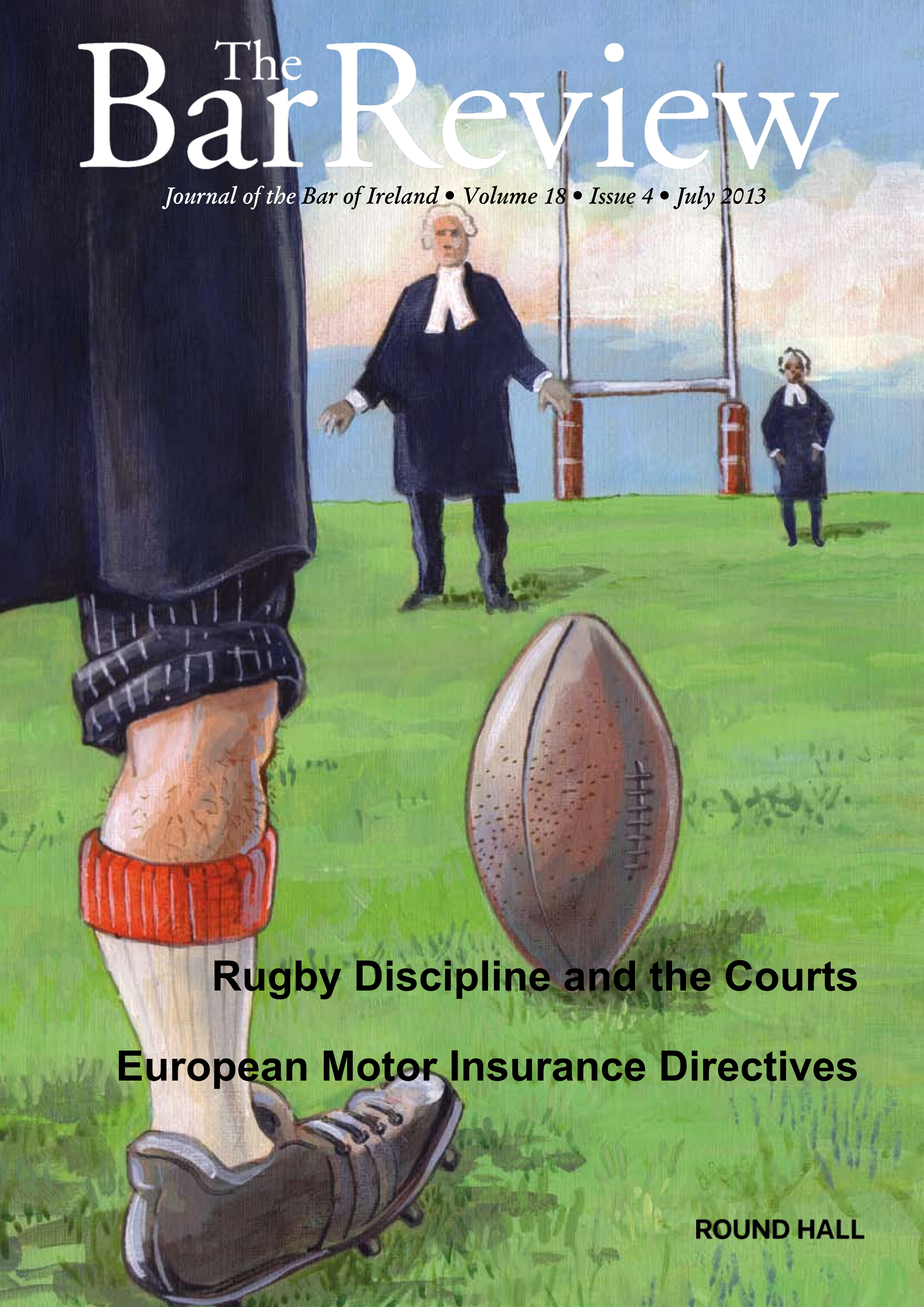

The Bar Review
Journal of the Bar of Ireland • Volume 18 • Issue 4 • July 2013
Rugby Discipline and the Courts
European Motor Insurance Directives
ROUND HALL

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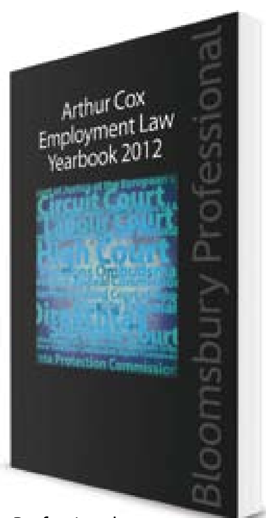

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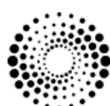

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European Motor Insurance Directives: Recent Caselaw

LISA KELLY BL AND KIERAN FLECK SC

This article seeks to assess the liability of insurers to victims who have suffered injury or damage in respect of road traffic accidents, following the recent decision of the Fourth Chamber of the European Court of Justice in *Churchill Insurance Company Limited v Benjamin Wilkinson and Tracey Evans v Equity Claims Limited* (1st December, 2011). This case was most recently considered by Judge Ryan in the High Court in *Lisa Ludlow v Darren Unsworth and Zurich Insurance plc* [2013] IEHC 153.

European Legislation

The Judgment of the Fourth Chamber concerns the effect of various European Motor Insurance Directives relating to insurance against civil liability in respect of the use of motor vehicles. The protection of the victim is the cornerstone of the First Motor Insurance Directive 72/166/EEC, Second Motor Insurance Directive 84/5/EEC and Third Motor Insurance Directive 90/232/EEC. The Directives were subsequently amended before being consolidated in the Directive 2009/103/EC of the European Parliament and of the Council of the 16th of September 2009. The Directives require all motor vehicles in the EU to be covered by compulsory third party insurance. They also aim to ensure that compulsory motor insurance allows all motor vehicle passengers, who are victims of an accident caused by the motor vehicle to be compensated for injury or loss they have suffered.

Article 3(1) of the First Directive provides:

> "Each Member State shall... take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. The extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of these measures."

Article 1(4) of the Second Directive provides:

> "Each Member State shall set up or authorize a body with the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified or uninsured vehicle." [The MIBI]

Article 1(4)(3) of the Second Directive provides:

> "…Member States may exclude the payment of compensation by that body in respect of persons who voluntarily entered the vehicle which caused the damage or injury when the body can prove that they knew it was uninsured."

Article 2(1) of the Second Directive provides:

> "Each Member State shall take the necessary measures to ensure that any statutory provision or any contractual clause contained in an insurance policy issued in accordance with Article 3 (1) of Directive 72/166/EEC, which excludes from insurance the use or driving of vehicles by:
> — persons who do not have express or implied authorization thereto, or
> — persons who do not hold a licence permitting them to drive the vehicle concerned, or
> — persons who are in breach of the statutory technical requirements concerning the condition and safety of the vehicle concerned,
>
> shall, for the purposes of Article 3 (1) of Directive 72/166/EEC, be deemed to be void in respect of claims by third parties who have been victims of an accident."

Facts of *Churchill Insurance Company Limited v Benjamin Wilkinson*[1]

The Plaintiff, Benjamin Wilkinson, was a named driver in an insurance policy with Churchill Insurance and travelled as a passenger in his car after giving permission to his friend to drive. It was accepted that Mr. Wilkinson knew that the person was not insured to drive the car under the insurance policy. Mr. Wilkinson sustained injuries after the driver lost control of the vehicle and collided with another vehicle travelling in the opposite direction. Although Churchill Insurance accepted they were liable to compensate the Plaintiff, they relied on Section 151(8) of the Road Traffic Act 1988 (UK) and claimed they were entitled to an indemnity from the Plaintiff as the insured of the same sum payable as the compensation due to him for his injuries.

Facts of *Tracey Evans v Equity Claims Limited*

In a similar claim, Tracey Evans was insured to drive her motorcycle with Equity Claims Limited. Ms. Evans gave permission to another person to drive although they had no

1 For further discussion see C. Noctor & R. Lyons, "The MIBI Agreements And The Law" (2012), 2nd Edition, Bloomsbury Professional, pages 49 - 54

authority to do so, while she rode as a pillion passenger. She also sustained injuries when the motor vehicle collided with the rear of a lorry.

Section 151 of the Road Traffic Act 1988 (UK) concerns the duty of insurers to satisfy a judgment, which relates to civil liability of the type covered by a compulsory insurance policy. It provides:

> "(1) This section applies where, after a certificate of insurance ... has been delivered ... to the person by whom a policy has been effected..., a judgment to which this subsection applies is obtained.
>
> ...
>
> (5) Notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy..., he must, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment –
>
> (a) as regards liability in respect of death or bodily injury, any sum payable the judgment in respect of [that] liability ...,
>
> …
>
> (8) Where an insurer becomes liable under this section to pay an amount in respect of a liability of a person who is not insured by a policy..., he is entitled to recover the amount from that person or from any person who –
>
> (a) is insured by the policy..., by the terms of which the liability would be covered if the policy insured all persons ..., and
>
> (b) caused or permitted the use of the vehicle which gave rise to the liability...."

In essence, Section 151(8) "grants to a compulsory motor insurer… the right to recoup his payment from either the uninsured person who created the liability or an insured person who caused or permitted the use of the vehicle which gave rise to the liability… It is the benefit that the compulsory motor insurer obtains in return for having to pay out in circumstances where it might otherwise have been able to avoid or cancel the policy."[2]

Churchill Insurance and Equity Claims Limited argued before the Court of Appeal that Section 151(8) of the 1988 Act is not a provision which, "excludes from insurance", within the meaning of Article 13(1) of Directive 2009/103, and that the drivers in both cases had the requisite authorisation to use or drive the vehicles in question. However, Mr. Wilkinson and Mrs. Evans argued that the provision excludes an insured, who is also a victim, from insurance within the meaning of Article 13(1) and that the authorisation referred to in that provision is that of the insurer, not the insured.[3]

The Court of Appeal (England and Wales) stayed proceedings and referred two questions to the European Court of Justice for a preliminary ruling:

> '1. Are Articles 12(1) and 13(1) of [Directive 2009/103] to be interpreted as precluding national provisions the effect of which, as a matter of the relevant national law, is to exclude from the benefit of insurance a victim of a road traffic accident, in circumstances where:
>
> — that accident was caused by an uninsured driver;
>
> — that uninsured driver had been given permission to drive the vehicle by the victim;
>
> and
>
> — that victim was a passenger in the vehicle at the time of the accident; and
>
> — that victim was insured to drive the vehicle in question?
>
> In particular:
>
> — is such a national provision one which "excludes from insurance" within the meaning of Article 13(1) of [Directive 2009/13]?
>
> — In circumstances such as arising in the present case, is permission given by the [insured] to the non insured "express or implied authorisation" within the meaning of Article 13(1)(a) of [Directive 2009/103]?
>
> — Is the answer to this question affected by the fact that, pursuant to Article 10 of [Directive 2009/103], national bodies charged with providing compensation in the case of damage caused by unidentified or uninsured vehicles may exclude the payment of compensation in respect of persons who voluntarily enter the vehicle which caused the damage or injury when the body can prove that those persons know that the vehicle was uninsured?
>
> 2. Does the answer to question 1 depend on whether the permission in question (a) was based on actual knowledge that the driver in question was uninsured or (b) was based on a belief that the driver was insured or (c) where the permission in question was granted by the insured person who had not turned his/her mind to the issue?'

The European Court of Justice observed that Directive 2009/103 was not in force at the time of the facts in the main proceedings and the question was construed as relating to the corresponding provisions of the Second and Third Directives.

In essence by its first question, the Court was asking whether Article 1(1) of the Third Directive and Article 2(1) of the Second Directive must be interpreted as precluding national rules whose effect is to exclude from the benefit of insurance a victim of a road traffic accident when that accident was caused by an uninsured driver and when the victim, a passenger in the vehicle at the time of the accident, was insured to drive the vehicle himself and had given permission to the driver to drive it.[4]

The European Court of Justice referred to other recent case law in arriving at a decision most notably, *Case C-537/03 Candolin and Others [2005] ECR I-5745:*

2 *Churchill Insurance Co Ltd v Fitzgerald & Wilkinson; Evans v Equity Claims Ltd* [2012] EWCA Civ 1166, paragraph 61

3 Case C-442/10 *Churchill Insurance Company Ltd v Wilkinson; Evans v Equity Claims Ltd* [2011] ECR I-00000, paragraph 15

4 Case C-442/10 *Churchill Insurance Company Ltd v Wilkinson; Evans v Equity Claims Ltd* [2011] ECR I-00000, paragraph 20

"The member states must exercise their powers in compliance with Community law and, in particular, with Article 3(1) of the First Directive, Article 2(1) of the Second Directive and Article 1 of the Third Directive, whose aim is to ensure that compulsory motor vehicle insurance allows all passengers who are victims of an accident caused by a motor vehicle to be compensated for the injury or loss they have suffered. The national provisions which govern compensation for road accidents cannot, therefore, deprive those provisions of their effectiveness."[5]

Candolin emphasises the protective aims of the Directives to allow all passengers, except those in certain prescribed situations, who are victims of an accident to be compensated for their loss:

"... The fact that the passenger concerned is the owner of the vehicle the driver of which caused the accident is irrelevant."[6]

It follows that the fact that a person was insured to drive the vehicle which caused the accident does not mean that that person should be excluded from the concept of third parties who have been victims of an accident within the meaning of Article 2(1) of the Second Directive, in so far as he was a passenger in that vehicle and not the driver.[7]

The only distinction permitted by EU rules relating to civil liability in respect of the use of motor vehicles is that between the driver and passenger.[8] The Court held that the aim of protecting victims pursued by the First, Second and Third Directives, requires the legal position of the owner of the vehicle, present in the vehicle at the time of the accident as a passenger, to be the same as that of any other passenger who is a victim of the accident.[9] Likewise, it held that the aim also precludes national rules from restricting unduly the concept of passenger covered by insurance against civil liability in respect of the use of motor vehicles, by excluding from that concept persons who were on board a part of a vehicle which is not designed for their carriage and equipped for that purpose.[10]

Answer to Question 1

The Court held that Article 3(1) of the First Directive precludes an insurer from relying on statutory provisions or contractual clauses in order to refuse to compensate third parties who have been victims of an accident caused by the insured vehicle.[11] By way of derogation from that obligation, the second subparagraph of Article 2(1) provides that certain persons may be excluded from compensation by the insurer, having regard to the situation they have themselves brought about, that is to say, persons who voluntarily entered the vehicle which caused the damage or injury, when the insurer can prove that they knew the vehicle was stolen.[12]

Therefore, Article 1(1) of the Third Directive and Article 2(1) of the Second Directive must be interpreted as precluding national rules the effect of which is to omit automatically the requirement that the insurer should compensate a passenger, the victim of a road traffic accident, on the ground that that passenger was insured to drive the vehicle which caused the accident but that the driver was not.[13]

Second Question

By its second question, the referring Court asks, in essence, whether the answer to the first question would be different, depending on whether the insured victim was aware that the person to whom he gave permission to drive the vehicle was not insured to do so, whether he believed that the driver was insured or whether or not he had turned his mind to that question.[14]

Answer to Question 2

The Court held that it is irrelevant for the purpose of replying to the first question that the insured was or was not aware that the person to whom he gave permission to drive the vehicle was uninsured. The Court held that Member States may take into account factors within the ambit of their rules relating to civil liability and that those national rules do not deprive the Directives of their effectiveness. The Court did have regard to a situation where national rules may reduce the amount of compensation by the conduct of an individual party due to his contribution to the occurrence of the loss but that compensation may not be disproportionately high:

"Accordingly, national rules, formulated in terms of general and abstract criteria, may not refuse or restrict to a disproportionate extent the compensation to be made available to a passenger by compulsory insurance against civil liability in respect of the use of motor vehicles solely on the basis of his contribution to the occurrence of the loss, which arises. It is only in exceptional circumstances that the amount of compensation may be limited on the basis of an assessment of that particular case."[15]

---

5 Case C-537/03 *Candolin and Others* [2005] ECR I-5745, paragraph 27-28

6 Case C-537/03 *Candolin and Others* [2005] ECR I-5745, paragraph 35

7 Case C-442/10 *Churchill Insurance Company Ltd v Wilkinson; Evans v Equity Claims Ltd* [2011] ECR I-00000, paragraph 32

8 Case C-442/10 *Churchill Insurance Company Ltd v Wilkinson; Evans v Equity Claims Ltd* [2011] ECR I-00000, paragraph 31

9 Case C-442/10 *Churchill Insurance Company Ltd v Wilkinson; Evans v Equity Claims Ltd* [2011] ECR I-00000, paragraph 30, Case C-537/03 *Candolin and Others* [2005] ECR I-5745, paragraph 33

10 Case C-356/05 *Farrell* [2007] ECR I-3067, paragraphs 28 to 30, Case C-442/10 *Churchill Insurance Company Ltd v Wilkinson; Evans v Equity Claims Ltd* [2011] ECR I-00000, paragraph 30,

11 Case C-442/10 *Churchill Insurance Company Ltd v Wilkinson; Evans v Equity Claims Ltd* [2011] ECR I-00000, paragraph 33

12 Case C-442/10 *Churchill Insurance Company Ltd v Wilkinson; Evans v Equity Claims Ltd* [2011] ECR I-00000, paragraph 35, Case C-129/94 *Ruiz Bernaldez* [1996] ECR I-1829, paragraph 21, Case C-537/03 *Candolin and Others* [2005] ECR I-5745, paragraph 20

13 Case C-442/10 *Churchill Insurance Company Ltd v Wilkinson; Evans v Equity Claims Ltd* [2011] ECR I-00000, paragraph 36

14 *Case C-442/10 Churchill Insurance Company Ltd v Wilkinson; Evans v Equity Claims Ltd* [2011] ECR I-00000, paragraph 45

15 Case C-442/10 *Churchill Insurance Company Ltd v Wilkinson; Evans v Equity Claims Ltd* [2011] ECR I-00000, paragraph 49, Case C-537/03 *Candolin and Others* [2005] ECR I-5745, paragraphs 29, 30 and 35

The decision is far reaching in that it states that European Motor Insurance Directives must be interpreted as precluding national rules whose effect is to "*omit automatically"* the requirement that the insurer should compensate a passenger who is a victim of a road traffic accident. This is so even when that accident was caused by a driver not insured under the insurance policy and when the victim, who was a passenger in the vehicle at the time of the accident, was insured to drive the vehicle himself and he had given permission to the uninsured driver to drive it.[16]

Irish Courts

To date, the Irish Courts have not dealt directly with the consequences of the *Churchill* decision. Although a recent decision of Judge Ryan in the High Court concerned very similar facts, the case fundamentally turned on the Plaintiff's credibility.

In *Lisa Ludlow v Darren Unsworth and Zurich Insurance Plc* [2013] IEHC 153*,* the Plaintiff claimed she was a passenger in her own car, which was driven by the First named Defendant who was not a named driver. Her car was insured with Zurich Insurance Plc, the Second Named Defendant, and the Plaintiff claimed she was entitled to an indemnity and compensation in respect of her injuries pursuant to the Policy of Insurance and the European Motor Insurance Directives. Zurich denied it had any liability.

Judge Ryan pointed out that "*any exclusion contained in the policy of insurance issued by Zurich that excluded the entitlement of a passenger (whether owner or otherwise) is void under the Directives.*" However, in his Judgment, Judge Ryan made clear that the Plaintiff still had to prove her case on the balance of probabilities.

Judge Ryan made reference to Section 26 of the Civil Liability and Courts Act 2004*,*

> "which mandates the dismissal of the action of a plaintiff in a personal injuries action who knowingly gives evidence that is false or misleading in any material respect unless that would result in specified injustice being done. The courts have held that the intention of the measure is that a plaintiff who is otherwise deserving of success to the extent justified by truthful evidence nevertheless suffers dismissal by knowingly adducing false evidence in any material respect. The mere fact that the plaintiff would have succeeded to some extent is not injustice in the meaning of the provision."

The Plaintiff maintained in her evidence that she had collected her boyfriend in her car and drove to a nearby pub on Friday 8th of May 2009. They both had a few drinks and when they left, met an acquaintance of theirs named Darren Unsworth, whom the Plaintiff's boyfriend then invited back to his house. Ms. Ludlow vaguely remembers giving her keys to Mr. Unsworth who would then drive them to their destination. Ms. Ludlow's last recollection before the incident was having her hand on the passenger door and her next memory was getting out of the car after it had crashed into the wall of Bettystown golf club. Ms. Ludlow was found sitting in the passenger seat of the car but there was no sign of Mr. Unsworth or the Plaintiff's boyfriend. Ms. Ludlow stated in her evidence that she did not remember what happened. She was taken to Drogheda Hospital and remembers phoning her boyfriend to send a taxi for her. She took the taxi but could not recall where she went, only that she woke up in her mother and father's house the next day.

The investigating Gardai gave significant evidence that concerned the credibility of the Plaintiff. They both attended at the road traffic accident and later responded to a call to the station at 1.40am reporting a domestic violence incident at the home of her boyfriend in which the injured party was identified as Lisa Ludlow. However, upon arrival of the Gardai at her boyfriend's house, Ms. Ludlow was unwilling to make a statement. This evidence illustrated that Ms. Ludlow must have gone from Drogheda Hospital to her boyfriend's house and from there to her mother and father's house.

According to the evidence, the first mention of Darren Unsworth was at the earliest on Monday 11th of May. This was made after Ms. Ludlow resumed living with her boyfriend at his house. A number of weeks later in June 2009, Ms. Ludlow handed a piece of paper to the Gardai with the name Darren Unsworth and accompanying address, Co. Westmeath together with an English mobile number. However and further to investigations, they were unable to establish the existence or whereabouts of this individual.

The Plaintiff's boyfriend was not called to give evidence on her behalf. Judge Ryan stated that the Plaintiff's account was *"very improbable"* and that the probability was that the Plaintiff's boyfriend was driving the car and that the involvement of Mr. Unsworth was introduced in order to protect the Plaintiff's boyfriend. Judge Ryan was disbelieving of the Plaintiff's evidence as to her recollection of certain events but not others, especially the row with her boyfriend at his home that led to her phone call to the Gardai.

> "It is true that it is sufficient for her to establish that she was injured when travelling as a passenger and the identity of the driver does not determine liability. But a plaintiff cannot play fast and loose with the truth, cannot tell some truth but not the whole of it, cannot tell a mixture of lies and truth and leave it to the court to try and winkle out the good from the bad. The circumstances of the case are material. They include the events before the critical incident in which the injuries were sustained as well as what happened after…
>
> The plaintiff in her evidence to the court told some of the truth but stopped short of telling the whole truth and nothing but the truth. In light of my findings, I must conclude that the plaintiff knowingly gave evidence that was false and/or misleading in material respects. Section 26(1) mandates the dismissal of the claim unless there is specific injustice, which is not present."

Conclusion

It remains to be seen how the Irish Courts will deal with the

16 Case C-442/10 *Churchill Insurance Company Ltd v Wilkinson; Evans v Equity Claims Ltd* [2011] ECR I-00000, paragraph 44

consequences of the *Churchill* decision. What is noteworthy however, is that although a plaintiff may be entitled to compensation for injuries sustained in circumstances analogous to those arising in the *Churchill* and *Evans* case, it is a prerequisite that a plaintiff's evidence must be credible and truthful. ■

L-R: Pictured at the launch of Criminal Law *in "The Criminal Courts of Justice" are the authors T.J. McIntyre (UCD), Sinead McMullan BL, and Sean O'Toghda BL.*

L-R: At the recent launch of their new book Irish Probate Practitioners' Handbook *are Karl Dowling BL, The Hon Mr Justice Iarfhlaith O'Neill (The High Court), and Robert Grimes BL.*

An independent judicial commission – Lessons to be learned from Canada

Gemma O'Farrell BL

Introduction

Judicial independence is founded on the minimum guarantees of security of tenure, financial security and administrative independence. Recently, Mr Justice Clarke[1] suggested a debate on the establishment of an independent judicial commission, which would have either a constitutional or statutory status. The purpose of this piece is to consider the Canadian decision which led to the creation of the *Judicial Compensation and Benefits Commission*, a body which recommends salaries for federally appointed judges in that jurisdiction. It is suggested that the establishment of an independent commission in Ireland would ensure judicial independence is maintained and avoid situations like the current debate surrounding judicial pay, conditions and appointments.

The Provincial Judges Reference

In 1997, the Supreme Court of Canada delivered an opinion in the *Provincial Judges Reference*[2]. The case was based on the joinder of three challenges to the independence of the provincial courts[3]. Like other civil servants, judicial pay had been decreased in accordance with a deficit in funds. The plaintiffs argued that the decision of the provincial legislators to lower their pay amounted to a breach of section 11(d) of the Canadian Charter of Fundamental Rights and Freedoms which states that:

> "to be presumed innocent until proven guilty according to law in a fair and public hearing by *an independent and impartial tribunal*"

The majority found in favour of the plaintiffs, holding that the threat to judicial independence was something which deserved constitutional protection. This was grounded in the preamble of the Constitution Act 1867. The court recommended the establishment of an independent commission that would act as a buffer between the judiciary and the government. Lamer CJ giving the majority decision cited extensively from the Supreme Court of Canada decision of *R. v. Valente*[4] and affirmed the requirements of judicial independence and impartiality:

> "Although judicial independence is a status or relationship resting on objective conditions or guarantees, as well as a state of mind or attitude in the actual exercise of judicial functions, it is sound, I think, that the test for independence for purposes of s. 11(d) of the Charter should be, as for impartiality, whether the tribunal may be reasonably perceived as independent. Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception. The perception must, however, as I have suggested, be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees."[5]

Judicial Independence

It was stated in *R. v. Valente* that financial security, security of tenure and administrative independence are necessary safeguards for an independent and impartial judiciary. Lamer CJ submitted that these guarantees should be considered through the prism of individual judicial independence and the institutional independence of the court. In considering security of tenure, the court emphasised that in order to ensure judicial independence, a judge's tenure must be until the age of retirement and for a fixed period of time ensuring that there is no manipulation of the office by an exterior appointing body or by the Executive. The independence of

1 http://www.irishtimes.com/news/crime-and-law/new-body-could-handle-judicial-nominations-and-pay-judge-suggests-1.1356431; "So far as the judiciary is concerned it may at least be worth considering whether there is some merit in seeking to establish, perhaps, for the avoidance of complications, at a constitutional level, a form of judicial commission which would be given the power to deal with all three pillars of the interaction between the Executive and the Oireachtas, on the one hand, and the judiciary, on the other. Such a commission might be given constitutional power to nominate persons for appointment by the President as judges, the power to fix judicial terms and conditions and the power to provide for judicial training and to deal with judicial conduct."

2 *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island;Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3. The *Judges Act*, R.S. 1985, c. J-1, as amended (the *"Judges Act")*, provided for the establishment of the *Judicial Compensation and Benefits Commission* to account for the fact that this decision was not binding on federal governments.

3 In the provinces of Alberta, Manitoba and Prince Edward Island.

4 [1985] 2 S.C.R. 673.

5 *R v Valente,* at para 22.

the judge is maintained through this minimum guarantee of security of tenure. In considering the guarantee of the administration of justice the Court defined it as *"institutional independence with respect to matters that relate directly to the exercise of the tribunal's judicial function . . . judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function.*"[6]

Of particular note are the Courts *dicta* in relation to the guarantee of financial security in order to ensure judicial independence. In the *Provincial Judges Reference*, the Court concluded that to ensure judicial independence, an independent salary commission was needed. Lamer CJ suggested a commission whose mandate would be to review and make recommendations on judicial pay over a fixed period of time:

> "As a general principle, s. 11(d) allows that the salaries of provincial court judges can be reduced, increased, or frozen, either as part of an overall economic measure which affects the salaries of all persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class. *However, the imperative of protecting the courts from political interference through economic manipulation requires that an independent body — a judicial compensation commission — be interposed between the judiciary and the other branches of government. The constitutional function of this body would be to depoliticize the process of determining changes to or freezes in judicial remuneration.* This objective would be achieved by setting that body the specific task of issuing a report on the salaries and benefits of judges to the executive and the legislature, responding to the particular proposals made by the government. As well, in order to guard against the possibility that government inaction could be used as a means of economic manipulation by allowing judges' real salaries to fall because of inflation, and also to protect against the possibility that judges' salaries will drop below the adequate minimum required by judicial independence, the commission must convene if a fixed period of time (e.g., three to five years) has elapsed since its last report, in order to consider the adequacy of judges' salaries in light of the cost of living and other relevant factors."[7]

The Court required that the independent commission be independent, objective and effective. As regards composition the court stated:

> "First and foremost, these commissions must be *independent*. The rationale for independence flows from the constitutional function performed by these commissions — they *serve as an institutional sieve*, to prevent the setting or freezing of judicial remuneration from being used as a means to exert political pressure through the economic manipulation of the judiciary. It would undermine that goal if the independent commissions were under the control of the executive or the legislature.
>
> . . .
>
> In addition to being independent, the salary commissions must be objective. They must make recommendations on judges' remuneration by reference to objective criteria, not political expediencies. The goal is to present "an objective and fair set of recommendations dictated by the public interest" (Canada, Department of Justice,Report and Recommendations of the 1995 Commission on Judges' Salaries and Benefits (1996), at p. 7). Although s. 11(d) does not require it, the commission's objectivity can be promoted by ensuring that it is fully informed before deliberating and making its recommendations. This can be best achieved by requiring that the commission receive and *consider submissions from the judiciary, the executive, and the legislature*. . . . Moreover, I recommend (but do not require) that the objectivity of the commission be ensured by including in the enabling legislation or regulations a list of relevant factors to guide the commission's deliberations. These factors need not be exhaustive. A list of relevant factors might include, for example, increases in the cost of living, the need to ensure that judges' salaries remain adequate, as well as the need to attract excellent candidates to the judiciary.
>
> Finally, and most importantly, the commission must also be *effective*. The effectiveness of these bodies must be guaranteed in a number of ways. First, there is a constitutional obligation for governments not to change (either by reducing or increasing) or freeze judicial remuneration until they have received the report of the salary commission. Changes or freezes of this nature secured without going through the commission process are unconstitutional. The commission must convene to consider and report on the proposed change or freeze. Second, in order to guard against the possibility that government inaction might lead to a reduction in judges' real salaries because of inflation, and that inaction could therefore be used as a means of economic manipulation, the commission must convene if a fixed period of time has elapsed since its last report, in order to consider the adequacy of judges' salaries in light of the cost of living and other relevant factors, and issue a recommendation in its report. Although the exact length of the period is for provincial governments to determine, I would suggest a period of three to five years."[8]

In considering refusal by government to accept a recommendation, Lamer CJ stated that such refusal would be susceptible to a "simple rationality", judicial review standard.[9]

6 (1985) 24 DLR (4th) 161, at 187.

7 [1997] 3 S.C.R. 3, at para 147, (emphasis added).

8 *Ibid.*, at 173-174.

9 "First, it screens out decisions with respect to judicial remuneration which are based on purely political considerations, or which are enacted for discriminatory reasons. Changes to or freezes in remuneration can only be justified for reasons which relate to the public interest, broadly understood. Second, if judicial review is

While the decision of the majority may provide some comfort were a similar case to come before an Irish court, the dissent of La Forest J is perhaps indicative of what may be regarded as the public perception on the issue. La Forest J was critical of the stance of the majority on "*an issue on which judges can hardly be seen to be indifferent, especially as it concerns their own remuneration*".[10] He stated:

> "In my view, it is abundantly clear that a reasonable, informed person would not perceive that, in the absence of a commission process, all changes to the remuneration of provincial court judges threaten their independence. I reach this conclusion by considering the type of change to judicial salaries that is at issue in the present appeals. It is simply not reasonable to think that a decrease to judicial salaries that is part of an overall economic measure which affects the salaries of substantially all persons paid from public funds imperils the independence of the judiciary. To hold otherwise is to assume that judges could be influenced or manipulated by such a reduction. A reasonable person, I submit, would believe judges are made of sturdier stuff than this.
>
> …
>
> The threat to judicial independence that arises from the government's power to set salaries consists in the prospect that judges will be influenced by the possibility that the government will punish or reward them financially for their decisions. Protection against this potentiality is the raison d'être of the financial security component of judicial independence. There is virtually no possibility that such economic manipulation will arise where the government makes equivalent changes to the remuneration of all persons paid from public funds. The fact that such a procedure might leave *some* members of the public with the impression that provincial court judges are public servants is thus irrelevant. A reasonable, *informed* person would not perceive any infringement of the judges' financial security."[11]

The Judicial Compensation and Benefits Commission

Following the *Provincial Reference,* the Judicial Compensation and Benefits Commission was established. The Judges Act provides at section 26(1.1) that the adequacy of judicial compensation and benefits are to be considered in light of the following criteria:

(a) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;

(b) the role of financial security of the judiciary in ensuring judicial independence;

(c) the need to attract outstanding candidates to the judiciary; and

(d) any other objective criteria that the Commission considers relevant.

Salaries are recommended by the commission to the government however these recommendations are not mandatory and the governments may deviate from these recommendations with rational reasons.[12] The composition of the commission is that members have tenure for four years and make a report with recommendations to the Minister of Justice every four years. The court had suggested that the composition of the commission be not "*…entirely controlled by any one of the branches of government. The commission should have members appointed by the judiciary, on the one hand, and the legislature and the executive, on the other.*"[13] As such, the Commission consists of three members appointed by the Governor in Council; a chairperson, a person nominated by the judiciary and one person nominated by the Minister of Justice of Canada.

Since its introduction a number of recommendations have been refused by government and thereafter successfully challenged by judicial associations. However the recent 2005 Reference decision has emphasised that the recommendations are just that, and thus while they may be seriously considered, there is no obligation on the government to accept them. As the legislation does not regard the recommendations as binding, there is no obligation on government to accept them. However, coupled with this is a requirement that the government have legitimate reason to reject a recommendation and that they act in good faith. As such, the commission operates so as to recommend levels of pay rather than to determine what they are. It is a consultative role.

Conclusion

While still evolving, the Judicial Compensation and Benefits Commission provides the necessary "institutional sieve" and helpful guidance for Ireland in the establishment of a comparative commission. Mr Justice Clarke noted in his paper that the composition and legal framework of such a body would warrant further and detailed consideration. He concluded:

> "However, I feel that the time is now right for such a debate and these suggestions are tentatively put forward not, as I have said, as a proposal but rather as an attempt to give a concrete start to a reasoned debate." ■

sought, a reviewing court must inquire into the reasonableness of the factual foundation of the claim made by the government, similar to the way that we have evaluated whether there was an economic emergency in Canada in our jurisprudence under the division of powers *(Reference re Anti-Inflation Act, [1976] 2 S.C.R. 373).*"*Ibid.,* at 183.

10 [1997] 3 S.C.R. 3., at para 302.

11 *Ibid.*, at 337 & 342 (emphasis in original).

12 Recommendations are not required to always be followed in their entirety and confirmed in the 2005 Supreme Court decision of *Provincial Court Judges' Assn of New Brunswick v New Brunswick (Minister of Justice)* [2005] 2 S.C.R. 286. The Provincial Judges Reference was curtailed somewhat by the Supreme Court. The court suggested deference to government decisions on recommendations as to judicial compensation. The case also demonstrates teething issues with regard to the judicial review standard applied.

13 [1997] 3 S.C.R. 3., at para 172.

The Year of the Cat
(Bar Soccer Club trip to Coimbra Portugal)

Conor Bowman BL

The Portugese writer, Antonio Lobo Antunes, in his novel, The Land at the End of the World, says that the Chinese Year of the Cat is the year in which the sumptuous library in the University of Coimbra was opened and that, consequently, the ornate oriental motifs carved on the bookcases there are an homage to the feline form. As we drove to the stadium in the bus before our game against the local lawyers, we stopped at a roundabout where someone had drawn a cat on a wall in black paint and written underneath, "believe in your dreams." Who were they codding?

What should have been a triumph of endeavour over old age, against the Coimbra lawyers, turned into the kind of show-trial we have come to expect in tawdry revolutions. How else could it be that a perfectly good tackle by one of our players resulted in a penalty, while three incidents of hand-ball in the opposite penalty box were ignored? It's like being served Malibu by your host and then being ejected from the party for possession of a coconut-based liqueur!! The Bar scored two super (and legitimate) goals and were clearly the better team.

There is a traditional music in Portugal called Fado. How appropriate, because a little of it certainly goes a long way. However it took a rendition of *The Old Triangle*, sung from a height, to really clear the place. If our hosts thought they were the only ones with a gravely limited repertoire, they were highly mistaken. One of the Fado songs was entitled *The Legacy of Lies*.

The hostelries of Coimbra are numerous and varied but one deserves special mention. The Tapis Bar near the University is popular with sky-divers and students and lawyers alike. The staff are friendly, the music is mostly great and the place stays open until 7am. What more could you ask? There are plenty of restaurants and the food, though a little hit and miss, is generally quite fishy but affordable. Why stay in a four star hotel and eat in a one star restaurant? Ask Rod Stewart.

Is Coimbra a pet-friendly city? The answer is definitely yes. The aforementioned library has its own bat colony to combat insects. In the restaurant where "Pizza-Gate" occurred, a cat roamed freely under the tables between our feet as we ate. In the finest dining room in Coimbra (a Michelin star gaff), a portrait of Chairman Miaow adorns the wall in the entrance hall, reassuring patrons. On one evening, a few of our party even attended a Kangaroo Court, where at least one person was caught on the hop!

One of the highlights of the trip was a series of religious lectures delivered free of charge from time to time by a portly clergyman who attached himself to our group. Other notable events were the early morning swimming contests and the early evening fashion show staged in the hotel pool and bar respectively. We also met members of the Nuremburg Trial Lawyers association and the advance party from Manuca Mediation (*we are the honey that heals, give us a buzz*). Some of our party went kayaking and managed not to drown, others went AWOL and managed not to be found out, others still put the notion of romance languages to the ultimate test.

In short, this was one of the best soccer trips ever. It was marked by the renewal of old acquaintances, the beginning of new friendships, the laughter of lawyers and the faint sounds of trains and cats in the distance. ■

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[1986] IR 642; *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39; *Bailey v Flood* (Unrep, Morris P, 6/3/2000) and *Devlin v Minister for Arts* [1999] 1 IR 47 considered – Companies (Amendment) Act 1982 (No 10), s 12(3) – Reliefs refused (2012/612JR – Dunne J – 8/3/2013) [2013] IEHC 111
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Misuse of technical term – Conformity with statute – Intent of parties – Whether court should presume lawful purpose – Whether court should look to form or substance of agreement – Passing of date for service of notice – Relief in equity – Balancing of equities – Whether time of the essence in service of notice – Whether plaintiff entitled to relief in equity following late service of notice – *PW & Co v Milton Gate Investments Ltd* [2003] EWHC 1994 (Ch), [2004] Ch 142 followed – Relief granted (2011/11692P – Charleton J – 12/11/2012) [2012] IEHC 494
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Pre-incorporation contract

Specific performance – Sale of land – Ratification of pre-incorporation contract – Trust for development company not yet incorporated – Company subsequently incorporated but unable to raise funds –Whether first defendant personally liable to perform contract – Contract executed in trust and principal disclosed subsequently – Signature as trustee – *Dublin Laundry Company v Clarke [*1989] ILRM 29; *Lavan v Walsh* [1964] IR 87; *Moffat Ltd v Wheeler* [1929] 2 Ch 224; *United Yeast Company Ltd v Cameo Investments Ltd* (1975) 111 ILTR 13; *Park Grange Investments Ltd v Shandon Park Mills Company Ltd* (Unrep, Carroll J, 2/5/1991); *Mount Kennett Investment Company v O'Meara* [2007] IEHC 420, (Unrep, Smyth J, 21/11/2007); *Murphy v Ryan* [2009] IEHC 305, (Unrep, Kelly J, 24/6/2009) and *HKN Invest OY v Incotrade PVT Ltd* [1993] 3 IR 152 considered – Companies Act 1963 (No33), s 37 – Order for specific performance granted against second defendant (2009/4623P – Murphy J – 14/3/2013) [2013] IEHC 109
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Partial termination – Validity of termination – Limitation of damages clause – Interpretation – Meaning of "gross negligence" – Meaning of "wilful act" – Deliberate act – Ambiguity – *Contra proferentem* rule – Whether entitled to terminate agreement – Whether limitation clause applied – Whether guilty of gross negligence – Whether wilful amounted to no more than deliberate – *Analog Devices BV v Zurich Insurance Co* [2005] IESC 12, [2005] 1 IR 274, *Brady v Irish National Insurance Co Ltd* [1986] IR 698, *Rohan Construction v ICI* [1988] ILRM 373 and *Investors Compensation Scheme Ltd v West Bromich Building Society* [1998] 1 WLR 896 followed; *Lac Minerals Ltd v Chevron Mineral Corporation of Ireland* [1995] 1 ILRM 161 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 58, rr 7 and 10 – Defendant's appeal allowed (389/2011 – SC – 14/11/2012) [2012] IESC 55
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Delay

Criminal trial – Trial for forgery – Previous refusal of prohibition – Further delay subsequent to refusal – Unavailability of designated judge – Prosecutorial delay – Whether added obligation to ensure expeditious trial devolved on prosecution following first judicial review – Blameworthy delay – Whether effective remedy available to applicant – Failure to apply for new judge – Unexplained delay – Absence of actual prejudice – Whether delay led to presumption of prejudice – Balance between public interest in prosecution of crime and right to expeditious trial – Systemic delay – Onus on applicant to demonstrate that fair trial improbable – Impact of proceedings before ECHR – Distinction between right to compensation for failure to provided an expeditious trial and grounds for order for prohibition – *McFarlane v Director of Public Prosecutions* [2008] 4 IR 117; *PM v Malone* [2002] 2 IR 560; *PM v Director of Public Prosecutions* [2006] IESC 22, [2006] 3 IR 172; *Barker v Wingo* (1972) 407 US 514; *McFarlane v Ireland* [2010] ECHR 1272; *Barry v Director of Public Prosecutions* [2003] IESC 63; *TH v Director of Public Prosecutions* [2006] 3 IR 520; *Kostovski v Netherlands* (1989) 12 EHRR 434; *Doorsen v Netherlands* (1996) 22 EHRR 330 and *Kennedy v Director of Public Prosecutions* [2012] IESC 34, (Unrep, SC, 7/6/2012) considered – Appeal dismissed (38/2011 – SC – 26/10/2012) [2012] IESC 54
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Drunk driving – Specified person – Proof – Lesser included offence – Whether essential proof that defendant was or was not a specified person – *DPP v Kemmy* [1980] IR 160 considered – Road Traffic Act 1961 (No 24), ss 49, 50, 53(4) and 82 – Courts (Supplemental Provisions) Act 1961 (No 39), s 52 – Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), s 55 – Taxi Regulation Act 2003 (No 25), s 34 – Road Traffic Act 2010 (No 25), ss. 3(1), 4, 4(4)(a), 4(4)(b), 5 and 8A – Road Traffic (No. 2) Act 2011 (No 28), s 9(a) – Question posed answered (2012/1515SS – Charleton J – 10/12/2012) 2012 IEHC 540
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Construction of contract – Termination – Wrongful dismissal – Probationary period – Termination notice period – *Quantum* of damages for wrongful dismissal – Whether plaintiff still in probationary period when employment terminated – Whether notice of termination in accordance with contractual notice period – *Igote Ltd v Badsey Ltd* [2001] 4 IR 511 and *Kramer v Arnold* [1997] 3 IR 43 followed – Redundancy Payments Act 1967 (No. 21) – Unfair Dismissals Act 1977 (No 10), s 6(4)(c) – Relief granted (2012/1504P – Laffoy J – 31/1/2013) [2013] IEHC 41
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Injury in service of employer – Certified unfitness to work – Labour Relations Commission proposal for closure of employer – Terms of agreement to be applied to persons certified as fit to return to work – Certification of appellant rejected and employment status maintained by company – Medical evidence – Role of tribunal – Role of court on review – Findings of fact fully considered by tribunal – Whether identifiable error of law – *National University of Ireland v Ahern* [2005] IESC 40, [2005] 2 ILRM 437; *Henry Denny and Sons (Ireland) Ltd v Minister for Social Welfare* [1998] 1 IR 539; *Mulcahy v Waterford Leader Partnership Ltd* [2002] ELR 12; *Thompson v Tesco Ireland Ltd* [2003] ELR 21; *Wilton v Steel Company of Ireland Ltd* [1999] ELR 1; *O'Leary v Minister for Transport* [1998] 1 IR 558; *Irish Shipping v Adams* (Unrep, Murphy J, 30/1/1987) and *Minister for Finance v McArdle* [2007] IEHC 98, (Unrep, Laffoy J, 22/3/2007) considered – Claim refused (2011/795SP– Murphy J – 7/11/2012) [2012] IEHC 514
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Bonus – Contract of employment – Terms of bonus – Cash bonus – Deferred stock plan – Deferred cash bonus awarded in lieu of allocating shares – Whether breach of contract tin imposing deferred cash bonus scheme – Payment withheld as plaintiffs no longer in employment – Whether contractual provision in restraint of trade – Discretionary bonus – Discretion to be exercised reasonably – Whether new scheme fair and reasonable and in interests of employees – *John Orr Ltd v Orr* [1987] ILRM 702; *Finnegan v J & E Davy* [2007] ELR 234 and *Clarke v Nomura International* [2000] IRLR 766 considered – Claims dismissed (2009/1509S & 1510S – Hedigan J – 18/1/2012) [2012] IEHC10
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EXTRADITION LAW

European Arrest Warrant

Appeal – Refusal of surrender – Point of law of exceptional public importance – Guilt agreed in advance of hearing – Convicted and sentenced in absence without proper notification – Whether trial and conviction where guilt and sentence agreed to in advance – Absence of proper notification – Absence of undertaking that retrial available – Whether judicial adjudication that respondent ought be convicted – Possibility of refusal to convict – Issues tried by court – Construction of section – Framework Decision – *Goodman International v Hamilton* [1992] 2 IR 542; *The People v O'Shea* [1982] IR 384; *Minister for Justice, Equality and Law Reform v Ciechanowicz* [2011] IEHC 106, (Unrep, Edwards J, 8/3/2011); *Minister for Justice, Equality and Law Reform v Zachweija* [2011] IEHC 513, (Unrep, Edwards J, 23/11/2011); *Criminal Proceedings against Pupino* (Case C-105/103) and *Minister for Justice, Equality and Law Reform v Bailey* [2012] IESC 16, (Unrep, SC, 1/3/2012) considered – *Minister for Justice, Equality and Law Reform v McCague* [2010] IR 456 distinguished – Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States (2002/584/JHA), art 26 – European Arrest Warrant Act 2003 (No 45), s 45 – Finding that section applied where 'plea bargaining' existed and appeal dismissed (135/12 – SC – 6/12/2012) [2012] IESC 61
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European Arrest Warrant

Correspondence – Alleged double jeopardy – Age of offence – Strong personal and family ties in jurisdiction – Whether surrender would violate Constitution and Convention – Previous warrants – Rules on pleading points of objection – Possibility of subsequent attempts to extradite – Absence of substantive ruling in favour of respondent – Absence of oppression – Proportionality – Whether exceptional circumstances justifying non-surrender – Family not based on marriage – Right to liberty – Abrogation of right in accordance with law – *Kwok Ming Wan v Conroy* [1998] 3 IR 527; *O'Keeffe v O'Toole* [2008] IR 227; *Minister for Justice, Equality and Law Reform v Tobin* [2012] IESC 37, (Unrep, SC, 19/6/2012); *Henderson v Henderson* (1843) 3 Hare 100; *AA v Medical Council* [2003] 4 IR 302; *Johnson v Gore Wood and Company* [2002] 2 AC 1; *Woodhouse v Cosignia PLC* [2002] 1 WLR 2258; *Gairy v Attorney General of Granada* [2002] 1 AC 167; *Re Vantive Holdings* [2009] 2 IR 118; *Re Greendale Developments Ltd* [2000] 2 IR 514; *Hamburg Public Prosecutors Office v Altun* [2011] EWHC 397; *State (Quinn) v Ryan* [1965] IR 70; *State (O'Callaghan) v hUadhaigh* [1977] IR 42; *Bolger v O'Toole* (Unrep, SC, 2/12/2002); *Minister for Justice, Equality and Law Reform v O Fallúin* [2010] IESC 37, (Unrep, SC, 19/5/2010); *Minister for Justice, Equality and Law Reform v Koncis* [2011] IESC (Unrep, SC, 29/7/2011); *Re Article 26 and the Offences Against the State (Amendment) Bill 1940* [1940] IR 470; *Minister for Justice, Equality and Law Reform v Bednarczyk* [2011] IEHC 137, (Unrep, Edwards J, 5/4/2011) and *Minister for Justice, Equality and Law Reform v Machaczka* [2012] IEHC 434, (Unrep, Edwards J, 12/10/2012) considered – Rules of the Superior Courts 1986 (SI 15/1986), O 98, r 5 – European Arrest Warrant Act 2003 (No 45) – Surrender ordered (2012/133EXT – Edwards J – 22/11/2012) [2012] IEHC 508
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European Arrest Warrant

Gravity of offence – Possession of very small quantity of marijuana – Conduct of *de minimus* nature – Whether unjust and disproportionate interference with constitutional and convention rights – Second warrant – Possibility of issuing second warrant – Issue of proportionality – Obligation on issuing authority to conduct proportionality check prior to issuing second warrant – Principles of mutual trust and confidence between member states – Judicial cooperation and mutual recognition of judicial actions – Presumption that issuing authority acted in good faith – Separate entitlement of executing judicial authority to consider issue of proportionality – Whether execution of warrant proportionate – Minimum gravity requirement – Inherent unlikelihood of custodial sentence – Absence of notification prior to issuing of second warrant – Absence of opportunity to return voluntarily – Stress and anxiety – *Minister for Justice, Equality and Law Reform v Ostrowski* [2010] IEHC 200, (Unrep, Peart J, 19/3/2000); *Minister for Justice, Equality and Law Reform v O Fallúin* [2010] IESC 37, (Unrep, SC, 19/5/2010); *Minister for Justice, Equality and Law Reform v Koncis* [2011] IESC (Unrep, SC, 29/7/2011); *ES v Judges of Cork Circuit Court* [2008] IESC 37, (Unrep, SC, 10/6/2008); *Minister for Justice, Equality and Law Reform v Gorman* [2010] IEHC 210, [2010] 3 IR 583; *Assange v Swedish Prosecution Authority* [2011] EWHC 2849; *General Prosecution Service v C* (1 Ausl (24) 246.09); *Minister for Justice, Equality and Law Reform v Bednarczyk* [2011] IEHC 137, (Unrep, Edwards J, 5/4/2011); *Minister for Justice, Equality and Law Reform v Zigelis* [2012] IEHC 12, (Unrep, Edwards J, 17/1/2012); *Norris v Government of United States of America (No 2)* [2010] AC 487; *R(HH) v Deputy Prosecutor of Italian Republic* [2011] EWHC 1145; *Minister for Justice, Equality and Law Reform v DL* [2011] IEHC 248, (Unrep, Edwards J, 22/6/2011) considered – European Arrest Warrant Act 2003 (No 45), s 37 – Surrender refused (2012/161EXT – Edwards J – 8/2/2012) [2012] IEHC 57
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Surrender for serving of sentence – Consent to surrender – Postponing of surrender to allow serving of domestic sentence – Credit for period of detention arising from execution of warrant – Second arrest warrant – View of issuing judicial authority that time spent in Irish prison did not arise from execution of warrant – Matter for issuing member state to interpret and give effect to article relating to periods of credit – Absolute entitlement of issuing State to insist on surrender order being carried into effect – Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States (2002/584/JHA), art 26 – European Arrest Warrant Act 2003 (No 45) – Approval of surrender date to await conclusion of proceedings regarding second warrant (2008/217EXT – Edwards J – 17/1/2012) [2012] IEHC 12
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FAMILY LAW

Child abduction

Habitual residence – Wrongful removal of child – Wishes of child – Degree of maturity of child – Absence of custody and access orders — Report of psychologist directed by court – Circumstances in which child was living in

England – Circumstances in which child came to remain in Ireland –Whether child capable of forming own views –Whether case with exceptions permitting judicial authority to exercise discretion to refuse return of child – Whether grave risk return would place child in intolerable situation – Balancing of aims and objectives of convention with objections to return – Whether exceptional case – *AS v CS* [2010] IEHC 370, (Unrep, Clark J, 29/9/2010); *CA v CA* [2009] IEHC 460, [2010] 2 IR 162; *In Re M (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] 1 AC 1288; *TMM v MD (Child Abduction: Article 13)* [2000] 1 IR 149 and *S v S* [1992] 2 FLR 492 considered – Convention on Civil Aspects of International Child Abduction 1980, art 13 – Order refused (2011/15HLC– Peart J – 12/1/2012) [2012] IEHC 16
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HOUSING

Social housing

Local authority housing – Applicant in receipt of social housing from another local authority – Applicant applying to respondent for social housing – Respondent refusing to consider application – Whether applicant entitled to apply to respondent when already in receipt of social housing – Social Housing Assessment Regulations 2011 (SI 84/2011), regs 14 and 22 – Interpretation Act 2005 (No 23), s 5 – Housing (Miscellaneous Provisions) Act 2009 (No 22), ss 19 and 20 – *Certiorari* granted, matter remitted to respondent (2012/62JR – Hogan J – 31/7/2012) [2012] IEHC 344
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Asylum

Judicial review – Leave – Decision of commissioner – Nigerian national – Negative credibility findings – Whether right to fair procedures infringed – Whether failure to put to applicant that work reason for arrival – Duty to cooperate – Opportunity to explain given – Whether failure to inform applicant that details of incident relied upon could not be found – Failure to put question of internet searches to applicant – Option of internal relocation – Whether applicant should be required to appeal – Whether error of commissioner went to jurisdiction – Technical error – *Garvey v Ireland* [1981] IR 75; *LOJ v Refugee Appeals Tribunal* [2011] IEHC 493, (Unrep, Hogan J, 16/12/2011); *O v Refugee Appeals Tribunal* [2009] IEHC 607, (Unrep, Cooke J, 9/12/2009); *E v Refugee Appeals Tribunal* [2010] IEHC 133, (Unrep, Cooke J, 25/2/2010); *Tomlinson v Criminal Injuries Compensation Tribunal* [2005] ILRM 394; *O'Donnell v Tipperary (South Riding) County Council* [2005] 2 IR 483; *BNN v Minister for Justice, Equality and Law Reform* [2008] IEHC 308, [2009] 1 IR 719; *Stefan v Minister for Justice* [2001] 4 IR 203 and *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 considered – Refugee Act 1996 (No 17), s 13(10) – Leave refused (2008/1301JR – Hogan J – 11/1/2012) [2012] IEHC 3
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Asylum

Judicial review – Leave – Decisions of tribunal – National of Somalia – Applications of mother and child – Extensive findings of lack of credibility – Negative recommendation – Country of origin information – Dysfunctional and failed state – Alleged past persecution – Affirmation of recommendation based exclusively on lack of personal credibility – Absence of prospective assessment – Delay between oral hearing and report – Whether decision unreasonable or irrational – Whether substantial reason for questioning whether negative recommendations adequately based upon full examination of application – Factor of returning to Somalia with child born to another man – *A (MAM) v Refugee Appeals Tribunal* [2011] IEHC 147, (Unrep, Cooke J, 8/4/2011); *Messaoudi v Refugee Appeals Tribunal* [2004] IEHC 156, (Unrep, Finlay Geoghegan J, 29/7/2004) and *FKS v Refugee Appeals Tribunal* [2009] IEHC 474, (Unrep, Dunne J, 30/10/2009) considered – Refugee Act 1996 (No 17), ss 11 and 13 – Leave granted (2008/1180JR – Cooke J – 12/1/2012) [2012] IEHC 4
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Judicial review – Leave – Decision of tribunal – Iraqi national – Allegation that father high ranking member of collapsed regime – Absence of negative credibility findings – Finding that insufficient evidence supplied to show that killings of parents targeted – Critical country of origin information – Failure to give reasons for rejection of manifestly relevant information – Whether substantial grounds for contending decision unreasonable in law – Failure to afford applicant benefit of doubt – *R v Minister for Justice, Equality and Law Reform* [2009] IEHC 353, (Unrep, Cooke J, 24/7/2009) considered – Leave granted (2008/1063JR – Hogan J – 11/1/2012) [2012] IEHC 5
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Asylum

Judicial review – Leave – Tribunal – Afghan national – Preliminary issue – Whether proceedings to be struck out *in limine* on grounds of non-compliance with rules for affidavits – Interview conducted in foreign language with interpreter – Affidavit sworn in English without explanation as to how instructions were taken – Whether affidavits inadmissible – Whether proceedings to be struck out – Judicial discretion to deal with non-compliance – Justice of individual case – *Saleem v Minister for Justice, Equality and Law Reform* [2011] IEHC 223, (Unrep, Cooke J, 2/6/2011); *Re Sarazin's Letters Patent* [1947] 64 RPC 51; *O'Connor v Nurendale Ltd* [2010] IEHC 387, (Unrep, Hogan J, 22/10/2010); *Director of Public Prosecutions v Corbett* [1992] ILRM 674; *O'Leary v Minister for Transport* [2000] IESC 16; [2000] 1 ILRM 132; *Gale v Superdrug Strores plc* [1996] EWCA Civ 1306, [1996] 1 WLR 1089 and *Cropper v Smith* (1883) 26 Ch D 700 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 40, r 14 – Application stayed to enable filing of fresh affidavit (2008/1227JR – Hogan J – 17/1/2012) [2012] IEHC 8
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Campion v Wat

Modular hearing

Time and expense of litigation – Court resources – Case management rules – Function of courts in administering trials – Inherent jurisdiction of court – Public interest – Test for modular hearing – Claim against income fund manager pursuant to administration agreement – Whether issues readily capable of determination in isolation – Whether clear saving in time and costs identified – Prejudice – Whether tactical device – Expert witnesses – Abuse of process – *Orange Communications v Director of Telecommunicatiosn Regulation* [2000] 4 IR 159; *PJ Carroll and Co Ltd v Minister for Health (No 2)* [2005] 3 IR 457; *Cork Plastics (Manufacturing) v Ineos Compound UK Ltd* [2008[IEHC 93, (Unrep, Clarke J, 7/3/2008); *Millar v Peeples* [1995] NI 6; *McCann v Desmond* [2010] 4 IR 554; *Igote Ltd v Badsey Ltd* [2001] 4 IR 511; *Camerata Property Inc v Credit Suisse Securities (Europe) Ltd* [2011[EWHC 479; *ICDL GCC Foundation v European Computer Driving Licence Foundation Ltd* [2011] IEHC 353 (Unrep Clarke J, 4/8/2011) and *Bula Ltd v Crowley* (Unrep, Barr J, 29/4/1997) considered – Rules of the Superior Courts 1986 (SI 15/1986), O 63A, rr 5 and 6 – Modular hearing of certain issues ordered (2009/6385P – Charleton J – 26/1/2012) [2012] IEHC 25
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Security for costs

Ability to pay costs – *Prima facie* defence – Onus of proof – Discretion – Whether court should address merits of case or strength of case of on interlocutory application – Whether existence of admissible evidence objectively demonstrated which if accepted would provide defence to claim – Whether threshold met by mere denial of claim – Special circumstances – Delay in bringing application – Costs incurred before bringing of application – Whether defendant knew of financial frailty but delayed bringing application –*Lismore Homes Ltd (In Receivership) v Bank of Ireland Finance Ltd* [1999] 1 IR 501, *Moorview Developments Ltd v Cunningham* [2010] IEHC 30, *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 WLR 420 and *Tribune Newspapers v Associated Newspapers Ireland*, (Unrep, Finlay Geoghegan J, 25/3/2011), considered – Rules of the Superior Courts 1986 (SI 15/1986), O 90 – Companies Act 1963 (No 33), ss 316 and 390 – Regulation (EC) No 1400/2002 of the Council of 31/7/2002 on the application of art 8(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector – Application refused (2011/784P – Laffoy J – 21/12/2012) [2012] IEHC 560
Mike O'Dwyer Motors Ltd v Mazda Motor Logistics Europe NV (Trading As "Mazda Motor Ireland")

Security for costs

Amount of security – Foreign companies – Practice of directing one third total amount of estimated costs – Costs already incurred – VAT – Whether VAT recoverable or irrecoverable – Discretion to depart from practice – Distinction between proper approach under O 29 and under Companies Act 1963, s 390 – Foundation of two jurisdictions – Nature of limited liability – Jurisdictional difficulty of recovering costs where foreign plaintiff – Established weakness of case – Operative time for determining pre-application and post-application costs – Quantum of costs – Whether justice required departure from practice of making single and early estimate of total costs – *Windmaster Developments Ltd v Airogen Ltd* (Unrep, McCracken J, 10/7/2000); *Thalle v Soares* [1957] IR 182; *Guion v Heffernan* [1929] IR 487; *Fallon v An Bord Pleanala* [1992] 2 IR 380; *Procon (Great Britain) Ltd v Provincial Building Company Ltd* [1984] 1 WLR 557; *Lismore Homes Ltd v Bank of Ireland Finance Limited* [2001] 3 IR 536; *Proetta v Neil* [1996] 1 IR 1000; *Pitt v Bolger* [1996] IR 108; *Salthill Properties Ltd v Royal Bank of Scotland* [2010] IEHC 31, (Unrep, Clarke J, 5/2/2010); *Brocklebank v Kings Lynn Steamship Company* [1878] 3 CPD 365; *Massey v Allen* [1879] 12 CHD 807; *Al-Koronky v Timelife Entertainment Group Ltd* [2005] EWHC 1688; *Penny v Penny* [1996] 1 WLR 1204 and *Hidden Ireland Heritage Holidays Ltd v Indigo Services Ltd* [2005] 2 IR 115 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 29 – Companies Act 1963 (No 33), s 390 – Partial security ordered with balance of security to be assessed at directions stage (2010/6443P– Clarke J – 19/1/2012) [2012] IEHC 13
Harlequin Property (SVG) Ltd v O'Halloran

Strike out

Inherent jurisdiction – Frivolous and vexatious – Abuse of process – Malicious prosecution claims – Withdrawal of case from jury on two previous occasions – Prejudicial material put before jury despite advice of trial judge – Jurisdiction of court – Pleadings – Inherent jurisdiction – Cumulative pattern of behaviour – Actions of counsel for plaintiff – Improper conduct of proceedings – Certainty of problems arising again – *Aer Rianta cpt v Ryanair Ltd* [2004] 1 IR 506; *James Farley v Ireland* (Unrep, SC, 1/5/1997); *Fay v Tegral Pipes Ltd* [2005] 2 IR 261; *Barry v Buckley* [1991] IR 306; *Riordan v An Taoiseach* [2001] 4 IR 465; *Dykun v Odishaw* [2000] ABQB 548; *Re Lang Michener* [1987] 37 DLR 685 and *Cavern Systems Dublin Ltd v Clontarf Residents Association* [1984] ILRM 25 considered – Rules of the Superior

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Murray v Fitzgerald

Summary judgment

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Friends First Finance Ltd v Cronin

Summary judgment

Loan agreements – Guarantee – Estopped from seeking repayment – Whether arguable defence – *Danske Bank a/s t/a National Irish Bank v Durkan New Homes* [2010] IESC 22 (Unrep, SC, 22/4/2010) applied – Application refused, matter adjourned to plenary hearing (2012/1665S & 2012/139COM – Finlay Geoghegan J – 12/2/2013) [2013] IEHC 57
ACC Bank plc v Mike O'Dwyer Motors Ltd

Summary judgment

Mortgages – Applicable test – Whether clear no arguable defence existed – Influencing of application of criteria by circumstances of case – Application of test of credibility to proposed defence – Defence – Reliance on negligent misstatement of agent of plaintiff – Allegations of breach of contract and negligence – Whether plaintiff *prima facie* entitled to judgment – Whether account given by defendant credible – Alleged verbal statement inconsistent with signed and witnessed contracts – Behaviour of defendants inconsistent with proposed defences – Failure to raise matters prior to litigation – Commercial nature of transactions – *Aer Rianta cpt v Ryanair Ltd* [2001] 4 IR 607; *First National Commercial Bank v Anglin* [1996] 1 IR 75; *Irish Dunlop Co Ltd v Ralph* (1958) 95 ILTR 70; *Banque de Paris v de Nara y* [1984] 1 Lloyd's Rep 21; *National Westminster Bank v Daniel* [1993] 1 WLR 1453 and *Harrisrange Ltd v Duncan* [2003] 4 IR 1 considered – Judgment granted (2011/2228S– Ryan J – 13/1/2012) [2012] IEHC 11
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Third party notice

Refusal to strike out – Package holiday – Serious injuries suffered after diving into swimming pool at night – Liberty granted to issue third party notice on parents – Motion to set aside third party notice on grounds of delay – Applicable rules – Chronology – Absence of prejudice – Absence of explanation for delay – Onus on respondent to explain delay – Whether trial judge erred in failing to have regard to inordinate delay and to failure to give explanation – *Connolly v Casey* [2000] 1 IR 345; *Molloy v Dublin Corporation* [2001] 4 IR 52; *Green v Triangle Developments Ltd* [2008] IEHC 52, (Unrep, Clarke J, 4/3/2008) and *Robins v* Coleman [2009] IEHC 486, [2010] 2 IR 180 considered – Rules of the Superior Courts 1986 (SI 15/1986), O16 – Civil Liability Act 1961 (No 31), s 27 – Appeal allowed; third party notice set aside (341/2011– SC – 19/12/2012) [2012] IESC 62
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PRISON LAW

Discipline

Contravention of prison rules – Possession of mobile phone – Inquiry – Prohibition of privileges – Second complaint relating to possession of mobile phone – Second inquiry – Second sanction of prohibition of privileges – Whether power to defer commencement of second period of loss of privileges – Alleged absence of jurisdiction – Powers of governor – Construction of statutory provisions – Absence of statutory provision as to when period of prohibition to commence – Whether section penal provision – *Attorney General v Great Eastern Railway Company* (1880) 5 App Cas 473; *The Ashbury Railway Company v Riche* Rep 7 HL 653; *Kincaid v Aer Lingus Teoranta* [2003] 2 IR 314 considered – Prisons Act 2007 (No 10), ss 12 and 13 – Appeal dismissed (488/2012 – SC – 29/11/2012) [2012] IESC 57
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PROFESSIONS

Solicitors

Client account – Payment out – Solicitor struck off – Funds held by Law Society – Proceeds of sale by client retained in client account – Client seeking payment out of money – Claim fees owed to respondent – Claim directors of corporate client not validly appointed – Whether funds should be paid out to client – Whether dispute concerning fees relevant – Whether validity of appointment of directors of client relevant – Application to pay out granted (2006/371SP – Kearns P – 10/12/2012) [2012] IEHC 538
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Contributory negligence

Road traffic accident – Claim by passenger -Personal injuries – Alcohol consumption by driver – Impairment of capacity to drive – Alleged failure to wear seatbelt – Engineering evidence – Quantum of contributory negligence – Contributory negligence assessed at 40% (2010/1666P – Ryan J – 8/3/2013) [2013] IEHC 100
Gallagher v McGeady

Malicious conspiracy

Employment contract – Plaintiff manager of branch of defendant bank – Plaintiff alleged to have facilitated illegal activities – Inquiry conducted by defendant – Plaintiff dismissed by defendant – Whether inquiry fair and impartial – Whether plaintiff denied right of appeal – Whether perjury on part of defendant's witnesses – Whether conspiracy by defendant against plaintiff – Whether plaintiff placed on special paid leave or suspended by defendant – Whether placing of plaintiff on special paid leave lawful – Whether wrongful dismissal – Whether objective bias pleaded by plaintiff – Whether plaintiff defamed by defendant – Whether plaintiff entitled to costs for legal representation before defendant's inquiry – *Meskell v CIE* [1973] IR 121 distinguished – *Quirke v Bord Luthchleas na hÉireann* [1988] IR 83; *Maguire v Ardagh* [2002] 1 IR 385; *Morgan v Trinity College* [2003] 3 IR 157; *Carroll v Bus Átha Cliath* [2005] IEHC 1, [2005] 4 IR 184; *Maha Lingam v HSE* [2005] IESC 89 (Unrep, SC, 4/10/2005); *Nolan v Emo Oil Services Ltd* [2009] IEHC 15 (Unrep, HC, Laffoy J, 21/1/2009) considered – Claim dismissed (2001/11002P – O'Keeffe J – 21/1/2013) [2013] IEHC 6
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Misfeasance in public office

Teacher accused of child sexual abuse by former pupil – Inquiry by respondent – Numerous breaches of applicant's right to fair procedures and natural justice – Whether respondent owing duty of care to applicant – Whether negligence or breach of duty – Whether honest attempt by respondent to discharge public function – Whether applicant victim of targeted malice – Assessment of damages – Whether failure by applicant to mitigate loss – Claim allowed, damages awarded (2006/890JR – Ó Néill J – 21/12/12) [2012] IEHC 591
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Negligence

Employer's liability – Duty of care – Personal injuries – Eye injury – Whether plaintiff in employment of defendant on date of injury – Whether injury sustained during course of employment – General labour work for cash payment alleged – Evidence of parties – Evidence of witnesses – Balance of probabilities – Claim dismissed (2010/5979P – Peart J – 20/1/2012) [2012] IEHC 17
Donnelly v LPB Building Services Limited

Negligence

Nuisance – Right to property – Inviolability of dwelling place – Legitimate expectation – Heavy goods vehicles passing plaintiffs' property – Vibration damage – Whether plaintiffs' witnesses having necessary experience to be deemed expert – Whether heavy goods vehicle traffic excessive – Whether damage to plaintiffs' property caused by vibration damage from defendant's vehicles – Claim dismissed (2009/8151P – Gilligan J – 24/1/2013) [2013] IEHC 56
McEleny v Mayo County Council

Occupier's liability

Duty of care – Recreational user – Reckless disregard – Danger to be guarded against – Reasonable objectives in design and construction of ramp – Personal injury – Causation – Whether defendant liable for plaintiff's fall – Whether defendant breached of duty of care – Whether reckless disregard established – Whether plaintiff's fall caused by ramp – Occupiers' Liability Act 1995 (No. 10), ss 4 and 5 – Action dismissed (2010/4533P – O'Neill J – 29/1/2013) [2013] IEHC 19
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SI 152/2013

BILLS INITIATED IN DÁIL ÉIREANN DURING THE PERIOD 15TH MAY 2013 TO THE 20TH JUNE 2013

[pmb]: Private Members' Bills are proposals for legislation in Ireland initiated by members of the Dáil or Seanad. Other Bills are initiated by the Government.

Houses of the Oireachtas (Inquiries, Privileges and Procedures) Bill 2013
Bill No. 53 of 2013

Social Welfare and Pensions (Miscellaneous Provisions) Bill 2013
Bill No. 54 of 2013

Financial Emergency Measures in the Public Interest Bill 2013
Bill No. 57 of 2013

Thirty-Second Amendment of the Constitution (Abolition of Seanad Éireann) Bill 2013
Bill No. 63 of 2013

Protection of Life During Pregnancy Bill 2013
Bill No. 66 of 2013

Petroleum and Other Minerals Development (Amendment) Bill 2013
Bill No. 52 of 2013
[pmb] *Deputy Michael Colreavy*

Road Traffic Bill 2013
Bill No. 55 of 2013
[pmb] *Deputy Timmy Dooley*

Gender Recognition Bill 2013
Bill No. 56 of 2013
[pmb] *Deputy Aengus Ó Snodaigh*

Seanad (No. 2) Bill 2013
Bill No. 59 of 2013
[pmb] *Deputies Stephen S. Donnelly, Noel Grealish, Finian McGrath, Mattie McGrath and Shane Ross*

Access to the Countryside Bill 2013
Bill No. 60 of 2013
[pmb] *Deputy Robert Dowds*

Interest Rate Approval Bill 2013
Bill No. 61 of 2013
[pmb] *Deputy Pearse Doherty*

Debt Collectors Bill 2013
Bill No. 64 of 2013
[pmb] *Deputy Niall Collins*

Regulation of Moneylenders Bill 2013
Bill No. 67 of 2013
[pmb] *Deputy Michael McGrath*

Central Bank and Financial Services Authority of Ireland (Amendment) (No. 2) Bill 2013
Bill No. 68 of 2013
[pmb] *Deputy Michael McGrath*

BILLS INITIATED IN SEANAD ÉIREANN DURING THE PERIOD 15TH MAY 2013 TO THE 20TH JUNE 2013

Public Service Management (Recruitment and Appointments) (Amendment) Bill 2013
Bill No. 58 of 2013

European Union (Accession of the Republic of Croatia) (Access to the Labour Market) Bill 2013
Bill No. 62 of 2013

Health (Amendment) Bill 2013
Bill No. 65 of 2013

PROGRESS OF BILL AND BILLS AMENDED DURING THE PERIOD 15TH MAY 2013 – 20TH JUNE 2013

[Seanad] – initiated in Seanad

Central Bank (Supervision and Enforcement) Bill 2011
Bill No. 43 of 2011
Passed by Dail Éireann

Construction Contracts Bill 2010 [Seanad] [pmb]
Bill No. 21 of 2010
Amended in Committee

Criminal Justice Bill 2013 changed from Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Bill 2013
Bill No. 7 of 2013
Passed by Dáil Éireann
Enacted

Criminal Law (Human Trafficking) (Amendment) Bill 2013 [Seanad]
Bill No. 39 of 2013
Report Amendments

Financial Emergency Measures in the Public Interest Bill 2013
Bill No. 57 of 2013
Committee Amendments
Enacted

Further Education and Training Bill 2013
Bill No. 5 of 2013
Report Amendments

Health (Pricing and Supply of Medical Goods) Bill 2012 [Seanad]
Bill No. 63 of 2012
Amendments made by the Dáil
Enacted

Health Services Executive (Governance) Bill 2012 [Seanad]
Bill No. 65 of 2012
Passed by Dáil Éireann

Houses of the Oireachtas (Inquiries, Privileges and Procedures) Bill 2013
Bill No. 53 of 2013
Committee Amendments

Housing (Amendment) Bill 2013
Bill No. 44 of 2013
Report Amendments

Industrial Development (Science Foundation Ireland) (Amendment) Bill 2012 [Seanad]
Bill No. 113 of 2012
Amended in Committee

Land and Conveyancing Law Reform Bill 2013
Bill No. 34 of 2013
Committee Amendments

Non-use of Motor Vehicles Bill 2013
Bill No. 37 of 2013
Committee Amendments
Enacted

Public Health (Tobacco) (Amendment) Bill 2013
Bill No. 3 of 2013
Committee Amendments
Enacted

Public Service Management (Recruitment and Appointments) (Amendment) Bill 2013 [Seanad]
Bill No. 58 of 2013
Committee Amendments

Residential Tenancies (Amendment) (No. 2) Bill 2012
Bill No. 69 of 2012
Committee Amendments

Social Welfare and Pensions (Miscellaneous Provisions) Bill 2013
Bill No. 54 of 2013
Committee Amendments

Taxi Regulation Bill 2012 [Seanad]
Bill No.107 of 2012
Passed by Seanad Éireann

Thirty-Second Amendment of the Constitution (Abolition of Seanad Éireann) Bill 2013
Bill No. 63 of 2013
Committee Amendments

For up to date information please check the following websites:

Bills & Legislation

http://www.oireachtas.ie/parliament/

Government Legislation Programme updated 16th April 2013

http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/

Rugby Discipline and the Courts: Going Through The Phases?

Tim O'Connor BL*

This new season marks a fundamental sea-change in rugby that has passed quietly unnoticed. Along with the retirement of the last people who played representative rugby as amateurs, last season saw a seventeen year old player playing for the Newport Gwent Dragons who would not even have been crawling when rugby turned professional[1]. From now on, rugby is a business, and to everyone now playing, will always have been been a business.

It is in this context that this paper seeks to address the disciplinary system in rugby as it is: a disciplinary system in an employment situation, albeit a sporting one, and seeks to examine what remedies are available to players in that context. It also aims to contrast the approach taken by the Courts in the two main jurisdictions under which European rugby operates, those of England and Wales and those of Ireland, to see what similarities and what differences in approach may become apparent.[2]

The disciplinary system in rugby

Discipline in rugby for offences committed on-pitch are dealt with under the aegis of various bodies, depending on what level a player has reached: sub-national union/provincial, national, cross-border (including European, Pro 12 and Super 15), international or even beyond (as at the Rugby World Cups, and the Lions). Although the various bodies each deal with matters under their jurisdiction, they all base their disciplinary systems around the same International Rugby Board Regulation, Regulation 17[3]. This, or the regulations explicitly based on it, applies at all levels, but for the purposes of this paper will only be looked at in the light of professional players[4].

At this level, it is the case that most games will have a Citing Commissioner appointed, who has the power to recommend that a player face a disciplinary hearing for offences against the game committed on the pitch[5]. For a professional player, these are offences committed in the workplace, and in the course of work. Indeed, so directly connected to the players employment as such are many such offences that a player's club may well be vicariously liable for the player's actions in committing such offences, as being within the scope of his employment as such[6]. Such a hearing, from which there is a right of appeal, has the right to impose suspensions from playing and fines on players.

It should be noted that at the professional level, these disciplinary hearings are not applied by the player's employer, the club, but by a third party or parties with whom that employer has contracted by way of the participation or tour agreements for the tournament or tour in question[7]. However, the player may have the benefit of that process (and the burden). In *Modahl v. British Athletic Federation (Modahl (No.2)*[8], part of a series of cases involving the runner Diane Modahl and the British Athletics Federation over Modahl's positive test for banned substances, it was held that an athlete who has contracted with a federation which is part of a wider system has a sufficient nexus with the disciplinary system to bring an action; a similar approach appears to have been taken in Ireland in *Fitzharris v. O'Keeffe*[9] albeit based very much on the individual facts. As a matter of practicality, it is unlikely that any club is going to stand in the way of a player seeking to overturn a suspension.

Which Jurisdiction?

Rugby, particularly in Europe, can be a jurisdictional nightmare. The Rabo Direct Pro 12 has teams from four

* Barrister-at-Law. The author is grateful for their kind assistance and comments to Rob Marrs of the Law Society of Scotland, Mr. Darryl Broderick, solicitor, and those others who have provided links to incidents discussed. An earlier draft of this paper was presented to the members of the Irish Bar Rugby Club and the North Western Circuit of the English and Welsh Bar in Manchester in May, 2012, and the author is grateful for feedback from his colleagues on this earlier draft. The views expressed are solely those of the author.

1 Hallam Amos of the Newport Gwent Dragons against London Wasps in the LV Cup on the 22nd of October, 2011; he scored a try in the 29-30 win for the Dragons. On the Dragons' bench for the same game was 16 year old Jack Dixon. http://www.bbc.co.uk/sport/0/rugby-union/15350223

2 For general sports law context, cf.

3 http://www.irb.com/mm/document/lawsregs/0/regulation17a4_874.pdf

4 For a background discussion in an English context, cf His Honour Judge Blackett *The Disciplinary Officer of the Rugby Football Union* 2009 ISLR 57.

5 For the purposes of this paper, disciplinary hearings, held after a player is sent off, will be treated as, and referred to as, citing hearings, as there is little difference in practice or the rules, and the term "citing hearing" to refer to both is, in any event, common rugby usage.

6 *Gravil v. Carroll & Redruth RFC.* [2008] EWCA Civ 689. The case involved liability for a jaw broken by a punch from the first named defendant, who was a professional player for the second named defendant. It was held throwing punches was foreseeably within what was to be expected as employment as a professional rugby player.

7 It should be noted that it is not uncommon for players to be suspended by their own club in advance of a disciplinary hearing: this is commonly taken into account as a mitigating factor should be a ban be imposed at a hearing. It remains the case, however, that this is independent of and parallel to the disciplinary process proper.

8 [2001]EWCA Civ 1447, *passim*.

9 [2008] IEHC 438.

unions and five jurisdictions[10]. The Heineken European Cup has teams from six countries, and six jurisdictions, but frequently plays in other jurisdictions[11]. The Amlin Challenge Cup includes teams from Spain and Romania[12]. The question of the law that applies is even less clear.

Under the Bye Laws of the IRB, disputes between the IRB and Unions, or intra-Union disputes, are subject to English law[13]. However, the IRB itself – a party to those Bye Laws – and the European Rugby Cup Limited are Irish-registered companies operating out of the same building on St. Stephen's Green in Dublin and subject to the requirements of Irish company law. The Lions and Celtic League (which operates the Pro 12) are also Irish-registered companies, with registered offices in Ballsbridge in Dublin. Contractual disputes involving the IRB have, in the past, ended up in front of the Irish Courts, not those of England and Wales[14]. The ERC Participation Agreement is under Irish law[15], and when Trevor Brennan sought to have his hearing before the ERC injuncted, it was the Irish High Court to which the application was made[16]. However, the secrecy surrounding so many participation agreements forming the basis of jurisdiction in competitions often makes it impossible to say which jurisdiction applies to which case. Indeed, the French courts have in the past set aside suspensions handed down by the ERC[17]. This paper will therefore proceed on the basis that, while individual participation agreements will dictate the relevant law, it would appear from the limited information available that England and Wales and Ireland are the dominant jurisdictions applicable to rugby, and ones whose case law is readily transferrable to the Common Law jurisdictions forming a majority of those playing professional rugby[18].

10 Namely: Ireland, Wales, Scotland and Italy: and Ireland, Northern Ireland, England and Wales, Scotland and Italy.

11 Particularly Spain – Biarritz Olympique Pay Basque playing large games in Donostia/San Sebastian. HEC games have also been played in Belgium and will again this coming year, and indeed outside the EU entirely in Geneva (Bourgoin v. Munster in 2007).

12 http://www.ercrugby.com/eng/amlinchallengecup/index.php

13 Specifically referred to as such in Bye Law 11 (b), rather than "the law of England and Wales": http://www.irb.com/mm/Document/AboutIRB/IRBConstitution/02/03/02/20/2030220_PDF.pdf. How this goes down west of the Severn is not recorded.

14 *Evans v. IRFB Services Ltd.* [2005] IEHC 107.

15 See 2., p4. http://www.ercrugby.com/images/content/DECISION_OF_APPEAL_COMMITTEE_APPEAL_OF__MARIUS_TINCU.pdf

16 http://news.bbc.co.uk/sport2/hi/rugby_union/6300155.stm. Cf. http://www.ercrugby.com/images/content/TrevBrennan1June2007.pdf

17 This is the case of Marius Tincu, whose suspension for eye-gouging was set aside by a French Court, despite no apparent jurisdictional link or power on the part of that Court to interfere with the decision made in Dublin by the appointees of an Irish-registered company. http://fr.usap.fr/articles-6/64-527-cnosf-propose-lnr-requalifier-marius-tincu/http://www.law.ed.ac.uk/courses/blogs/sportandthelaw/blogentry.aspx?blogentryref=8146. See also Caldow, *A Clash of Cultures*, JLSS 2010 55 (3) 50.

18 Although Scotland and South Africa are not strictly Common Law countries, they may be regarded as being within the wider Common Law family as opposed to codified Civil Law systems based on the Code Napoleonique. For a wider view, see Kelly, *Judicial Review of Sports Bodies' Decision: Comparable Common Law Perspectives* ISLR (2011) 71.

Attitude of the Court – Background

The fundamental position of the Courts, both in England and Wales, and in Ireland, is that the Courts intensely dislike interfering in matters of sporting discipline wherever possible. Arguably the most famous and most quoted statement of this is that of Denning MR in *Enderby Town Football Club v. The Football Association*[19] where he said , "justice can often be done in [tribunals] better by a good layman than a bad lawyer."[20]

The Courts have consistently held to this view in both jurisdictions. So, in *Gould v. McSweeney* [21], Smyth J. held:

> "Sports organisations do best to resolve differences under their own governing codes, rather than resort to courts of law. Issues of natural justice are important, but the substance of matters rather than their form are important in seeking to resolve internal disputes in such organisations and recourse to the courts should be a last resort, and that only in the rarest of cases."[22]

Judicial Review – An Option?

Even though the various sporting governing bodies are in many cases acting as if the sole official bodies in their sport – indeed, are treated at EU law as being emanations of the State – they are not public bodies, but are held to derive their jurisdiction from contract. As such, their decisions are not amenable to judicial review. For example, in *R v. Jockey Club ex p Aga Khan* [23], the Court of Appeal held that decisions of the Jockey Club were made pursuant to a contract with the Jockey Club and were not amenable to judicial review[24].

This stance was challenged in *Mullins v. Jockey Club*[25] where Willie Mullins, the trainer, sought to contest the disqualification of Be My Royal after winning the 2002 Cheltenham Gold Cup. Mullins argued argued inter alia that the decision in *Aga Khan* was incompatible with the European Convention on Human Rights and should be revisited. Burton J. dismissed Mullins' arguments, holding:

> "... if I assume that I am free to reconsider the amenability of the Appeal Board to judicial review, I should reach the same decision, for the reasons given so clearly by all three members of the Court of Appeal. Review of the disciplinary decisions of the Jockey Club and its organs is a matter for private law, not public law."[26]

The Irish courts have taken a similar view. In *Murphy v. Turf Club*[27], Barr J. refused judicial review on the basis that it would not lie where the jurisdiction involved derived from contract or voluntary association. Most recently, in *Coughlan v. FAI*[28],

19 [1971] Ch 591

20 Ibid at

21 [2007] IEHC 5, approved in *Carroll v. FAI,* infra, n. 23.

22 Ibid at

23 [1993] 1 WLR 1990.

24 Ibid at

25 [2005] EWHC 2197.

26 Ibid at

27 [1989] IR 171.

28 Unreported, Hedigan J., 27th January, 2010.

the owner of Cork City Football Club sought to challenge his suspension as a person fit to run a football club by way of judicial review. He was unsuccessful, with the court making it clear that the contractual or voluntary nature of the basis for jurisdiction of sporting bodies was fatal to judicial review, and citing and approving *Murphy v. Turf Club* to this effect.

It is therefore well established now, beyond review, that judicial review will not lie in respect a sporting decision[29]. However, there is another angle, that may avail, and that is the supervisory jurisdiction of the Courts.

Supervisory Jurisdiction

As with so much else, the supervisory jurisdiction ultimately orginates in the fertile mind of the cricket-loving[30] Lord Denning MR. In *Nagle v. Fielden*[31], where, in a case about the rejection by the Jockey Club of an application for a trainer's licence, he said:

> "We live in days when many trading or professional associations operated 'closed shops'. No person can work at his trade or profession except by their permission. They can deprive him of his livelihood. When a man is wrongly rejected or ousted by one of these associations, has he no remedy? I think he may well have, even though he can show no contract. The courts have power to grant him a declaration that his rejection and ouster was invalid and an injunction requiring the association to rectify their error. He may not be able to get damages unless he can show a contract or a tort. But he may get a declaration and injunction."[32]

This was approved and cited in various cases, including in *Stevanage Borough Football Club Ltd. v. Football League*[33] and by Latham LJ in *Modahl (No. 2)*[34], when he stated:

> "However this particular debate has been resolved, certainly in this court, in *Nagle v. Fielden* …, in which the court unanimously held that, where a man's right to work was in issue, a decision of a domestic body which affected that right could be the subject of a claim for a declaration and an injunction even where no contractual relationship could be established."[35]

In the *Modahl* cases, Lord Woolf had already held in *Modahl (No. 1)*[36] that:

> "Mr. Pollock is wrong in suggesting that the approach of the courts in public law on applications for judicial review has no relevance in domestic disciplinary proceedings of this sort. The question of whether a complaint about the conduct of a disciplinary committee gives rise to a remedy in public law or private law is often difficult to determine. However, the complaint in both cases would be based on an allegation of unfairness. While in some situations public and private law principles can differ, I can see no reason why there should be any difference as to what constitutes unfairness or why the standard of fairness required by an implied term should differ from that required of the same tribunal under public law."

In *Bradley v. The Jockey Club*[37], the plaintiff was a former jockey who, following a trial about the alleged importation of cocaine, was alleged to have been passing insider information to tipsters in return for money while still riding. He was given a full hearing, found guilty, and suspended from all racing activities for eight years, reduced to five on appeal. He then challenged this, seeking judicial review. Richards J. noted at paragraph 34, significantly, that:

> "It is nevertheless common ground that, even in the absence of any contractual relationship, the decision of the Appeal Board is subject to the supervisory jurisdiction of the court in accordance with the principles stated in *Nagle v. Feilden* [1966] 2 QB 633. For all the doubts expressed about the jurisprudential basis of *Nagle v. Feilden*, it has become an accepted part of the law and has perhaps assumed an even greater importance since the courts came to adopt a restrictive approach towards the application of judicial review to the decisions of sporting bodies."[38]

He examined the authorities, including those outlined above, and set out the ambit of the supervisory jurisdiction, at paragraph 37:

> "That brings me to the nature of the court's supervisory jurisdiction over such a decision. The most important point, as it seems to me, is that it is *supervisory*. The function of the court is not to take the primary decision but to ensure that the primary decision-maker has operated within lawful limits. It is a review function, very similar to that of the court on judicial review. Indeed, given the difficulties that sometimes arise in drawing the precise boundary between the two*, I would consider it surprising and unsatisfactory if a private law claim in relation to the decision of a domestic body required the court to adopt a materially different approach from a judicial review claim in relation to the decision of a public body. In each case the essential concern should be with the lawfulness of the decision taken: whether the procedure was fair, whether there was any error of law, whether any exercise of judgment or discretion fell within the limits open to the decision-maker, and so forth.* [Emphasis added]

In other words, the supervisory jurisdiction is, in many regards, on all fours with a form of judicial review available

29 Similarly, attempts at judicial review in other rugby-playing countries have been dismissed: cf *Loe v. NZRFU* (Unreported, 1993).

30 Cf. the famous opening of *Miller v. Jackson* [1977] QB 966: "In summer, village cricket is the delight of everyone…"

31 [1966] 2 QB 633., 646.

32 Ibid

33 [1997] 9 Admin LR 109 at page 115.

34 [2002] I WLR 1192.

35 Ibid at

36 Unreported, AC, Lord Woolf MR., 28th July, 1997.

37 [2004] EWHC 2164.

38 Ibid

for private disciplinary tribunals where judicial review will not lie[39]. In terms of the ambit of the two, it is very hard to see the practical difference, given the approach taken by Richards J.; and it should be noted that this paragraph was expressly approved as a correct statement of the law by Lord Phillips MR on appeal, as was the judgement as a whole.[40] Indeed, Buxton LJ preferred Richards J.'s view as a statement of the law to *Nagle v. Fielden*.[41].

It should be noted, however, that in this context, there is a strong element of what might be termed curial deference. Richards J. made it clear that:

> "It is *not* the role of the Court to stand in the shoes of the primary decision-maker, strike the balance for itself and determine on that basis what it considers the right penalty should be… The importance of the court limiting itself to a supervisory role of the kind I have described is reinforced in the present case by the fact that the Appeal Board includes members who are knowledgeable about the racing industry and are better placed than the Court to decide on the importance of the Rules in question and the precise weight to be attached to breaches of those Rules."[42]

In this vein, in *Flaherty v. National Greyhound Racing Club*[43], Evans-Lombe J. stated that it was "with hesitation" that he intervened in a case involving greyhound doping[44]. Scott-Baker LJ on appeal stressed the importance of giving sporting bodies as much latitude as possible, given their expert knowledge[45]. He cited Mance LJ in *Modahl (No. 1)*, citing in turn Sir Robert Megarry VC in *McInnes v. Onslow Fane*[46] to the effect that, while it is the function of the courts to control illegality and make sure a body does not act *ultra vires,* it is not in the interest of sport or anybody that the courts should double-guess regulating bodies, who cannot be expected to act in every detail as if a court.

This approach was approved and followed by Stadlen J. in *McKeown v. British Horse Racing Authority*[47]. It is fair to say this particularly emphasised that errors of fact will only be subject to review where they reach the standard of unreasonableness, namely, that no reasonable decision-maker could have made that error of fact, but that the regard to the special expertise should not amount to a servile obeisance to the sporting tribunal, especially where it involves a person's livelihood. This last is of clear importance in the context of professional sport in general, and of rugby in particular.

It should be noted that while the Courts show more sympathy to individuals who are being capriciously punished, there is less sympathy apparent for clubs, or indeed individuals, who are not getting a benefit extended to others. In *Park Promotion t/a Pontypool RFC v. WRU*[48], Pontypool were unsuccessful in challenging the change in the proposed smaller new top division of Welsh club rugby on the basis that it had been extended from the original proposed ten teams to twelve – with Pontypool the unlucky thirteenth team on the merit table. Jack J., having analysed the law, refused the relief sought on the basis that the WRU was entitled to make the league larger, and that it was not unfair or capricious to have a cut-off point, and deny entry to those, such as Pontypool, below that. Jack J., while implicitly rejecting the WRU's submission that there was no requirement on a governing body to act fairly as between members, noted the nature of the balancing act in the supervisory jurisdiction:

> "It could, I emphasise 'could', be grossly unfair to waive a requirement in relation to one club but not in relation to another. So it is necessary to imply a term to the broad effect that there shall be fairness as between clubs in this respect…It was said that the court's intervention was limited to checking unreasonable or capricious behaviour and upholding procedural fairness in the context of disciplinary matters. In my view this is an area where the court's approach is particularly sensitive to the factual situation before it, and I suspect that there will be little difference in most cases between the position as I have set it out and that contended for by the WRU."[49]

The supervisory jurisdiction should therefore be viewed as one which is analogous to judicial review, but with a very strong element of deference to the familiarity of the sporting bodies with their sport, one stronger than the normal curial deference to expert tribunals. It will largely be restrained to cases where the body has acted *ultra vires*; where there is procedural injustice or a want of natural justice; or where there is irrationality, or an element of arbitrariness or caprice; and it is very much on the individual facts of the case.

The Supervisory Jurisdiction and Irish Courts

The issue of the supervisory jurisdiction has been surprisingly uncanvassed in Irish case law. The Courts have intervened to ensure fair procedure, but there appears to have been no systematic analysis of the basis on which this has been

39 Cf. Totman and O'Grady, *Challenging a sanctioning decision in the Courts* WSLR 2012 (4) 8. Totman and O'Grady criticise the fact that the supervisory jurisdiction is not a public remedy, but do not show any reason why the supervisory jurisdiction differs in any respect and do not address the comments of Richards J. as to the ambit. The comments of Latham J. at 109-110 in *Modahl (No. 2)* (note 5. above) in respect of Lord Denning's distinctions between public and private law in this sphere are an interesting counterpoint. *Cf.* the contrasting views of Morgan in *A Mare's Nest? The Jockey Club and Judicial Review of Sporting Bodies* 2012 LIM 102.

40 [2005] EWCA Civ 1056 at 17, 18.

41 Ibid, at 29-31

42 Ibid

43 [2004] EWHC 2838.

44 Significantly, he did at approve a passage from a textbook to the effect that "*[i]t is no longer appropriate to base judicial reluctance to intervene on anything other than the margin of appreciation or latitude that should be afforded to a specialist body making a decision within the boundaries of the regulatory function entrusted to it"* (ibid, at 106).

45 [2005] EWCA Civ. 1117.

46 [1978] 1 WLR 152 at 1535: "I think that the courts must be slow to allow an implied obligation to be fair to be used as a means of bringing before the court for review honest decisions of bodies exercising jurisdiction over sporting and other activities which those bodies are far better fitted to judge than the courts. This is so even where those bodies are concerned with the means of livelihood of those who take part in those activities".

47 2010 EWHC 508.

48 [2012] EWHC 1919

49 Ibid at 45.

done. In *Clancy v. IRFU*[50], Morris J. granted an injunction compelling the IRFU to consider an appeal against a ruling that the Plaintiff could not play for Blackrock RFC in a league fixture, but there was no analysis of the English case law on the subject. The power of the Courts to intervene to ensure fair procedure seems to have been taken as implicit, but the ambit of that power remained nebulous.

In *Barry v. Rogers & Allen & Ors*[51], Judge McMahon (as he then was), dealt with an application for an injunction against GAA disciplinary proceedings. He recognized the right and, indeed, duty of the Courts to intervene, albeit in limited cases, in an analysis whose elegant statement of the conflicting interests is worth quoting at length.

> "There are occasions, however, where the law will intervene to ensure that justice is done, and that minimum standards of fair procedures are observed. If the decision, for example, would have serious consequences for the player or member of the association, the courts are prepared to intervene to prevent an injustice, and to insist that an appropriate standard of fair procedures is observed. (Cox and Schuster, *op.cit*. pp.57/58) This statement of the law raises two questions: (i) how serious must the consequences be for the court to intervene? (ii) If the court decides to intervene what level or standard of fair procedures will it demand of the sporting body?
>
> Clearly, if a player's livelihood is at stake, or if he/she, is deprived of the opportunity of competing for a high honour which opportunity may not present itself again or will only be available at some distant date, the court might well be moved to entertain a complaint. Further, it should not be thought that the court's vigilance will be activated only when the member's right to earn a livelihood or other economic interest is threatened. "Significant" or "serious", should not be defined only in terms of economic values. … It would be regrettable indeed, if the courts confined its concern only to those situations where economic interests were threatened…
>
> Similarly, when the courts insist that a level of fair procedures is warranted the standard it will insist on is not defined with any great precision in the jurisprudence. McCutcheon states that "where serious disciplinary matters are involved the fundamental dictates of justice demands scrupulous adherence to the highest standard of procedural and substantive fairness" (in Greenfield and Osborn, *Law and Sport in Contemporary Society*, Frank Cass Publishers, 2000, at pp.1 16-117 as quoted in Cox and Schuster, op.cit. at 58). This may well be the required standard where, for example, an Olympic champion is being stripped of his gold medal for alleged doping offences. In other cases, the standard may or may not be so high. "There is no set level of fair procedures to which all athletes are entitled. Rather it will vary from case to case depending on the impact of the impugned decision on the person affected thereby" (see Cox and Schuster op cit. at 58 citing *Flanagan v. UCD* [1988] I.R. 724 and Griffith Jones, *Law and the Business of Sport*, Butterworths, London, 1997).
>
> The truth is that the law will demand a level of fair procedures which is sufficient in all the circumstances to ensure justice for the player or member affected by decision. The more serious the consequences the higher the standard that will be required. One cannot be more specific than that from the case law."[52]

However, he then qualified this by stressing:

> "As a final word in this matter I should say that one must expect that laymen applying the disciplinary rules will occasionally do so in a somewhat robust manner. Provided those administering the rules, however, do so in a bona fide manner, giving each side a fair opportunity of participating, the onus on members who wish to challenge the findings and decisions is a heavy one.
>
> One must be careful that the heavy hand of the law does not weaken the operation of such voluntary bodies or undermine the considerable benefits they bring to society."[53]

However, his comments about professional sports should be balanced against this, given the nature of professional rugby:

> "Neither are the players paid to play, which means, in turn, that decisions by the disciplinary bodies within the G.A.A. can rarely threaten directly the livelihoods or the income of the players. In this respect the G.A.A. differs from sporting associations where members are paid to play. *In these latter cases, because of the economic consequences of an adverse determination for the player, greater safeguards may be warranted both in the definition of the safeguards and in the application and administration of the rules."* [Emphasis added][54]

In *Moloney v. Bolger*[55], the Plaintiffs sought to prevent the Respondents from relegating Tullamore RFC in the Leinster League. The injunction sought was refused on the balance of convenience; again, the power seems to have been implicitly assumed but unspecified.

In *JRM Sports t/a Limerick Football Club v. FAI*[56], Clarke J. accepted for the sake of argument that the fair procedure requirements (with, it would seem the implicit supervisory jurisdiction in that regard) might be read into a contract between a club and a governing body, but this would again seem to have been *de bene esse* and Clarke J. made the Courts' reluctance to intervene in sporting matters plain. The cases on the supervisory jurisdiction were mentioned, but the approach, while similar, would seem to introduce a further

50 [1995] 1 ILRM 195.
51 [2005] 4 JIC 1301.
52 Ibid, section III.
53 Ibid, section VI.
54 Ibid, section IV.
55 [2009] 9 JIC 0601
56 [2007] IEHC 67.

hurdle, namely that the interests of the wider sport must be weighed as well as the individual case:

> "A significant weight has to be attached in any balancing which the Court has to engage in under the balance of convenience to allowing major sporting bodies to get on with the job of administering the sport with whose governance they are charged. That is not to say that such bodies are above the law. Clearly if they have been in breach of their legal obligations then the Court must intervene. However in considering whether it is appropriate to interfere, on a temporary basis, with what would otherwise be the proper administration of the sport concerned then it seems to me that the Court has to regard any such significant interference as a matter of importance. This will be so particularly where the interference will have more than a minimal short term effect. If every time a party was able to pass the relatively low threshold of suggesting that it had a legal case against a sporting body and was able to interfere with the way in which that sporting body carried out the management of the sport on that basis it is likely that the administration of major sports would grind to a halt. *Therefore, it seems to me, that the Court has to place a significant weight in the balance of convenience on factors such as the overall effect of the giving of the order sought on the proper administration of the sport concerned.*" [Emphasis added][57]

In *Conway v. Irish Tug of War Association & Ors.*[58] Laffoy J. felt that *Modahl (No.2)* was based on the facts of that case, but it does not appear from the judgment that the wider cases on the supervisory jurisdiction were argued.

It would appear that, if anything, the ambit of the supervisory jurisdiction as seen by the Irish Courts is narrower than the view taken by the Courts of England and Wales (which is, arguably, to the benefit of sporting bodies seeking to have their decisions left undisturbed). It should be noted in passing that this may be in part due to the differing requirements on those Courts: the Irish European Convention on Human Rights Act 2003 imposes a narrower duty in respect of such Convention rights as may be availed of than does the equivalent Human Rights Act 1998 in the UK. Lest it be thought that this is a merely academic point, there have been attempts in rugby citing decisions to rely on the provisions of the European Convention on Human Rights.[59]

Supervisory Jurisdiction and Judicial Review – Similarities

Given this close analogy, it is worth examining what precisely the parallel with judicial review means in practice. There are, after all, different flavours of judicial review, and different reliefs that can be sought. Typically, these may be divided conveniently into positive reliefs – orders that something should be done, such as *mandamus* – and negative reliefs – orders quashing something done, like c*ertiorari*, or restraining something from being done, such as prohibition. So, when a parallel is drawn between the supervisory jurisdiction and judicial review, with which strand does it have more in common as a matter of practicality and practice?

On reviewing the cases, it is notable that what may be termed successful cases on the positive side are comparatively rare. Those cases that are successful are more on the negative side: quashing steps taken. This is unsurprising; if Courts are reluctant to intervene in stopping a sporting body from doing something, they are all the less likely to intervene to direct a sporting body to take positive actions in how a sport is to be run. Therefore, it may be stated that an applicant to the Courts under the supervisory jurisdiction is more likely to succeed if he or she is seeking to restrain an unfair action, instead of seeking to have a benefit refused by the sporting body granted by the Court.

It should also be noted that the reliefs in judicial review, and, it seems to follow, in the supervisory jurisdiction, are discretionary; for example, they will not be granted if the unfairness does not have any real effect or create any real injustice, or if the conduct of the person seeking the reliefs is such as to make him or her the author of their misfortunes. This reluctance to interfere where it is felt there has been no injustice done in a sporting sense can be most clearly seen in the *Pontypool* case, where the fact that Pontypool were below the teams who got the lucky break on the league table was a considerable factor in the refusal of any relief. Therefore, it would seem that a successful candidate for relief should, ideally, be one seeking to have quashed a capricious or arbitrary decision that denies him or her a basic entitlement which removes or restricts what they have earned on the pitch or course. This, of course, is exactly what happens in the context of bans or suspensions in disciplinary hearings, and it is to this that we now turn.

The Supervisory Jurisdiction and Rugby

The requirements of the Citing Process are such that it is fair to say elements of natural justice, or procedural unfairness *per se* are rarely likely to arise. It is also fair to say that the nature of the citing system, involving as it does on-pitch incidents, is rarely likely to lead to questions arising as to whether there is jurisdiction to hear the case: indeed, in the one case the author is aware of where such a challenge was raised, the *Justice4* case arising out of armbands worn by the Springbok team in the third Lions test in 2009 protesting against the suspension of Bakkies Botha, the hearing accepted arguments as to their limited jurisdiction, thereby sparing the Springbok leadership lengthy suspensions.[60]

However, it is the element of arbitrariness and caprice which might yet give rugby pause.

Inconsistency and Rugby Discipline.

Few things are more finely calculated to drive rugby

57 Ibid.

58 [2011] IEHC 245.

59 As in what is known as the "Justice4" case, relating to the Springboks and their management in the third Lions test in 2009, where they sought to rely on the provisions of Article 11, relating to freedom of expression, in relation to wearing armbands on the pitch implicitly criticizing a disciplinary decision. See n.54 infra.

60 IRB decision of the 24th of August, 2009 at para. 84.

supporters and players insane than the quirks of the citing system. In particular, it is the issue of inconsistency that attracts most ire.

The reason is that there is the feel of palpable arbitrariness, both in what actions are cited at all, and what suspensions are handed down. The matters that are supposed to be taken into account are listed in the Regulation; these include past record, conduct, and various other matters. The problem is, these have not been applied consistently.

To take one example, the issue of experience. In two decisions, on the same offence, some two months apart, the issue of experience was raised in the cases of Alan Quinlan and Schalk Burger. For Quinlan, that he was "old enough to know better" was an aggravating circumstance[61]: for Burger, having fifty caps was treated as being a mitigating circumstance[62]. Quinlan got a twelve week suspension, and Burger, for what was universally judged a much more serious version of the same offence, eight.

Similarly, with standing in the game. For Paul O'Connell, at a red card hearing, it was treated as being an aggravating factor that as a well-known player he was in this situation[63]: for Dylan Hartley, that he was well-known in the game was treated as being a mitigating factor[64]. Further, while O'Connell was refused full mitigation for having been suspended in the past and having contested the charge[65], Hartley was given mitigation reducing his suspension below the entry-level (which Regulation 17 points out is only to happen in exceptional circumstances) despite a six-month suspension in the past for gouging[66]. It would clearly be open to point out that this raises questions of inconsistency such as to be arbitrary.

On specific offences, while tip-tackles have been punished with relentless (and refreshingly consistent) efficiency by the ERC, the same offence by Stephen Ferris in the recent 6 Nations was dismissed because of a factually inaccurate claim that the Welsh player in question had a foot on the ground and a reference to a requirement that the tackled player be past horizontal which had been removed from the law of rugby in question some 15 months before.

It should be noted, further, that it is even harder to decipher any pattern of consistency in the Rabo Direct Pro12, as it does not publish its disciplinary decisions. Without these judgements, it is effectively impossible to understand on what basis any unusual decisions are made. It is, in effect, a black box decision-making process, of the type condemned by the Irish Supreme Court in *Atanasov*, and affecting the livelihoods of players. The perception of the system being arbitrary is now regarded as being a settled matter amongst rugby fans, to the extent that the manner in which Brendan Venter's coming back into a citing hearing eating a biscuit was taken as evidence of a poor attitude at hearing[67] has given rise to a trope on any seemingly-odd sentence that the player in question must have brought either the wrong, or very good, biscuits.[68]

It is this settled perception, it is suggested, that may lead to a line of attack by aggrieved players. While it has been noted, fairly, by those involved in rugby discipline that the requirement for consistency is as to process, rather than outcome[69], it is submitted that the requirement for consistency of process is one that is not met where what is an aggravating factor in one case is a mitigating factor in another. This is an inconsistency in the process followed, and it is this which renders it open to attack.

The Ambush Injunction

For a player, all that matters is being on the pitch for a big game. For a team, all that matters is getting its best players on the pitch in time for a big game. If a disciplinary hearing prevents that, a player will seek to minimize the time off-pitch. A case in point would be *Jones v. WRU* where Mark Jones, facing suspension for his actions while playing for Ebbw Vale against Swansea, injuncted the WRU and obtained an order preventing the suspension from being enforced[70]. The case was ultimately lost on appeal; but Jones got to play, and Ebbw got a star player on the pitch.

This approach has been particularly problematical for the Gaelic Athletic Association in Ireland. The proliferation of ambush injunctions restraining hearings, taken on the eve of a major game effectively to delay a suspension from coming into operation until after the game, had reached such a point that it was perceived to be a root cause of the creation of the Dispute Resolution Authority[71]. *Jones* shows how it has been successful in England and Wales: the injunction taken out by Cork Constitution against the playing of the 2010 Munster Senior Cup shows how it may be used in rugby[72].

61 http://origin-data.ercrugby.com/Quinlan_Decision_of_Discipline_Committee_-_13_May_2009_-_00998935.PDF

62 *Schalk Burger* Decision of Alan Hudson, 31/7/2009 at 4.5.a. – "Burger is clearly a fine rugby player with fifty test caps and many national and international accolades."

63 http://origin-data.ercrugby.com/ERC_Decision_(Paul_OConnell_-_16_Dec).pdf

64 http://press.rbs6nations.com/tools/documents/DylanHartleyDecision01734770-%5B12372%5D.pdf at page 13.

65 http://origin-data.ercrugby.com/OConnell_Appeal_decision.pdf

66 Supra, n. 58 at page 13.

67 RFU Disciplinary hearing, *Brendan Venter* of the 18th of May, 2010 at 31.

68 The extent to which this was instantly and relentlessly mocked was noted in the appeal decision: *Brendan Venter v. RFU* Appeal decision of the 2nd of June, 2010, at 24.

69 Cf. His Honour Judge Blackett, "Consistency relates to process not numbers": *Judge Jeff Blackett's Obolensky lecture in full* 2010 ISLR 38 at 42. Contrast, however, the learned judge's examples of rational sentencing differences with the examples given above where there were differing sentences even without the different bases given as examples.

70 http://www.heraldscotland.com/sport/spl/aberdeen/court-backs-rugby-player-over-ban-1.410513. Cf. Blackshaw, *The Rules of Natural Justice: What are They and Why are They Important in Sports Disciplinary Cases?* ISLJ 2009 1/2 134-5.

71 Cf. Anderson, *Keeping sports out of the Courts: The Use of Alternative Dispute Resolution in Irish Sport* (2010) Arbitration 647; Procter *Dispute Resolution in Sport; The Role of Sport Resolution UK* ISLR 2010 3.

72 http://www.irishexaminer.com/archives/2010/0320/sport/cork-con-court-injunction-scuppers-munster-senior-cup-decider-plans-115050.html It should be noted, however, that *Coughlan* was *not* cited to the Circuit Court at the ex parte application, nor were the other clubs such as UCC or Young Munster affected joined as notice parties, (see discussion of this by Jack J. in *Pontypool v. WRU,* supra, n.47 at 56). Despite these difficulties (of which, of course, the Court was unaware, the matter not being canvassed ex parte), the desired injunction was obtained ex parte. It is submitted that this perfectly illustrates the dangers or opportunities (depending on one's perspective) of the ambush injunction.

In the context of discipline, the perfect situation, made for an ambush injunction, is the back-to-back pool games of the HEC. A crucial player, cited in the first game of a back-to-back, is formally cited at the end of the citing window (the Tuesday after a Sunday game). On the basis of the arbitrary and inconsistent manner in which matters which must be considered for sentence are treated, he alleges that it is impossible for him either to know how to deal with the charge, or to be able to address it properly in mitigation, or that it holds out the prospect of a reasonably fair and non-capricious hearing. It is a fair question to be tried; the balance of convenience is in favour of the player being allowed to play, as he can always be suspended afterwards; and club gives the undertaking as to damages; so the player plays, and his team wins.

It has not reached this stage yet; but with the supervisory jurisdiction, and the increasing push for results, it is surely just a question not of if, but when, rugby marches down the path already beaten by an amateur game. The recent changes in Regulation 17 which have noticeably required universality and which remove many former discretionary powers which where the source of inconsistent sentences would appear to reflect an awareness of the danger; but, in a classic dilemma for any law-maker, such changes will just make capricious departures from these tighter rules all the more obvious, all the more open to challenge as being arbitrary or capricious and may, ironically, bring closer the date of the first application for an ambush injunction. If and when it does, it will be a fascinating moment in the development of the interaction of the law and sporting disputes. ■

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Democratization and the Rule of Law

Brendan Gogarty BL*

Introduction

The strengthening of democratic institutions is an important matter for rule of law programmes. However, in the absence of a legitimate electoral process, the credibility of any democratic framework would be negligible. The end of the Cold War brought about an increasing impetus to the demands for democratization, be it in the former Soviet Bloc and further beyond. In this regard, elections are widely recognised as essential to the installation, re-installation and consolidation of democracy. The development of national legal systems conducive to rule of law principles is an important consequence of this process.

I have been a member of different election observations missions since 1992. My first assignment was with the President Carter Centre as a member of an election mission to Guyana. My most recent mission is with the Organisation for the Security and Co-operation in Europe (O.S.C.E) for the June parliamentary elections in Albania. These different international bodies seek to assist the development of functioning democratic institutions in countries with difficult histories of conflict, not least in the Balkans. In light of my experiences, it struck me that it may be of interest to consider the developing methodology of election observation, in particular that followed by the E.U. and the O.S.C.E. In essence, the objective is to support the integrity of elections and to combat fraud. Otherwise there could be chaotic polling, stolen seats and even widespread violence.

Role of E.U. and O.S.C.E

This year is the 20th anniversary of the first E.U. election observation activity, to the Russian Federation Duma elections in 1993. Host countries seeking to enhance their democratic frameworks, invite missions on the basis of their agreement to be bound by various conventions such as the International Convention on Civil and Political Rights. The principles governing the conduct of E.U. missions is set out in the Communication on Election Assistance and Observation as adopted by the European Commission in April 2000. Election mission activity undertaken by the O.S.C.E. is done through its human rights institution O.D.I.H.R. (Office for Democratic Institutions and Human Rights), which was founded in 1991. The function of O.D.I.H.R. is to assist governments with respect to meeting their commitments in the fields of human rights and democracy. Part of this task concerns elections missions and rule of law programmes.

* The author has been a member of election missions with the U.N., the E.U., the O.S.C.E. and the President Carter Centre. He underwent election training in Stadtschlaining International University for Conflict Studies in Austria.

N.E.E.D.S. Project and Election Missions

Following upon the invitation of a host country, a Needs Assessment Mission is conducted which leads to recommendations, in particular the establishment or otherwise of an Election Observation Mission. The first Network for Enhanced Electoral and Democratic Support (N.E.E.D.S.) project was adopted by the E.U. in 2001, with revisions on an ongoing basis. This was further enhanced by the Declaration of Principles for International Election Observation in 2005. The Needs Assessment Mission sets about considering the component elements of the electoral cycle in the host country, as measured against internationally accepted concepts of fundamental freedoms and political rights, enshrined in the Universal Declaration of Human Rights and other Declarations and Conventions.

Elements of the Election Cycle

Unsurprising to lawyers, the first aspect to consider is the Legal Framework and Electoral System of the host country. The analysis of the Legal Framework may be approached by posing certain key questions. Some such questions are:

- How universally accepted standards of elections apply through legal frameworks and accord with international standards for democratic elections.
- Requirements of free access to the electoral process for candidates, voters and the media.
- How the integrity of the electoral process is guaranteed by the voting procedures, counting and tabulation of results.
- The adequacy or otherwise of the legal framework to respond to complaints and violations
- Matters of campaign finance, administration and controls.

Whilst the assessment of the legal framework may take place with reference to objective international criteria, that of the national electoral system has a more subjective element as the system probably emerged from the particular culture, history and conflicts (past and present) of the host country. Nonetheless, the main principles and criteria of the national electoral system design must be scrutinised, along with the credibility/acceptance of boundary delimitation processes.

Apart from the forgoing elements of the election cycle, a N.E.E.D.S. project will assess the election administration, candidate registration and voter registration systems, election campaign environment and election financing, media issues (for example, possible polarization of national and private broadcasters, local and cable T.V. stations, newspapers, magazines, etc.) and where relevant, new election technologies.

New Election Technologies

In Ireland we have had an unsatisfactory experience with new election technologies, in the form of electronic voting. With respect to the Albanian parliamentary elections, two new election technologies have been introduced, on a pilot basis. An Electronic Voter Verification System (E.V.S.) has been introduced to the Tirana District, and an Electronic Counting System (E.C.S.) in the Fier District.

(A) Electronic Voter Verification System (E.V.S.)
The E.V.S. is intended to verify and automatically register voters on election day. Devices have been installed in voting centres, to read a voter's identification card or passport. Should the E.V.S. not work, regular voter identification can be authorised as in the previous manner. Potential difficulties have been identified with this system concerning its capacity to read deteriorated ID's or to prevent attempts of multiple voting at different voting centres.

(B) Electronic Counting System (E.C.S.)
This system uses ballot scanners to facilitate the counting of ballot papers. In the event of difficulties, manual counting and tabulation comes into play (the reliable "peann luaidhe" system beloved of tallymen) A verification system is in place which provides that after counting the first two ballot boxes for each ballot scanner, manual counts are undertaken to verify the accuracy of the E.C.S. Should differences between the electronic and manual count exceed 0.5%, manual counting takes place.

The Election Observation Mission (E.O.M.)

Once an E.O.M. has been authorised, it is necessary to assemble a team which is sub-divided into three categories:

(a) Core-Team Members,
(b) Long Term Observers and
(c) Short Term Observers.

In addition to international observers, there is also citizen election observation, as well as observation by authorised representatives of political parties and candidates. The core-team is the "power house" of any E.O.M and will include a legal/human rights analyst, an election analyst, a political analyst/country expert, a media analyst, a statistician, etc. This team, together with the Long Term Observer element, will be deployed well in advance of the polling date. The Short-Term Observer element is later deployed throughout the country and closer to the polling date.

Short Term Observers (S.T.O.'s)

Short Term Observation Missions are, in my experience quite fascinating. I have been an S.T.O. in regions as far apart as the rainforests of Latin America to frontiers of Serbia, Kosovo and Montenegro. Although it is a privilege, it is not for the faint-hearted. Observers may be deployed to countries where tensions are running high. Within those countries, they may be deployed to very remote regions, where conditions are "challenging". Nonetheless, these regions are my preference as they afford greater engagement with local communities.

The role of an S.T.O. may include encountering community leaders, assessing election conditions, being alert to grievances, inspecting polling stations, meeting election officials and observing the vote count and tabulation of results. As to the latter, the S.T.O. will have undergone training in the electoral laws of the host country, as well as its voting, counting and tabulation procedures. An S.T.O. has to be careful to operate in an unobtrusive and impartial manner. For example, an S.T.O. should not attempt to arbitrate upon grievances that may arise at polling stations. All occurrences are included in the S.T.O.'s final report as to whether or not the election in the observer district was conducted in a free and fair fashion.

My description of an Observer's function indicates that it is entirely passive. Yet, on one important level, this is not quite the case. The visible presence of an Observer is an encouragement to people to vote, when otherwise they may have been fearful of so doing. That presence does provide a needed degree of reassurance, particularly in circumstances of voter intimidation. In my experience, the most vulnerable in this regard have been Amer-Indian peoples, under the pressure of political and commercial interests.

Conclusion

The fostering of democratic governance, by its nature makes a positive contribution to rule of law initiatives. The Helsinki Document of 1992 mandates the O.S.C.E. Office for Democratic Institutions and Human Rights (O.D.I.H.R.) to:

> "ensure full respect for human rights and fundamental freedoms, to abide by the rule of law, to promote principles of democracy and ... to build, strengthen and protect democratic institutions, as well as promote tolerance throughout society."

I think it is reasonable to conclude that rule of law objectives regarding access to justice, judicial independence and a proper criminal Justice system cannot be achieved in the absence of properly functioning democratic institutions, which institutions are hopefully fostered by the activities of international observations missions. ■

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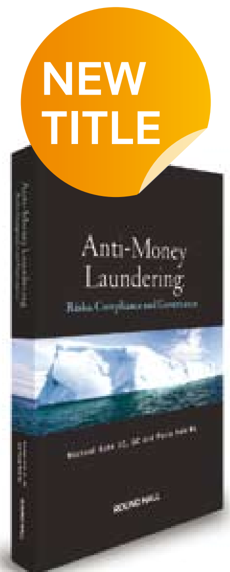

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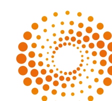

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