to consider what the object of the monitoring is, and adopt policies and procedures to notify employees. Imposing disciplinary sanctions or dismissing employees on foot of information obtained as a result of unlawful monitoring may increasingly be subject to challenge.

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Bankers' books and hearsay evidence

A recent Supreme Court decision has brought clarity to the interpretation of the Bankers Books Evidence Acts.



Sarah Cooney BL
Tomás Keys BL

Introduction

The proliferation of litigation between banks and their customers has resulted in a similar rise of technical defences being advanced by defendants in claims brought by way of summary summons. The purpose of this article is to explore one of these technical defences – non-compliance with the Bankers' Books Evidence Acts 1879-1989.

With the introduction of Section 1 (1) of the Civil Evidence Act 1995 in England and Wales and Section 3 of the Civil Evidence (Northern Ireland) Order 1997, the common law exclusion against hearsay evidence was dispensed with in the context of civil litigation in those jurisdictions. No such statutory provisions exist in this jurisdiction.

As a result, the Superior Courts have attempted to grapple with the rule against hearsay and the exceptions under the Bankers' Books Evidence Act in the context of the summary summons procedure, which has led to divergent jurisprudence.

The recent Supreme Court decision in *Ulster Bank Ireland Limited v O'Brien & Ors*¹ has brought some clarity to the issue.

The purpose of this article is to explore one of these technical defences – non-compliance with the Bankers' Books Evidence Acts 1879-1989.

Bankers' Books Evidence Acts, 1879-1989²

To end the onerous requirement to bring to court the original bankers' books under *subpoena duces tecum*, the 1879 Act permitted into evidence a copy of an entry in a banker's book. Section 3 provides:

"Subject to the provisions of this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions, and accounts therein recorded".

Admissibility, however, is subject to sections 4 and 5. Section 4 provides:

"A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank.

"Such proof may be given by a partner or officer of the bank, and may be given orally or by an affidavit sworn before any commissioner or person authorised to take affidavits".

And section 5 states that:

“A copy of an entry in a banker’s book shall not be received in evidence under this Act unless it be further proved that the copy has been examined with the original entry and is correct.

“Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any commissioner or person authorised to take affidavits”.

Since 2010, two apparent lines of authority have developed in relation to the question of whether strict adherence to the provisions of the Bankers’ Books Evidence Acts was a necessary prerequisite for a bank trying to prove its claim.

Strict adherence not necessary

The issue of whether a plaintiff’s claim could be defeated as a result of non-adherence to the provisions of the Bankers’ Books Evidence Act was addressed by Clarke J. in his judgment in *Moorview Developments Limited & Ors v First Active Plc.*³ The purpose of the 1879 Act, according to Clarke J. in *Moorview*, was not to facilitate banks in proving matters. Instead it was:

“to enable evidence to be given of the contents of other parties’ bank accounts without the necessity for the attendance of a representative of the bank concerned and the production of the relevant books...”⁴

Clarke J. held that where, as in the case before him, a representative from the bank gave evidence that the records which he produced were the records taken from First Active’s electronic books, and were a faithful record, then it was not necessary to conform with the provisions of the Bankers’ Books Evidence Acts. Clarke J. opined:

“that legislation is irrelevant to a case where the contents of the bank’s books are proved in the ordinary way by a witness who can give direct evidence of having analysed the books”.⁵

He further held that:

“Business records of that type are prima facie evidence of a course of dealing between parties, although, of course, any party is free to challenge the accuracy of any such records. However, the idea that a bank wishing to prove its case in debt against a customer has to produce a separate bank official who was personally involved in each individual transaction, which gives rise to the customer’s current debt is, in my view, fanciful. A witness from a bank is entitled to give evidence of the bank’s records showing the amount due by a customer of that bank. That evidence and those records provide prima facie evidence of the liability”.⁶

Finlay Geoghegan J. adopted the approach of Clarke J. in her judgment in *Bank of Scotland v. Fergus*.⁷ At page five she stated:

“In this case Mr Moroney, as a former official of the Bank, is entitled to give evidence of the Bank’s records in relation to the indebtedness of the Company to the Bank. Those records include the electronic records of the Bank. That evidence is admissible evidence and is prima facie evidence of the liability of the Company to the Bank. As pointed out by Clarke J. [in *Moorview*], if a specific element of the records is

challenged, the Court would have to decide on the factual dispute and the weight to be attached to the evidence of the relevant bank official would depend upon his personal knowledge of the matter in dispute”.

Since 2010, two apparent lines of authority have developed in relation to the question of whether strict adherence to the provisions of the Bankers’ Books Evidence Acts was necessary.

The views expressed by Clarke J. in *Moorview* and by Finlay Geoghegan J. in *Fergus*, were adopted and applied by Ryan J. in his judgment in the High Court of *Bank of Ireland v Keehan*,⁸ where he found that those cases were authority for the proposition:

“that a witness could give evidence by reference to the books and records of the company in order to demonstrate prima facie liability, subject to any rebutting evidence”.⁹

On the facts, the evidence was ruled admissible. Ryan J. disagreed with the defendant’s submissions, and held that:

“The test is whether there is sufficient information to enable the defendant to know whether he should discharge the debt. The defendant has not asserted any confusion or uncertainty about his liability”.¹⁰

A stricter approach

In *Bank of Scotland Plc v Stapleton*,¹¹ Peart J. found that *Moorview* was wholly distinguishable on the facts before it. It was argued by the defendant that the affidavit evidence adduced on behalf of the plaintiff was inadmissible hearsay as the affidavit was sworn by an employee of Certus, and not by an employee of the bank. Bank of Scotland, no longer having a presence in the jurisdiction, outsourced the management of its loan portfolio to Certus. Peart J. commented that the decision in *Moorview* was:

“certainly not an authority for the proposition that somebody other than an officer or employee of the plaintiff bank may come to court with a copy of the bank’s records and prove the bank’s entitlement to the amount claimed, simply because he/she has a written authority from the bank concerned to give evidence on its behalf”.¹²

Peart J. ruled that the evidence sought to be relied upon by the plaintiff was inadmissible hearsay, and that while the legislation allowed copy documents to be admitted as evidence, nothing in the legislation, however, relieved the bank from the strictures of the rule against hearsay:

“Where a bank needs to prove by sworn testimony the amount it is due by a defendant customer, that evidence must be provided by an officer or partner of the bank – in other words an employee of the bank itself, and not some person employed by some other company to whom the task of collecting the debt has been

outsourced for whatever reason".¹³

In *Ulster Bank Ireland Limited v Dermody*,¹⁴ one of the issues before O'Malley J. was whether an employee of Ulster Bank Limited, a related but separate legal entity to the plaintiff, could swear the affidavit proving the debt on its behalf. In her judgment, O'Malley J. observed that the decisions in *Moorview*, *Fergus* and *Keehan* were based on:

"the view that business records of this nature are admissible as prima facie evidence of the truth of their contents, without reference to statute. Unfortunately, I find myself unable to reconcile this with the decision of the Supreme Court in *Hunt* and I have not been referred to any other authority, which includes such records as exceptions to the rule at common law".¹⁵

O'Malley J. held that she was bound to follow the Supreme Court in *Criminal Assets Bureau v Hunt*,¹⁶ and in so doing found that the evidence of the employee of Ulster Bank Limited was "not admissible to prove the truth of the contents of the records. This was so unless it came within the provisions of the Acts".

She also held that the deponent was not an 'officer' of the plaintiff bank within the meaning of the Act. O'Malley J. could see:

"no legal or factual difference between the service that Ulster Bank Limited provides to Ulster Bank Ireland Limited in debt collection cases and that provided by Certus to Bank of Scotland, as considered by Peart J. in *Stapleton*".¹⁷

The judgment that O'Malley J. found herself bound by was the judgment of the Supreme Court in *Criminal Assets Bureau v Hunt*,¹⁸ where Keane C.J. stated:

"It is clear that in accordance with the rules of evidence normally applicable in civil proceedings, the documents in question could be proved only by their authors giving sworn evidence and being subject to cross-examination, unless advantage was taken of the provisions of the Bankers' Books Evidence Acts, 1879-1959. The documents in question, accordingly, should not have been admitted into evidence in the High Court, unless, as the Bureau contend, they were admissible under the provisions to which I have referred".¹⁹

In the case of *ACC Bank Plc v Byrne & O'Toole*,²⁰ the plaintiff sought summary judgment against the first defendant on foot of a personal guarantee entered into by him. The defendant argued that the plaintiff had not complied with the Bankers' Books Evidence Acts and therefore the evidence adduced by the plaintiff was inadmissible as a matter of law. In examining the provisions of the 1879 Act and its amendments, Cregan J. was of the view that in modern application to court, banks are required to comply with sections 4 and 5 of the Act 1879, and if not so proved, the evidence would be inadmissible.

Within the past year, both the Court of Appeal and the Supreme Court have considered the divergent lines of authority that had developed in the High Court jurisprudence.

On the affidavit evidence before him, Cregan J. came to the view that because the deponent, who was an employee of the bank, did not aver at the time of the making of the entry that the banker's book was one of the ordinary books of the bank, that the entry was made in the usual and ordinary course of business, and that the banker's books were in the custody or control of the bank, he found that the Act, i.e., sections 4 and 5, had not been complied with. The court ultimately adjourned the matter to allow for an affidavit to be sworn by an employee of the bank to show compliance with the Bankers' Books Evidence Acts.

Approach adopted by the Court of Appeal and Supreme Court

Within the past year, both the Court of Appeal and the Supreme Court have considered the divergent lines of authority that had developed in the High Court jurisprudence. In *Ulster Bank Ireland Limited v Egan*,²¹ the question before the Court of Appeal was whether the deponent who swore the affidavit on behalf of the bank was entitled to do so. The defendant argued that the requirements of the Act of 1879 had not been complied with and submitted that the facts were very similar to the facts in *Dermody*.

Mahon J. distinguished *Dermody*, *Hunt* and *Stapleton*. Mahon J. instead relied on Order 37 rule 1, which provides:

"Every summary summons indorsed with a claim (other than an account) under Order 2 to which an appearance has been entered shall be set down before the Master by the plaintiff, on motion for liberty to enter final judgment for the amount claimed, together with interest (if any)...such motion shall be... supported by an affidavit sworn by the plaintiff or by any other person who can swear positively to the facts showing that the plaintiff is entitled to the relief claimed and stating that in the belief of the deponent there is no defence to the action..."²² [Emphasis added]

On the facts, Mahon J. was satisfied that the plaintiff had complied with Order 37 rule 1 and that the defendants had unequivocally acknowledged their indebtedness to the plaintiff.²³

The Supreme Court considered the applicability of the Bankers' Books Evidence Act in the context of summary proceedings in the case of *Ulster Bank Ireland Limited v O'Brien & Ors*.²⁴

In that case, the plaintiff sought judgment against the defendants on foot of a summary summons to which the defendants filed appearances. In accordance with the provisions of Order 37 rule 1 of the Rules of the Superior Courts, a motion was issued by the plaintiff for liberty to enter final judgment and was made returnable before the Master of the High Court. The grounding affidavit was sworn by Mary Murray, described therein as a Senior Relationship Manager with the Global Restructuring Group of Ulster Bank. Upon hearing the motion, the Master agreed with an argument on behalf of the first and second defendants that the affidavit evidence adduced by Ms Murray on behalf of the bank amounted to inadmissible hearsay evidence, having not complied with ss. 4 and 5 of the 1879 Act, as amended, and he dismissed the motion.

On appeal, Hedigan J. overturned the decision of the Master and granted the plaintiff judgment in the sum sought. This, in turn, was appealed by the defendants to the Supreme Court.

In a unanimous decision, Mac Menamin, Laffoy and Charleton J.J. each delivered written judgments. In the context of the summary summons procedure, Laffoy J. first considered whether the averments contained in the affidavit of Ms Murray

complied with Order 37 rule 1 of the Rules of the Superior Courts, i.e., whether she could swear positively to the facts grounding the plaintiff's claim. The uncontested affidavit of Ms Murray contained the averments that she had responsibility for the daily management of the defendants' loan facilities, that she made the affidavit with the bank's authority and consent, and from facts within her own knowledge, from a perusal of the bank's books and records. In Laffoy J.'s view, these averments were sufficient to comply with the requirements of Order 37 rule 1, i.e., that a prima facie case had been established against the defendants in respect of the amount due and owing to the bank. Laffoy J. held that:

"The Bank did not have to rely, and was not relying, on an entry in a banker's book being admitted in evidence to establish the O'Briens' indebtedness to it in the sum claimed in accordance with the Act of 1879, as amended, so that the necessity to comply with the provisions of ss.4 and 5 of the Act of 1879 as amended did not arise. Accordingly, the submission made on behalf of the O'Briens that there was no admissible evidence before the High Court proving the indebtedness of the O'Briens to the Bank is rejected".²⁵

Laffoy J. found that the crucial aspect of the dicta of Keane C.J. in *Hunt* was that the evidence may have been admissible if the statements had been properly proved and not otherwise. She found that *Hunt* therefore had no relevance to the within case, Laffoy J. opining that:

"the bank did not have to take advantage of the Act of 1879 as amended to establish its entitlement to judgment in the sum claimed, because the bank put evidence before the High Court, which was not contradicted".²⁶

In distinguishing the cases of *Dermody* and *Stapleton*, but expressing no particular view as to their correctness, Laffoy J. commented that they:

"are both premised on the assumption that compliance with s.4 of the Act of 1879 was a prerequisite to establishing prima facie proof of the relevant plaintiff's claim, which had not been complied with because the deponent in each case was neither a partner nor an officer of the plaintiff".²⁷

The Court ultimately agreed with the approach taken by Ryan J. in *Keehan*. The approach adopted by the Supreme Court in *O'Brien* was most recently followed by Baker J. in *ACCLM v Dolan & Ors*,²⁸ in a case that concerned an application for summary judgment on foot of five guarantees. The defendant argued that the proofs advanced by the bank were hearsay and did not come within the exceptions set out by the Act of 1879. The plaintiff relied on the Supreme Court decision in *O'Brien*, submitting that the bank was not necessitated to comply with the Act of 1879, as amended. Baker J. found that the plaintiff had established a prima facie case, which entitled it to summary judgment.

Conclusion

While it is clear from the *O'Brien* decision that the strict criteria of the Bankers' Books Acts are no longer a necessary proof for claims brought on foot of a summary summons, the provisions of the Act may still come into play if the proceedings are adjourned to plenary hearing and/or there is a serious challenge to the contents of the bank records. In that regard, if a defendant seeks to contest any part of the evidence proffered by a bank, it can do so, and the court will accordingly attach the appropriate weight to such evidence.

Practitioners should be minded to ensure, where possible, that the deponent of an affidavit grounding a motion for liberty to enter final judgment is an employee or authorised official within the plaintiff's bank, who can swear positively to the facts showing that the plaintiff is entitled to the relief sought.

References

- [2015] IESC 96 (Unreported, Supreme Court, Mac Menamin, Laffoy, Charleton J.J., December 16, 2015).
- Section 141 of the Central Bank Act 1989 provides that the Bankers' Books Evidence Acts 1879 and 1959, and s.131 and s.141 of the Central Bank Act, 1989, may be cited together as the Bankers' Books Evidence Act 1879-1989. Section 131 of the Central Bank Act 1989 allows for the admissibility of computer records, once proved in accordance with the replaced section 5 of the 1879 Act.
- [2010] IEHC 275 (Unreported, High Court, Clarke J., July 9, 2010).
- Ibid at page 12.
- Ibid at page 12.
- Ibid at page 22.
- [2012] IEHC 131 (Unreported, High Court, Finlay Geoghegan J., March 30, 2012).
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- Ibid at page 9.
- Ibid at page 11.
- [2013] 3 IR 683.
- Ibid at page 689.
- Ibid at page 690.
- [2014] IEHC 140 (Unreported, High Court, O'Malley J., March 7, 2014).
- Ibid at page 11.
- [2003] 2 IR 168.
- [2014] IEHC 140 (Unreported, High Court, O'Malley J., March 7, 2014) at page 12.
- [2003] 2 IR 168.
- Ibid at page 189.
- [2014] IEHC 530 (Unreported, High Court, Cregan J., July 31, 2014).
- [2015] IECA 85 (Unreported, Court of Appeal, Mahon J., April 29, 2015).
- Ibid at page 11.
- Although the Supreme Court granted leave to appeal from the Court of Appeal judgment pursuant to Article 34.5.3° of the Constitution, the proceedings were settled before the matter was listed for hearing before the Supreme Court.
- [2015] IESC 96 (Unreported, Supreme Court, Mac Menamin, Laffoy, Charleton J.J., December 16, 2015).
- Ibid paragraph 13 of Laffoy J.'s judgment.
- Ibid paragraph 17 of Laffoy J.'s judgment.
- Ibid paragraph 24 of Laffoy J.'s judgment.
- [2016] IEHC 69 (Unreported, High Court, Baker J. February 9, 2016).

Ross O'Driscoll (O Drisceoil) 1959-2015



Ross O'Driscoll (or O Drisceoil as he liked his name to appear in the Law Library diary) will be remembered as someone who enjoyed, if not a long, then certainly a full and varied life. He was born the youngest of six children to Bartholomew (Bat) and Maureen O'Driscoll in Galway City in February 1959. His childhood was uneventful and appears to have been boisterously happy. He was endowed with a lively and active brain, yet chose to live a simple, dignified life in East Clare, combining practice as a barrister on the South Western Circuit with horse and sheep rearing on a farm outside Tuamgraney near Scarriff. He was a deeply religious man and had a life-long association with the Benedictine monks at Glenstal Abbey.

Ross could converse freely and knowledgeably on subjects as diverse as the Rule in Shelley's Case, the duties and responsibilities of the Camerlengo on the death of a Pope, the Georgics of Virgil, the Rule of St Benedict, the pathophysiology of diabetes, and the eradication of fluke and worms in sheep and cattle.

There were a number of reasons why this was so. First, when the time came in the 1970s for Ross to leave secondary school and enter university he chose to read Classics. This was a wise decision, which enriched his psyche and served him well in his later pursuits. Second, having mastered Greek and Latin, he decided to follow in his father's and elder sister's footsteps and study medicine. He graduated with honours and fortuitously ended up working as a GP in neighbouring Co. Clare, thereafter adopting that county as his home. He also travelled regularly as the volunteer physician on the annual Killaloe diocesan pilgrimage to Lourdes, catering to the needs of the sick and infirm of the diocese.

In the 70s – long before ephemeral diversions such as reality TV, boy bands, and the Kardashians – Ross was well known among his fellow UCG students for his keen skills as an orator, demonstrated regularly at college debates. He was often spotted cycling through the campus sporting a black gown billowing behind him like a parachute. Indeed, a perpetual trophy for debating has been presented to the college, in his honour, by his former classmates.

Perhaps it was his depth of knowledge of the classics and his background in public speaking that drew Ross ultimately to a career in law. He enrolled at the King's Inns and was called to the Bar in 1996, following in the footsteps of his famous cousin, the late James (Jim) O'Driscoll SC.

Above all else, Ross the orator was attracted to the concept of a system of justice dispensed by impartial decision-makers, be they judges or juries, persuaded by evidence and argument. He is remembered for his rigorous representations on behalf of clients in the courts of the South Western Circuit over the ensuing years. His research for cases (big and small) was

prodigious. Every practitioner on circuit and beyond knew that when you drew Ross as your adversary you had a battle on your hands. Indeed, on one occasion, due to his career change, he had the distinction of appearing in court in two different roles on the same day and before the same judge: one as counsel and the other as expert witness.

Ross never seemed to stand still, and his devotion to all modes of transport – horse (to Mass on Sundays), train (to the Law Library and Dublin) and car (to trains and courts on circuit) – was notable. To take a lift in a car from Ross was an unforgettable experience. The saga always began with the rigmarole of gaining access to the vehicle. This was usually, though not universally, achieved through the driver's door and only after he had removed to the rear seat: a bale of hay; a Law Library 'overdue' volume of some textbook or other; a horse's bridle; James L Carey's *Vox Romana*; copious outdated copies of *The Clare Champion*; and, when in season, a few punnets of strawberries. When driver and passenger were 'securely' incarcerated inside the vehicle, it invariably launched at the speed of light. Passengers felt compelled to bring his attention animatedly, if fruitlessly, to each 'stop' and 'yield' sign. Clearly, there was no mention of road signs on the Via Appia or the road to Damascus. No duck, goose, turkey or hen would attempt to cross the Scarriff/Templemore road between 7.00am and 10.00am any morning during term.

Ross had a great love of horses and was a keen horseman, although over the years his equestrian pursuits cost him broken bones in most of his body. He rode regularly with the Galway blazers and was an attendee at the Ballinasloe Horse Fair every October.

Ross possessed all four cardinal virtues: practical wisdom (prudence); temperance; courage; and, justice. But I believe he will also be remembered as a man of sincere compassion, kindness, humility, gentleness and patience. He was regarded by his colleagues, friends, neighbours and many clients with great respect and is sadly missed by all who knew him. He disliked flattery and his favourite epithet was not 'classical scholar' 'doctor' or, indeed, 'barrister', but 'herdsman'. Although modest, I once saw a wry smile cross his face when told that someone had remarked (as they had) that he was 'the best horseman in Clare and beyond'.

Ross was very fond and proud of his siblings and extended family. We extend our condolences to them.

Ross O'Driscoll was a great gift from God to all who knew him. He will be sadly missed.

Ar dheis Dé go raibh a anam.

PQ

Trials and television

Televised trials risk becoming spectacles, and verdicts may be affected.



Shane Murphy SC

Oliver Wendell Holmes famously stated that: “The life of the law has not been logic but experience”. That perceptive assessment is not one that is shared by many institutions in our modern culture. There is a tendency to neglect the lessons to be learnt from the past. The wisdom of the ages is often seen as an unnecessary restriction in a society that is utterly suffused with the cult of modernity.

Recently there have been calls for the introduction of televised trials as a way of increasing transparency and public understanding of our criminal justice system. Trials have been televised in the past. In my view, the experience has not been a happy one.

Trial of the century

In 1935, the trial of Bruno Hauptmann, accused of kidnapping and killing the two-year-old son of Charles Lindbergh, the world-renowned aviator, was filmed. That trial has been the subject of much comment over the years. Many people believe that it resulted in a miscarriage of justice. The contemporary media record from 1935 is extraordinary (as can be seen on YouTube). The newsreel films reflect an extraordinary and intense media interest in the trial. At one point in the film footage, a journalist looks into the camera and speaks in gushing terms about the excitement of the trial, the fact that it was “the trial of the century” and that it was a trial that had “everything” that might be of interest to the general public and to the media.

The footage is remarkable, not only for its clarity but for its content. There are interviews with the prosecutor. The jury members are filmed and named. There

is an interview given by a panel of handwriting experts who affirm on camera, prior to the conviction, that they have no doubt whatsoever that the handwriting connected to a ransom note was that of the accused. There is film footage taken inside the courtroom, including one clip of a hectoring, bullying cross-examination of the accused by the prosecutor.

The power of the narrative

Eighty years after the event, a modern observer of this trial cannot but be struck by the impact that this media attention must have had on the jury in the case. The power of the media narrative in the Hauptmann case leaves one in little doubt that it must have played a part in its outcome.

More importantly, the danger revealed by cases like Hauptmann or the OJ Simpson case is the temptation for the media to move from being an observer and a narrator to becoming a participant, and sometimes a partisan participant, in the process of public discourse. Many lawyers view the presence of television cameras in court as likely to change the behaviour of the people participating in the trial: lawyers, witnesses and judges.

Unwelcome

Television is not a welcome presence in court because of its potentially distorting influence. In my view, the filming of court proceedings and the broadcasting of that film during the trial in Hauptmann’s case, and also in the more recent trials of Oscar Pistorius and OJ Simpson, created the real risk of converting the orderly process of the criminal trial into a spectacle.

The criminal trial process represents the greatest bulwark against that atavistic human instinct common to us all: to rush to judgment. We need to guard this trial process with the greatest of care.

The evidence, from 1935 to date, suggests that contemporary filming of trials is undesirable. The maintenance of the calm and dispassionate administration of justice in criminal trials remains all important. The criminal justice system, with all of its checks, balances, burdens of proof and other strictures, including the exclusion of television from courts, is there to protect us from ourselves.



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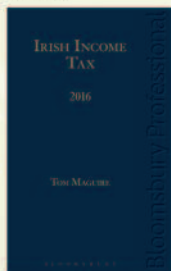
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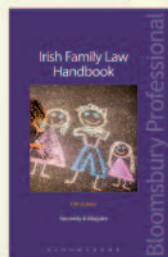


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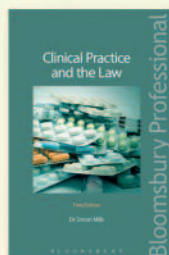


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