PROFESSIONAL NEGLIGENCE AND LIABILITY UPDATE

DUBLIN CONFERENCE

8th June 2023

PROFESSIONAL NEGLIGENCE LAWYERS ASSOCIATION & HOLMES O'MALLEY SEXTON

DUBLIN CONFERENCE

Thursday 8th June 2023

0900-0930 Registration and refreshments

0930-1000 *Cases struck out for Delay – the Cave Court judgment*
Caren Geoghegan SC
https://www.lawlibrary.ie/members/caren-geoghegan-bl/

1000-1010 *Questions and discussion*

1010-1040 *Solicitors' obligation to cease to act – The Sheffield United case*
Andrew Butler KC – Tanfield Chambers
https://www.tanfieldchambers.co.uk/person/andrew-butler-kc/

1040-1050 *Questions and discussion*

1050-1120 Refreshments

1120-1150 *The use of Experts in Professional Negligence Litigation*
Gavin Mooney SC
https://www.lawlibrary.ie/members/gavin-mooney-sc/

1150-1200 *Questions and discussion*

1200-1230 *Data Breach Claims*
Michael Murphy – Partner - Holmes O'Malley Sexton
https://holmeslaw.ie/people/michael-murphy

1230-1240 *Questions and discussion*

1240-1340 Lunch

1340-1410 *Keynote Address*
Rossa Fanning SC – Attorney General of Ireland
https://www.attorneygeneral.ie/ag/ag.html

1410-1440 *Architects - BCAR and the Assigned Certifier Risk*
Joan O'Connor B.Arch. Dip. Arb. FRIAI RIBA FCI Arb. - Joan O'Connor Consultancy Ltd
https://ie.linkedin.com/in/joan-o-connor-3207613b

1440-1450 *Questions and discussion*

1450-1520 *Construction - ESG and Mitigation of Professional Risk*
Dr Hugh O'Donnell – Senior Consultant - Ingenium
https://www.ingeniumtc.com/about/
https://www.thinkbusiness.ie/articles/thinking-business-hugh-odonnell/

1520-1530 *Questions and discussion*

1530- 1545 Refreshments

1545-1615 *Risk Mitigation Measures in the Construction Sector*
Eoin Leonard, CEO - i3PT
https://i3pt.ie/our-team/eoin-leonard/

1615-1625 *Questions and discussion*

1625-1655 *The use of E-Discovery*
Grainne Bryan - FTI Consulting
https://www.fticonsulting.com/experts/grainne-bryan

1655-1700 *Closing Remarks*

PROFESSIONAL NEGLIGENCE AND LIABILITY
DUBLIN CONFERENCE
Stephens Green Hibernian Club, 9 St Stephen's Green, Dublin
8th June 2023
ATTENDEES (1 of 3)

Rossa Fanning SC	Attorney General	Dublin
Edward Aczel	PNLA	London
Peter Barr	Gateley Legal	Leeds
Fiona Beirne	Davies Group	Dublin
Grainne Bryan	FTI Consulting	Dublin
Andrew Butler KC	Tanfield Chambers	London
Christian Carlyle	HF Ireland	Dublin
Gavan Carty	Kent Carty Solicitors	Dublin
Niamh Casey	Berkshire Hathaway Specialty Insurance	Dublin
Richard Coakley	AXA xl	Dublin
Martina Connolly	DWF Claims	Dublin
Deirdre Courtney	Augustus Cullen	Dublin
Harry Fehily	Holmes	Limerick
Catherine Fleming	T J Hegarty	Cork
Caren Geoghegan SC	Barrister	Dublin
Sarah Grace	Aviva	Dublin
Bill Holohan SC	Holohan Lane Solicitors	Cork
Jonathan Jackson	Gateley Legal	Belfast
Lisa Kelly	AmTrust International Underwriters DAC	Dublin
Peter Kiely	T J Hegarty	Cork
Damien Kilpatrick	Aon Ireland	Dublin
Ciaran Leavy	Lavelle Partners	Dublin

Aidan Leonard	DWF Claims	Dublin
Eoin Leonard	i3PT	Dublin
Rachael Liston	Liston Flavin	Co Wicklow
April Lynch	Leeson Claims Services Ireland	Dublin
Katy Manley	PNLA\BPE Solicitors	Cheltenham
Sinead McBreen	Zurich Insurance	Dublin
Jackie McDonagh	Berkshire Hathaway Specialty Insurance	Dublin
Conor McGill	AIG Europe	Dublin
Heather McIlveen	McLarens	Dublin
Niamh Moloney	Liberty Mutual Insurance Europe	Dublin
Keira-Eva Mooney	AIG Europe	Dublin
Gavin Mooney SC	Barrister	Dublin
Ciara Murphy	Beauchamps	Dublin
Michael Murphy	Holmes	Limerick
Brian Murray BL	Law Library	Dublin
Lasairfhiona Ni Laighin	Beale & Co. LLP	Dublin
David Niven	Pennington Manches Cooper	London
Joan O'Connor	Architect	Dublin
Teresa O'Connor	A&L Goodbody	Dublin
Dr Hugh O'Donnell	Ingenium	Dublin
Aisling O'Neill	DWF Claims	Dublin
Paddy Oonan	Leeson Claims Services Ireland	Dublin
Matthew Pascall	Temple Legal Protection	Guildford
Mary Purtill	RDJ	Cork
Ciaran Reddin	BHSI	Dublin
Melissa Regan	Holmes	Limerick

Lorraine Rowland	Hiscox	Dublin
Marguite Seymour	Holmes	Limerick
Aoife Skehan	Holmes	Limerick
Mark Smith	AIG Europe	Dublin
Lydia Stanley	Zurich Insurance	Dublin
Niall Stratford	McLarens	Dublin
Rachel Turner	Dillon Eustace	Dublin

PNLA
Professional Negligence
Lawyers Association

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Caren Geoghegan BL

"Cases struck out for Delay – the Cave Court judgment"

Caren Geoghegan SC

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Caren Geoghegan is a practising barrister at the Irish Bar since 2007.

Her principal area of practice is commercial litigation.

She has recently acted in a number of significant commercial insurance disputes in the High Court.

She also frequently practices in the areas of public law and judicial review.

She is a member of the Incorporated Council of Law Reporting for Ireland. She is also a committee member of the Commercial Litigation Association of Ireland.

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Cases struck out for delay – Cave Projects

Caren Geoghegan

8 June 2023

A Presentation to the Professional Negligence Lawyers Association

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Jurisdiction to strike out for delay / want of prosecution

- Order 122 r 11 of the Rules of the Superior Courts
- Inherent Jurisdiction
- **Allen v. Sir Alfred McAlpine & Sons Limited** [1968] 2 QB 229 Diplock L.J. at 254:-

  "The chances of the courts being able to find out what really happened are progressively reduced as time goes on. This puts justice to the hazard".

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Jurisdiction to strike out for delay / want of prosecution

- **Primor Plc v Stokes Kennedy Crowley** [1996] 2 IR 459 – 3 step test

  (1) Whether there was inordinate delay;
  (2) If there was inordinate delay, whether such delay was excusable; and
  (3) If the delay was inordinate and inexcusable, whether, on the balance of justice, the proceedings ought to be dismissed.

- **O' Domhnaill v Merrick** [1984] IR 151

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Cave Projects v Gilhooley [2022] IECA 245

- Decision of Collins J. 28 October 2022.
- Ní Raifeartaigh J. and Pilkington J. in agreement.
- Appeal of the second defendant (Mr Kelly) of a decision of Meenan J. in which an application to dismiss the proceedings for want of prosecution and delay was refused.

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Relevant Facts

- The proceedings involved a claim for the recovery of a liquidated debt arising from facilities that Bank of Ireland had advanced to the Defendants. The sums became repayable on demand after 31 January 2008.
- The bank issued a summary summons on 24 February 2011 seeking judgement of just over €11m.
- NALM acquired the facilities and then in January 2013 Cave acquired the loans and security from NALM.

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Relevant Chronology

- The proceedings were discontinued against the other defendants bar one co-defendant, following a settlement in May 2013.
- A detailed chronology is set out in the Judgment.
- An alleged inordinate delay of just over two years.
- By the time of the hearing of the appeal in June 2022 the action had been listed for 6 days starting on 29 November 2022

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Grounds of alleged prejudice

- No concrete or specific prejudice alleged
- Allegation of general prejudice that former employees of NAMA and/or the Bank might not be available to give evidence and/or their memory might be impugned.

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High Court Judgment

- Delay of just over two years was inordinate
- Delay was not inexcusable and/or was acquiesced to by Defendant
- In any event balance of justice favoured refusal due to a lack of candour in the affidavits grounding the application

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Court of Appeal

- Reference to the recent authorities in the *Primor* jurisprudence and in particular recent Court of Appeal judgments:-
- **Gibbons v N6 (Construction) Limited** [2022] IECA 112
- **Pringle v Ireland** [2022] IECA 113
- **Barry v Renaissance Security Services Limited** [2022] IECA 115
- **Greenwich Project Holdings Limited v Cronin** [2022] IECA 154
- **Doyle v Foley** [2022] IECA 193

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Analysis of Collins J. of *Primor* Principles

- The onus is on the defendant to establish all three limbs of *Primor.*
- An order dismissing a claim is on any view a very far reaching one and causes - "terminal prejudice".

> "That being so, it would seem to follow that such an order should **only** be made in circumstances where there has been **significant delay** and where, **as a consequence of that delay**, the court is satisfied that the balance of justice is **clearly** against allowing the claim to proceed." (para. 36)

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Analysis

- The nature and extent of the delay *"is a critical consideration"* in the balance of justice.
- Where inordinate and inexcusable delay is demonstrated there has to be a causal connection between that delay and the matters relied on for the purpose of establishing that the balance of justice warrants the dismissal of the claim.

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Analysis

- Each case will turn on its own facts and circumstances.

> *"A period of delay that is considered inordinate in one case may not be regarded as such in another."*

> *"Factors which excuse delay in one case may be ineffective in another."*

- Previous decisions as to periods of time found to be inordinate will *"rarely be helpful".*
- Similarly assessment of the balance of justice *"will rarely provide a useful blueprint for any other".*

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Analysis

- Defendants also bear a responsibility in terms of ensuring the timely progress of litigation.
- The precise contours of that responsibility have yet to be definitively mapped, but it is clear at least that any "*culpable delay*" on the part of a defendant – delay arising from procedural default – will weigh against dismissal.

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Issue of Prejudice

- A "*complex and evolving*" issue.
- There are many statements in *Primor* jurisprudence that the question of prejudice *"is central"*.
- Collins J. cites a number of cases which in his view puts the issue of prejudice, in particular in the form of "*fair trial*" prejudice – "*centre stage*".

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Issue of Prejudice

- Not confined to 'fair trial' prejudice.
- It may include damage to a defendant's reputation and business – but approach 'reputational prejudice' with caution.
- In a number of the cases where 'reputational prejudice' relied on – there was also significant and unexplained delay and significant 'fair trial' prejudice.

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Issue of Prejudice

- The absence of any specific prejudice or "concrete prejudice" may be a "*material factor in the court's assessment*".
- Clear however, "general prejudice" may suffice.
- Must be a sufficient evidential basis for prejudice claims.

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Issue of Prejudice

- Only such prejudice as is properly attributable to the period of inordinate and inexcusable delay ought to be taken into account.
- Many of the cases appear to proceed on the basis that once there is any period of inordinate and inexcusable delay, general prejudice should be assessed by reference to the entire period between the events giving rise to the claim and the date of trial. That is not the appropriate approach.

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Issue of Prejudice

- Perfect justice is rarely if ever achievable.
- It is wrong to make any immediate assumption of prejudice wherever there is a material default on the part of a plaintiff in prosecuting a claim. "prejudice is not to be presumed".
- Moderate prejudice may suffice.
- **Millerick v Minister for Finance** [2016] IECA 206 – query if in the absence of proof of prejudice proceedings can be dismissed

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Role of Article 6 ECHR

- It is "*entirely appropriate*" that the culture of *"endless delay*" is passed and Art 6 ECHR has played a significant role.
- But "*there is also a significant risk of over correction*".
- The dismissal of a claim should be seen as "***an option of last resort".***

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Conclusion

"All of this suggests that the courts must be astute to ensure that proceedings are not dismissed unless, on a careful assessment of all the relevant facts and circumstances, it is clear that permitting the claim to proceed would result in ***some real and tangible injustice to the defendant****".* (para. 37)

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Principles as applied in *Cave*

- Inordinate delay - however the period of two years is "certainly" at the lower end of the spectrum.
- Inexcusable delay - 18 months of inexcusable delay
- The balance of justice clearly favoured allowing the claim to proceed

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Burden of Proof

- Not an interlocutory application – hearsay not permissible
- **RAS Medical Ltd trading as Park West Clinic v Royal College of Surgeons In Ireland** [2019] 2 ILRM 273
- Conflicts of facts on affidavits cannot be resolved absent cross examination

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Implications of Cave Projects

- A recalibration of Primor test ?
- Individual circumstances of critical importance.
- Importance of conduct of defendants - **Corkery v. Marine Motors and BRP** [2023] IEHC 217

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Judgments since *Cave* dismissing proceedings

- **Kelleher v. Tallis & Company** [2023] IEHC 212 – 10 years of inexcusable delay.
- **Egan v. Governor and Company of Bank of Ireland** [2022] IECA 294 – 3 years of inexcusable delay in prosecuting claim. 10 years had elapsed since transactions complained of and issue of proceedings.
- **Killeen v. O'Sullivan Solicitors** [2022] IEHC 625 – inordinate and inexcusable delay of 8 years in a professional negligence claim.
- **Sheehan v. Cork County Council** [2023] IEHC 46 – inordinate and inexcusable delay in prosecuting proceedings of some 8 – 9 years.

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Judgments since *Cave* dismissing proceedings

- **Minnock v. Pepper Finance Corporation (Ireland) DAC** [2023] IEHC 267 – failure to deliver a statement of claim for 4 years after plenary summons issued. Also evidence of clear prejudice to the Defendant.
- **Vaughan v. English** [2023] IEHC 281 – inordinate and inexcusable 4 year delay in prosecution of the proceedings. Clear prejudice due to death of a principal witness.

Andrew Butler KC
Tanfield Chambers

"Solicitors' obligation to cease to act – The Sheffield United case"

Andrew Butler KC

Year of call 1993

Silk 2018

'*Incredibly impressive on the detail – commercial in his approach, with superb drafting skills. He gets on very well with clients. Robust and calls it as he sees it – he doesn't sit on the fence but gives clear, definitive and reasoned advice.*' – Legal 500 2022.

Andrew Butler KC practises in the areas of Property and Business & Commercial, and is Head of Chambers' Business & Commercial Group. While he accepts instructions across the full spectrum of commercial and property work, he particularly specialises in development disputes and professional negligence matters, with company law issues also forming an increasing part of his caseload.

Andrew is a qualified mediator and a member of both the Chartered Institute of Arbitrators and the London Court of International Arbitration. He is an adjudicator on the panel of the Professional Negligence Bar Association. He was appointed Queen's Counsel in 2018 and his silk practice has gone from strength to strength, involving an appearance in the Supreme Court, and regular appearances in the Court of Appeal, as well as the Commercial and Business and Property Courts.

Andrew was short-listed for Barrister of the Year in the Lawyer Awards 2020.

Real Property

Andrew's background is in Real Property and the majority of his practice is in professional negligence and commercial claims with a property element.

In the former context, he has undertaken claims against architects, surveyors, insurance brokers and

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solicitors, among other professionals (see, further, "Professional Negligence" below).

In the latter context, he undertakes cases in a variety of fields, including a recent Supreme Court case involving estate agency fees (*Devani v Wells* [2019] 2 WLR 617). In 2022, he has undertaken High Court trials in matters as diverse as landlord consent to assignment (*Gabb v Farrokhzad* [2022] EWHC 212, see link to news article here) and liability for a devastating fire at an oil processing plant in Essex (*Smith v Howard* [2022] EWHC 562 (TCC)). Of Andrew's performance in securing victory in the latter case, his instructing solicitor commented: "The result of course turned on cross-examination, where hits were scored on both sides. Perceived [sc. expert] bias proved to be the bigger hit. Not all silks would have been so effective."

Andrew routinely undertakes advisory work on real estate disputes and developments; recent examples include the viability of the redevelopment of a major UK shopping centre and two disputes concerning prime residential real estate in the Bahamas.

Commercial Disputes

Andrew undertakes purely commercial work, often with an international element. A particular example is the long-running case of *UCP v Nectrus* (reported on quantum at [2020] PNLR 9), in which Andrew (despite only being instructed shortly before a 12-day Commercial Court trial) successfully defended the majority of a multi-million pound claim made against a Cypriot entity in relation to a property venture in India. The case has attracted interest in particular in relation to a reflective loss case advanced by Andrew; while this was rejected by the trial judge and the Court of Appeal in *Nectrus*, it has recently been confirmed by the Privy Council in a different case (*Primeo v Bank of Bermuda*) that the defence was sound and that *Nectrus* is wrongly decided in this respect. An application to re-open the appeal in *Nectrus* has been successful [2022] EWCA Civ 949.

Other recent commercial cases undertaken by Andrew include *Auty v Duru*, a high value s.994 petition concerning a Turkish cosmetics group, *Quantum Advisory Ltd. v Quantum Actuarial LLP* [2022] 1 All ER (Comm) 473, a leading Court of Appeal authority on covenants in restraint of trade, and *TBD Owen Hollands v Simons* [2021] 1 WLR 992, an important Court of Appeal decision on search orders and common interest privilege.

Professional Negligence

As set out in the Real Property section, much of Andrew's work both within and beyond the field of property related disputes has a professional negligence element and he acts in claims against all manner of

professionals including insurance brokers, solicitors and architects. Aside from *UCP v Nectrus* (see "Commercial Disputes" above and reported at [2020] PNLR 9), recent and/or ongoing cases include:

- a claim against an Employer's Agent about the allegedly negligent drafting of a Liquidated and Ascertained Damages Clause in a major construction contract.
- a claim against a tax adviser/company law specialist arising out of errors in the establishment of a family trust fund.
- a claim against a barrister arising out of the Court of Appeal's decision in the residential forfeiture case of *Gibbs v Lakeside Development Ltd* [2019] 4 WLR 6.
- a claim against a solicitor arising out of the drafting of an SPA (involving a novel point under s.14A Limitation Act 1980).

Andrew is frequently called upon to talk about negligence issues and lectured on the RIBA CPD programme for many years. He is a member of the PNLA and PNBA, and also sits on the adjudication panel of the latter.

Mediation

Andrew is a trained mediator and has ample experience of the mediation process, both as advocate and mediator.

Notable Cases

Quantum Advisory Ltd. v Quantum Actuarial LLP [2023] EWCA Civ 12

Declaration sought by Claimant as to scope of services to be provided under 99-year Services Agreement and in particular whether Defendant required to undertake tendering and re-tendering exercises – questions of construction and proper approach to interpretation of long-term relational contracts, and the existence and effect of a contractual duty of good faith in such contracts – Andrew successfully resisting appeal against dismissal of claim.

Smith v Howard [2022] EWHC 562 (TCC)

Claim arising out of major fire at oil refinery plant in Essex – Andrew acting for Claimant who succeeded in liability-only trial against co-occupier of plant – case turned on negligent placement of oil container said to have been instrumental in the spread of the fire giving rise to difficult questions of liability and (in particular) causation.

Gabb v Farrokhzad [2022] EWHC 212 , [2022] 1 WLR 2842

Claim against landlord alleging unreasonable refusal of consent to assign a lease – unreasonable refusal established but claim for exemplary damages successfully defeated – partial permission to appeal obtained from Court of Appeal, but claim settled before appeal heard.

Quantum Advisory Ltd. v Quantum Actuarial LLP [2022] 1 All ER 473

Dispute arising out of long-term Services Agreement between actuarial pensions company and LLP formed to carry out services on its behalf – challenge to restrictive covenants preventing direct client engagement for entire 100-year duration of agreement – Court of Appeal deciding whether doctrine of restraint of trade applied and if so whether covenants were enforceable.

TBD Owen Holland v Simons [2021] 1 WLR 992

Important Court of Appeal decision about scope of search orders and in particular whether they permit the inspection and deployment in litigation of documents obtained as a result of a search – also issues of common interest privilege in relation to one particular document thus obtained.

Goyal v Florence Care Ltd. [2020] EWHC 659

Successful appeal against decision of County Court Judge giving rise to questions about (a) the continuation of proceedings against a bankrupt Defendant; (b) equitable accounting; and (c) solicitors' responsibilities in respect of third party funds.

UCP v Nectrus [2020] PLR 9

£21m dispute following loss of substantial funds invested by Isle of Man entity in construction projects in India – action brought against Cyprus-based Investment Manager – acted for Defendant in 13-day split trial in Commercial Court involving issues of liability, causation and reflective loss – appeal pending to Court of Appeal.

Devani v Wells [2019] 2 WLR 617

Supreme Court decision on formation of oral contracts and effect and application of s.18 Estate Agents Act 1979.

Recommendations

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"Andrew has a very good smooth style and is a commercial practitioner. He is great with clients and awfully good on his feet."

Chambers UK 2023

"He's an excellent counsel and the pleadings he drafts are top-notch. He cuts through the paperwork." "He is great with clients."

Chambers UK 2022

"Incredibly impressive on the detail – commercial in his approach, with superb drafting skills. He gets on very well with clients. Robust and calls it as he sees it – he doesn't sit on the fence but gives clear, definitive and reasoned advice."

Legal 500 2022

"A formidable but always reasonable opponent. He consistently provides high calibre, clear advice."

Chambers UK 2021

"He is quickly developing his silk practice."

Legal 500 2021

"Embarrassingly good on his feet and great with clients."

Legal 500 2020 (Property Litigation)

"He is extremely user-friendly and his tenacious and practical approach makes him a favourite with clients."

Chambers UK 2019

"He can very quickly review a large amount of information and detail and provide practical and specialised advice, often at short notice."

Chambers UK 2019

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"Gets on well with clients, a good advocate and calm under pressure."

Legal 500 2018

"A property specialist who is known for his expertise in cases driven by professional negligence claims. Sources see him as an approachable and accessible practitioner."

Chambers UK 2016

Awards

- Lawyer Monthly, Business Barrister of the Year (2015)

Qualifications

- FCI Arb
- MA (Oxon)
- BA

Memberships

- Chartered Institute of Arbitrators
- Commercial Bar Association
- Professional Negligence Bar Association
- Property Bar Association

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SHEFFIELD UNITED 1 - EVERYONE ELSE 0

A talk to the Professional Negligence Lawyers' Association, Dublin

1. Since I've been invited to speak in what I know to be one of the most sports-mad nations on earth, it seems only appropriate to talk to you about a case which not only took place in a sporting setting, but which also had as many twists and turns as the most thrilling sporting encounter. At the heart of it, too, are some important practical lessons for solicitors of all disciplines and, perhaps, professionals more widely; which is why I thought it would form an appropriate topic for this illustrious gathering.

2. It would be possible to get drawn too deeply into the minutiae of what was a fast-moving and hard-fought boardroom battle, but some factual background is inevitable. What follows is a simplified version.

3. Kevin McCabe was, at the time of trial, a 75-year-old businessman and chairman of the Scarborough group of companies. One of these companies was SUL (later the Claimant, Cutler Holdings, but which I will refer to as the Judge did as SUL) which owned Sheffield United FC. Some 10 years earlier, approaching 65, he had wanted to start to wind down his involvement. He also wanted to find an investor for the Club. The Club was then languishing in League One, which, with the logic for which English football is renown, is of course the third tier of the national structure.

4. To facilitate this, he split the ownership of the Club itself from the ownership of its property assets, creating a new company (Blades Leisure Ltd., or **"Blades"**) to hold the Club itself, and keeping the property interests in SUL. SUL leased the properties to Blades at preferential rents.

5. He then caused SUL to enter into an agreement with Prince Abdullah, a minor member of the Saudi royal family, whereby Prince Abdullah (or more accurately his company UTB) would invest £10m into Blades over a period of 2 years in return for 50% of the shares, SUL retaining the other half.

6. The resulting agreement was enshrined in four documents, the most important of which for the purposes of what followed was the Investment and Shareholders' Agreement, or ISA.

7. The ISA had two key features, as follows:

   7.1. it contained a so-called "Russian roulette" clause. The effect of this was that either party could serve a notice seeking to buy out the other, but, if they did so, the other party would be entitled to sell or to buy at the same price.

   7.2. it also contained a call option, whereby if either shareholder acquired 75% or more of the entire share capital of Blades, SUL would be compelled to sell the property interests to Blades at prices to be agreed or determined by a valuation process, unless the parties agreed otherwise.

8. Thereafter the story takes on a familiar turn; after a couple of years, the relationship started to sour and, put shortly, Mr McCabe wanted to effect a parting of the ways. On 29 December 2017, SUL took a calculated risk, and served a notice invoking the Russian roulette clause at a price of £5m. The calculation was that this was leave Prince Abdullah with a choice, which was also no choice. Either UTB would have to sell at a price for half of what he had invested; or it would have to buy, in which case it would acquire 75% and be required to buy the properties. Mr McCabe believed, correctly, that Prince Abdullah did not have the money to do that.

9. However, Prince Abdullah was not a man to be outmanoeuvred quite as easily as that. Spotting that nothing in the agreement required the existing shareholding to remain in UTB, he did the following things in response to the notice:

   9.1. first he incorporated a new company and transferred 80% of UTB's shareholding to it;

   9.2. second, he entered into agreements with two others (including his lawyer) whereby they agreed to accept a transfer of SUL's shares into their names, at the direction of UTB.

10. Then, he served a counter-notice requiring SUL to sell its shares to UTB, directing them as per the second device I have just mentioned. In this way: (a) he would not have to sell UTB's

shareholding at a loss, but also (b) UTB would not become the owner of 75% of the shares and so would not (or so it was argued) have to purchase the Properties.

11. It is fair to say that, at this point, the balloon went up. Amongst a litany of other allegations, including conspiracy and unfairly prejudicial conduct, SUL accused UTB of being in repudiatory breach of contract and claimed that it was released from any obligation to transfer its shares in accordance with the Russian roulette clause.

12. This led to litigation between SUL and UTB. But, just two weeks before this came to trial, there was a twist; Sheffield United got promoted (this was April 2019), its revenues increased dramatically, and in consequence UTB agreed to purchase the properties. But, for the same reasons, SUL's position had also changed; notwithstanding that it had originally wanted to sell the properties to UTB, it now did not want to. Instead, it wanted to buy UTB out.

13. The first trial took place before Fancourt J and has become, amongst other things, an important authority on another topical issue, namely the implication of obligations of good faith in commercial contracts – a talk for another day. For present purposes, what matters is that Fancourt J held that the devices to which UTB had had recourse as a means of avoiding the obligation to buy the properties did not work. The first device (transferring existing shares to a nominee) was simply not a genuine transaction. The second (directing that SUL's shares be transferred to third parties) was, on analysis, a sub-sale, and did not prevent UTB from taking 75% ownership. Fancourt J held that they could have worked (if, for example, there had been a genuine gift or transfer to a third party, as opposed to the deployment of pure nominees). The drafting was careless, because it did not tie the Russian roulette clause to the acquisition of the properties; it would have been possible to trigger one, without triggering the other. But the devices used by UTB had not had that effect.

14. So UTB had been in breach of contract in refusing to acquire the Properties. But, because they had ultimately agreed to buy the properties (albeit only two weeks before trial) no loss had been suffered as a result of these breaches. Furthermore, the breaches were not repudiatory breaches, so did not free SUL from the obligation to perform. Accordingly, the shares had to be sold, and UTB were awarded most of their costs.

15. In the face of what the Judge in the second action (to which we are about to turn) called the "unmitigated disaster" of the outcome of the first action, SUL turned its attention to its former lawyers, Shepherd and Wedderburn.

16. So far as relevant, the allegations against S&W were:

    16.1. that they were negligent in their drafting of the Russian roulette clause, leaving it open to circumvention in the way that they did;

    16.2. that they were negligent in advising SUL to exercise the Russian roulette clause;

    16.3. that when disagreement arose between SUL and UTB, they were negligent, and in breach of fiduciary duty, in failing to advise that they were in a position of own interest conflict and that SUL should seek independent legal advice.

17. But of course these allegations were complicated by the fact that, although UTB had tried the circumvent the Russian roulette clause, the Judge in the first action held that their attempts to do so had been unsuccessful. So the position in the second action was that the clauses had been drafted in such a way as to be susceptible to abuse, albeit that the precise methods deployed to abuse them had not succeeded.

18. This was, in other words, a particularly striking example of the *Dixey -v- Baxendale* duty, the effect of which is that it is not enough for a lawyer to be right about his or her reading of a particular provision; a lawyer must also make reasonable provision for the possibility that someone may take a different view. If this sounds harsh, we should remember that it is really the corollary of the principle that being wrong does not necessarily equate to negligence; being right is not a complete defence to negligence either. What is needed in any given situation is rounded advice, no doubt predicated on the adviser's opinion of the correct reading of a particular provision, but also adverting to the risk of a competing interpretation.

19. Where to strike the balance? What level of risk needs to be pointed out? As with so much in the field of professional negligence, the question is a fact-sensitive one. A distinction has been drawn between, on the one hand, a risk which is significant and, on the other hand, the risk of a "fanciful or spurious" position being taken. As characterised by Asplin LJ in the 2017 case

of *Barker -v- Baxendale Walker* the kind of risk we are concerned with is "of sufficient significance to require specific mention when taken with the degree of risk inherent in the circumstances and the importance in those circumstances of a balanced view of the provision").

20. Applying these principles, Bacon J in the negligence action held that S&W had been negligent at the time of preparation of the paperwork in failing to identify the lacuna in the Russian roulette clause, failing to advise SUL of its existence, and failing to advise them to try to agree different wording. However, on the question of causation, she held that while Prince Abdullah would if asked have agreed to different and more watertight wording, he would still, on the triggering of the Russian roulette clause, have sought ways of serving a counternotice. The dispute would therefore in all probability have taken the same course as it in fact did.

21. It followed from Bacon J's conclusion on this first allegation that S&W were also negligent in failing to advise SUL, when they were considering exercising the Russian roulette clause, that there were ways in which UTB could serve the counternotice while avoiding having to acquire the properties. What was said by SUL as regards causation on this point was that, if they had known this might happen, they would have pitched their offer at a higher price, so as to deter Prince Abdullah from serving a counter-notice on that basis instead.

22. Again, however, the case on causation was rejected. Bacon J reminded herself that *"where a witness gives evidence about what they would have done in a particular situation, that is inevitably speculative and may carry little weight, especially where the evidence is self-serving."* Bacon J held that Mr McCabe had proceeded despite knowing that the course was fraught with risk. Being advised as to the existence of another risk, or a different type of risk, would not have deterred him. It was also relevant here that SUL could of course have been called on to purchase Prince Abdullah's shares, and there was an issue of affordability for them as well as for Prince Abdullah; SUL was in talks with an alternative investor, but those had not progressed to the point where reliance could be placed on the provision of funding from that quarter.

23. The final allegation, and the one I want to spend a little time on, was the allegation that when confronted with UTB's attempts to avoid the anticipated consequences of serving a

counternotice, S&W should have advised SUL that they were in a position of own-interest conflict and that SUL should take independent legal advice.

24. The reason this caught my eye is that we would all no doubt recognise this kind of own-interest conflict – the uncomfortable position where a client comes back to you after a strategy, or a piece of drafting, has been called into question and asks you to satisfy yourself that you remain happy with it. Yet it is an obligation which appears rarely to have been considered in litigation, and which seems to me to present unusual practical difficulties, because retaining objectivity in relation to one's own work is difficult at the best of times, still more so in circumstances which are likely to be somewhat pressurised.

25. First of all, what is the regulatory position? In the UK, the SRA Code of Conduct at the relevant time provided (and I believe still does provide) that a solicitor should not act at all if there is an own-interest conflict, or even a significant risk of an own-interest conflict, with no exceptions to that prohibition. I am aware that the Code of Conduct in this jurisdiction contains a comparable obligation in these terms: *"A solicitor should not act where their duty to act in the best interests of a client in relation to a matter conflicts, or there is a significant risk that it may conflict, with their own interests in relation to that matter or a related matter."* – although none of the examples set out after this formulation specifically address the circumstance where a complaint is made about a solicitor's work.

26. Secondly, what is position in caselaw? As I have said, there seem to be relatively few previous cases in which an allegation of this kind has been made. Bacon J cited two: *Gold v Mincoff Science & Gold* [2001] 1 Lloyds Rep PN 423 and *Ezekiel v Lehrer* [2002] EWCA Civ 16, [2002] Lloyd Rep PN 260, in both of which own-interest was invoked as a potential means of avoiding what would otherwise have been a time-bar in relation to an allegation of earlier negligence. In neither case was the Court impressed: in the former case, Neuberger J said that it would be a *"relatively exceptional case"* where an otherwise time-barred allegation of negligence could be revived by focussing on a later duty to advise of an own-interest conflict when the problem came to light. The Court of Appeal, obiter, followed that approach in the latter.

27. Where limitation is not in issue, it is perhaps not surprising that the allegation has not often been made. After all, if the first piece of advice has been given negligently, it will not usually be necessary to rely on the later failure to tell the client to seek independent advice. And if

the first piece of advice has not been given negligently, it will rarely be a failure not to have told the client to go elsewhere at a later stage. In *Cutler*, however, it was said that it was negligent, because even though the solicitors' position was eventually vindicated, had SUL been advised to go elsewhere, a different litigation strategy would have been adopted, focussing on the meaning and effect of the ISA to the exclusion of some of the wilder allegations, including unfair prejudice and conspiracy, which were aired before Fancourt J and rejected.

28. There is another point to be borne in mind here as well, which is that it is not an uncommon litigation tactic to try to drive a wedge between a client and its lawyer. There are obvious advantages to an opposing party if it can, at the very least, cause a client to doubt the advice it has been given, still more perhaps if it can force the withdrawal of a lawyer on the other side. This feeds into the difficulty of judging whether or not an own-interest conflict truly exists. Not only is it difficult to be truly objective about one's own work; not only, too, is there a natural desire to fight one's own client's corner in the face of attacks of all kinds; but there is also likely to be the lingering sense that the point is likely to be being taken for tactical reasons and without any genuine belief in its merit.

29. How, then, did Bacon J deal with the allegation? First of all, on the question of the standard to be applied, she rejected the Claimant's submission that a duty arose wherever there was the "potential" for an allegation of negligence. She said that that set the bar too low. By parity of reasoning with the *Dixey v Baxendale* duty (which, you will recall, requires the lawyer to advise on the risk of a contrary view), she said that the duty to advise the client to go elsewhere arose only where there is a "significant" risk that he or she had been negligent. However, applying that to the facts, she did not hold back. She held that the view of the lawyers that there was no own-interest conflict was *"wholly misconceived"* and that the failure of S&W to direct their minds to the question of whether they had been negligent was a *"quite astonishing dereliction of duty"*. She found that S&W had been negligent, although she rejected the allegation that they were in breach of fiduciary duty, since that would require S&W to have knowingly suppressed an own-interest conflict, and S&W had merely convinced themselves that there was none.

30. However, notwithstanding the finding of negligence, the allegation failed again on causation grounds. Noting that after the first trial had gone wrong, SUL had continued to instruct S&W,

Bacon J held that that is exactly what would have happened had it been advised of the own-interest conflict at an early stage. Here I wonder (with respect) whether there is a flaw in Bacon J's reasoning. Given the wording of the Code of Conduct, which she alluded to, it ought to have been impossible for S&W to continue to act even if they had been instructed to do so. So it seems inevitable that SUL would have to have instructed different lawyers. The real question is whether that would have resulted in a refined and less disastrous litigation strategy, as the Claimant alleged it would have done. For good measure, Bacon J considered that and found that it would not have done.

31. As authoritative and brilliant as it is – and Bacon J is a judge for whom I have the highest regard – her judgment does leave some practical questions unanswered. For one thing, there seems to me to be a tension between the requirements of the Code of Conduct (requiring as they do that a solicitor should not act where there is even a significant risk of own-interest conflict) with the practicalities of the situations in which these issues can arise.

32. For one thing, a client may often present under great pressure of time and money (as, indeed, SUL did in this case); for a lawyer who may be trusted and well-versed in the particular matter to refuse to act in those circumstances because of a risk of own-interest conflict would hardly seem likely to improve the client's situation. It is true that the risk must be "significant" before withdrawal is demanded, but as the ***Cutler*** case itself shows, opinion may differ wildly as to what a significant risk is. Where one's own work has been called into question on any ground which anyone might conceivably think is significant, it may be a difficult – and brave – decision to continue to act.

33. For another thing, and as I have already alluded to, none of us is really the best judge of whether an attack on our own work is well-founded or not. The natural reaction is to push back – both for one's own sake and for one's client's sake, and perhaps out of the natural belief that the challenge may be tactically motivated – but the ***Cutler*** case shows all too clearly the dangers inherent in doing so.

34. To the extent that it is possible to answer these questions, I think the answer must ultimately lie in the application of common sense, and some careful record-keeping.

35. The first task, obviously, is to try to assess, as objectively as possible, whether there is merit in the position being taken. The more merit there is, the stronger the imperative to withdraw.

36. But, set against that, one also has to evaluate the practicalities of the situation. If a client has, say, 48 hours in which to formulate a stance on a key issue, the consequences of refusing to act may be particularly serious; less so if the client has 6 months in which to do so. Other factors may include the availability of an extension of time, and how well-resourced the client is. Obviously, if withdrawal is ultimately required by the Code, that must be respected, but some ways of withdrawing are less likely to cause harm to a client than others. Furthermore it is settled law that a failure to comply with a Code of Conduct is not negligent if it is justified in the particular circumstances which have arisen. Indeed, one might be more likely to expose oneself to a claim for negligence by withdrawing when there are no legitimate grounds on which to do so.

37. Third, and given the difficulty of marking one's own homework, a second opinion may be an invaluable commodity. In the first instance, this might be given by a colleague who can bring some objectivity to bear on the situation. If that colleague considers the position taken by the other side to be devoid of merit, that may well inform one's own response. If not, it may be necessary to escalate; one possible step short of withdrawal might be to offer to get a formal second (outside) opinion at shared expense.

38. Come what may, all of these steps should be carefully documented; what a Court will wish to see, should your actions ever be exposed to scrutiny is a carefully-reasoned response, whether that be as to why you consider the challenge to be devoid of merit, or why (notwithstanding that there was merit) you felt it legitimate or even necessary to continue to advise the client, what alternative opinions you canvassed etc. In ***Cutler***, Bacon J attached great weight to the fact that contemporaneous attendance notes of discussions with Counsel did not record the support for their position which their witnesses claimed in evidence had been given.

39. There are numerous other points of interest which arise from the Cutler case – of particular interest to me as an advocate was the Judge's response to an allegation that a point had not been put in cross-examination (which the Judge accepted, but forgave (paras.233-235)), her preparedness to make factual findings which were the opposite of those made by Fancourt J in the first litigation (para.243 – one can only wonder how the McCabes, who lost on both

occasions, felt about this), and the veiled criticism of some obviously elaborate advice given by Counsel on the prospects of success (her judgment refers at para.319, with the merest hint of disapproval, to photographs of the flipchart he had evidently used in conference). But these must be talks for another day.

40. What is undoubtedly the case is that no-one emerged from the litigation very well – the McCabe family were blameless but unsuccessful, S&W were successful but negligent in a variety of ways and to a high degree, and Prince Abdullah was revealed to be a man who would have recourse to dubious and ultimately unsuccessful legal schemes rather than honour his contractual obligations. Only Sheffield United, who have risen through the football league and are now once again to grace the English Premier League, have emerged with any credit.

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8 June 2023

Gavin Mooney SC

"The use of Experts in Professional Negligence Litigation"

GAVIN MOONEY SC

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Academics: -

- Bachelor of Commerce
- Master of Business Studies (Banking & Finance)
- Diploma in Legal Studies
- Barrister at Law

Other: -

- Graduate recruit with Revenue Commissioners
- Worked as Management Surveyor in Dublin and London
- Member of the Society of Chartered Surveyors/ RICS
- CEDR Accredited Mediator

Barrister: -

- Called to the Bar 1998
- Called to the Inner Bar 2018
- Called to the Bar of England and Wales (Middle Temple) 2018

Practice areas: -

- Professional negligence
- Landlord and tenant
- Land and conveyancing
- Contract
- Commercial and insolvency
- General common law

The Role of Experts in Professional Negligence Actions

Matters to be considered by plaintiffs' lawyers …

and matters to be quizzed by defendants' lawyers

Professional negligence actions – a serious matter

- Recognised in ***Primor v Stokes Kennedy Crowley & Ors*** [1996] 2 IR 459
  Mr Justice O'Flaherty described the effect on the co-defendant of a long running professional negligence action

- More recently in ***McGuinness v Wilkie & Flanagan*** [2020] IECA 111
  and quoted in in ***Egan v Bank of Ireland & Ors*** [2022] IECA 294

  > *"A number of authorities has considered that having claims not only of negligence, but of serious wrongdoing hanging over the heads of professional persons over a protracted period of time is in itself a source of prejudice for obvious reasons."*

-

Pre – Litigation Expert Involvement

- Clause 5.9 of the Code of Conduct of the Bar of Ireland

  "*Save in a case of alleged professional negligence on the part of a Barrister or solicitor, Barristers ought not to settle a pleading claiming professional negligence unless they have satisfied themselves that expert evidence is or will be available to support such claim"*

- **"*Reasonable grounds"***

  Ms Justice Denham in ***Cooke v Cronin & Neary*** [1999] IESC 54 endorsed as a correct statement of the law that

  "it is irresponsible and an abuse of the process of the court to launch a professional negligence action against institutions such as hospitals and professional personnel without first ascertaining that there are reasonable grounds for so doing".

- ***"Supportive evidence"***

  Mr Justice Noonan in ***Egan v Bank of Ireland & Ors*** [2022] IECA 294

  "While the decision of the Supreme Court in Cooke v Cronin [1999] IESC 54 points to the ethical obligation of lawyers in obtaining supportive evidence before launching negligence proceedings against a professional person, it has long been the case that it is an abuse of process to institute professional negligence proceedings without such supportive evidence"

- It appears generally accepted that *"reasonable grounds"* and *"supportive evidence"* now mean that in order to sue a professional a "peer opinion" is required.

- Further, this means in cases where practitioners from more than one profession, or more than one discipline within a profession, are sued a "peer opinion" is required for each

Expert Witnesses - Liability

- **Order 39 Rules of the Superior Courts (2016)**

57. (1) It is the duty of an expert to assist the Court as to matters within his or her field of expertise. This duty overrides any obligation to any party paying the fee of the expert.

(2) Every report of an expert delivered pursuant to these Rules or to any order or direction of the Court shall:

(a) contain a statement acknowledging the duty mentioned in sub-rule (1);

(b) disclose any financial or economic interest of the expert, or of any person connected with the expert, in any business or economic activity of the party retaining that expert, including any sponsorship of or contribution to any research of the expert or of any University, institution or other body with which the expert was, is or will be connected, other than any fee agreed for the preparation by the expert of the report provided or to be provided in the proceedings concerned and any fee and expenses due in connection with the participation of the expert in the proceedings concerned.

58. (1) Expert evidence shall be restricted to that which is reasonably required to enable the Court to determine the proceedings.

- Mr Justice McMenamin ***O'Leary v Mercy Hospital*** [2019] IESC 48

> *"Expert witnesses have played an important role in court proceedings since the earliest evolution of the common law. Such witnesses are often essential in assisting courts when reaching a conclusion on complex issues, whether they arise in a personal injury action, a commercial case, or a patent proceeding. However, there are, unfortunately, occasions when expert witnesses do not always appreciate their fundamental duty of independence and impartiality. Their primary duty is always owed to the court and not to their client or the person who retains them. ....*
>
> *What may not always be clear, is that some cases where the ultimate outcome will be clear-cut actually come as far as the courtroom because of what are called 'hired gun' witnesses on one side or the other. Quite often the deficiencies in the testimony of such witnesses are discovered only at the door of the court or in the hearing itself, by which time the parties may have incurred significant costs. This problem not only concerns private litigants and their advisers. At a time when litigation and insurance costs are a source of public concern, these problems can have a broader impact on the public. Prudent lawyers, acting in the interests of their clients, will always ensure that the expert testimony they seek to adduce will stand up to scrutiny in court*."

- **The *IKARIAN REEFER*** [1993] 2 Lloyd's Rep. 68. Cresswell J. in the High Court of England and Wales set out recognised principles and responsibilities of expert witnesses (as quoted by McMenamin J in *O'Leary*)

(1) The evidence of such witnesses should be, and be seen to be, independent and uninfluenced in form or content by the exigencies of litigation.

(2) Such witnesses should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within their expertise and should never act as advocates.

(3) Such witnesses should state the facts or assumptions upon which their opinion is based, and consider material facts which could detract from their concluded opinion.

(4) Expert witnesses should make it clear when a particular question or issue is outside their expertise.

(5) If such witnesses consider that insufficient data is available, they should say so, and indicate that the opinion is provisional only.

(6) If the witness is not sure that their report contains the truth, the whole truth and nothing but the truth, without some qualification, they should state that qualification in their report. If an expert witness changes his views on a material matter such change of views should be communicated (through lawyers) to the other side without delay and, when appropriate, to the court.

(7) Where expert evidence refers to photographs, plans, calculations analyses, measurements, survey reports or other similar documents these must be provided to the opposite party at the same time as the exchange of reports.

McKillen v Tynan [2020] IEHC 190 – Mr Justice O'Moore

A cautionary example

- Quoting from ***McGrath on Evidence*** (2nd Edition 2014) para 6.36

> *"A witness who gives evidence as an expert must have sufficient expertise in relation to the matter upon which he or she is to give evidence to be considered an expert and the burden of establishing this rests on the party calling the witness. Such expertise may be acquired by reason of experience, training or knowledge. In Galvin v. Murray [2001] 2 ILRM 234 at 239, Murray J. stated that, in general terms, "an expert may be defined as a person whose qualifications or expertise give an added authority to opinions or statements given or made by him within the area of his expertise".*

- Criticisms by Judge O'Moore
    - *Failure to identify area of expertise*
    - *Referring to his Affidavit being "for the purposes of supporting" the claim*
    - *Commenting on matters of no critical relevance*
    - *Giving legal opinions, but conceding such are matters for the Court*
    - *The use of emotive language*
    - "*Even if* [the expert witnesses] *qualify as experts in this field, I find that the content and tone of their evidence to be such as to render the evidence of no real value.*

- ***Duffy v McGee*** [2022] IECA 254 – Mr Justice Noonan -

Introductory observation

"78. Expert witnesses enjoy a special position in the law of evidence. Unlike non-experts, experts are not confined to giving purely factual evidence but may give opinion evidence where certain criteria are satisfied. The proliferation of the expert witness is an ever-present feature of almost all spheres of litigation, one such being personal injuries

79. Very frequently, the evidence of the expert will be decisive to the outcome, particularly where, as here, there are complex scientific or medical issues arising.
Some of the most high-profile miscarriage of justice cases have arisen from serious failures on the part of experts.
It is right therefore that the law expects and demands the highest standards of experts. This has found expression in many judgments and more recently, rules of court."

Application of *"highest standards"*

(having considered some shortcomings in a particular expert's evidence)

"103. Any one of these matters on its own would tend to strongly suggest an absence of objectivity and impartiality on the part of [the Expert] *but taken in combination, can only be described as a wholesale abdication by* [the Expert] *of his duty as an expert witness. I share the trial judge's experience of never having encountered such an approach to giving evidence by an expert witness before our courts.*
[The Expert] *impermissibly donned the mantle of a partisan advocate in his efforts to discredit the claim of the plaintiffs.*

104. It is simply not possible to adopt some kind of curate's egg approach to this evidence, as counsel for Mr. McGee suggested, and I am satisfied that the trial judge was perfectly correct to exclude [the Expert's] *evidence in its entirety.*
There was in this case such an abject failure to comply with the most basic obligation of an expert, namely, to be objective and impartial, as to render all of [the Expert's] *evidence inadmissible."*

- ***Duffy v McGee*** [2022] IECA 254 – Mr Justice Collins-

"23. The legal practitioners acting for a party seeking to adduce expert evidence bear an important responsibility for ensuring that the evidence is relevant and likely to assist the court and that witness has the necessary expertise to give it.

They must also ensure that such evidence is confined to issues properly within the scope of the expert's relevant expertise.

They also have a duty to ensure – and this is critical – that the witness fully understands, and is in a position to comply with, the duties of an expert witness, as articulated in the jurisprudence and encapsulated now in Order 39, Rule 57(1). If not, the witness should not be proffered."

24. Unfortunately, as Noonan J observes in his judgment, it is evident that many expert witnesses either fail to understand and/or fail to take seriously their duties as such.
Far too frequently, expert witnesses appear to fundamentally misunderstand their role and wrongly regard themselves as advocates for the cause of the party by whom they have been retained.
It may be said that this is an established part of litigation culture in this jurisdiction.

If so, the culture is unacceptable and it needs to change. To that end, courts need to be forceful in policing the rules and in taking appropriate measures where those rules are not complied with.

25 ……..as a matter of principle, (lack of) objectivity, impartiality and independence may (and in an appropriate case will) go to the admissibility of expert evidence, not merely to the weight to be given to such evidence. "

38. ….As well as the duties of expert witnesses themselves, I emphasise again the responsibilities of legal practitioners. The adverse consequences of calling an expert witness who is unable or unwilling to comply with their duties as such may not necessarily be limited to the exclusion of their evidence, serious as that may be for the party concerned. It may also have adverse consequences in costs."

Expert Witnesses - Quantum

- ***Emerald Meats Ltd. v. Minister for Agriculture*** [2012] IESC 48 at [28]: O'Donnell J

  "It is important that experts, and particularly accountancy witnesses, do not simply accept their client's instructions as to certain matters and then construct calculations on the basis of those instructions. If that is all that is done, then the expert report is no more than the provision of a very expensive calculator. The court is entitled to expect that such experts will apply their critical faculties and their expertise to the case being made by their clients."

- ***Rosbeg Partners v LK Shields (a firm)*** [2018] IESC 23 at [23]: O'Donnell J

  "It is important to remind ourselves that courts should approach claims such as this not simply on the basis of the genuineness or plausibility of witnesses, but by applying common sense and some degree of scepticism.
  Litigation inevitably shines a very bright light on the events the subject matter of a claim, but it is also a distorting process in at least two ways.
  First, there is an inevitable tendency to highlight and focus only upon the issues which are particularly relevant to the claim.
  Second, the light is being shone in retrospect, when we know the outcome of the events.
  Inevitably, there is a tendency to recall events and attribute to them a significance in the light of what is known to have occurred subsequently. This is not a reflection on the honesty of witnesses, rather it is human nature. Persons involved in routine car accidents will regularly tend to recall events in a way which discounts or avoids their own culpability.
  It is not unusual to give ourselves the benefit of the doubt, in any field, and all the more so when the stakes are high. The hearing of some contested cases may sometimes involve a direct conflict of evidence in which the only conclusion is that one of the parties must be giving evidence which is deliberately false.
  However, that is relatively rare.
  In many cases courts must sift through differing accounts at some remove in time from the facts, and do their best to allow for human error and the tendency for memories and consequently accounts to become subtly and unwittingly adjusted under the focus of a case, and in the light of the consequences of failure.

  When dealing with calculations of loss, it is also important for courts to recognise that it is a lot easier to make profits on paper than in real life, and particularly when the exercise is being carried out in retrospect, when all the imponderables which make business so difficult to plan in advance, are known and fixed.
  Just as there are many more ambitious, though plausible, plans advanced in board rooms and financial institutions seeking financial support than are brought to success in real life, so too it is easier to produce the narrative of commercial success in a court room, than it is perhaps to achieve that success in reality. Courts must, and do, try to bring an appropriate scepticism therefore to their task at each stage of litigation."

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"Data Breach Claims"

HOLMES

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Michael Murphy, Partner, joined the firm in 2009 and specialises in professional negligence litigation and dispute resolution. He leads our Healthcare, Pharma and Life science group.

Practising in the non-jury area, Michael works with particular emphasis on professional indemnity, having experience in negligence cases involving architects, engineers, solicitors, barristers and insurance brokers, as well as claims against directors and officers. He has considerable experience of assessing liability and quantum issues, including the 'no transaction' principle. He advises insurers on coverage matters, particularly for regulated professions, advising on the solicitors' Minimum Terms and Conditions, surveyors' RICS Minimum Terms and accountants' CARB Minimum Approved Policy Wording. Specialising in delivering efficient services and, where necessary, innovative solutions, Michael applies these skills to challenging financial lines claims.

Michael also deals with personal injuries litigation in relation to both public liability and employers' liability claims. With significant expertise in advising clients on complex liability and quantum issues in such cases, he also frequently resolves cases without the input of counsel where appropriate. In both the non-jury and personal injury spheres he has experience in dealing with litigation against construction companies, private companies and health service providers.

Having significant experience in commercial litigation, Michael handles commercial disputes, personal injury actions in the Circuit and Superior Courts, alternative dispute resolution (including mediation and arbitration) and cases before the Commercial Court. He has dealt with judicial review cases and injunctions and has also dealt with cyber claims, including the misappropriation of significant sums of money from professionals by cyber criminals. Michael achieves excellent results, such as the recovery of a substantial amount which was frozen in the bank of another EU Member State. He also advises on the GDPR, including compliance strategies, risk minimisation and litigation arising from data breaches.

Michael acts for international and domestic insurance companies, loss adjusters, financial institutions, statutory bodies, construction companies, SME's, large corporates and private clients.

Recent Work Highlights

- Advising upon indemnity and dealing with an arbitration and resolution of a claim involving an architect who was sued cumulatively for €23m arising out of allegedly negligent investment advice provided to two members of one of Ireland's most popular rock bands
- Defending seven sets of related High Court professional negligence proceedings against a firm of accountants arising from a dispute as to whether loans taken out by investors were recourse to property only or full recover. The 'real' exposure for our client was in excess of €2m but a settlement was brokered for a net €200,000 'all in' by agreeing to purchase the residue of the loan with the new charge holder in an innovative solution that saved the insurers over €2m in liability that would otherwise have crystalised
- Acted on behalf of an engineer and his insurers in the resolution of an extremely challenging construction claim. Involving one of Ireland's largest dairy food produce manufacturers, the claims was against the contractor and engineer that provided allegedly negligent construction services. By having the dispute between the defendants submitted for adjudication, following an unsuccessful mediation, we resolved the claim with the contractor agreeing to deal with 50% of the claim – having been unwilling to even discharge their own costs at the mediation several months earlier
- Resolved an extremely complicated claim that involved a medical negligence component insofar as a cannula had been retained in the plaintiff's arm following a surgical procedure which resulted in physical and psychological sequelae arising
- Successfully resolved a cyber claim in which €300,000 was misappropriated by an Eastern European cybercriminal from an Irish firm of solicitors. The potential liability of the bank which facilitated the transaction was explored as well as the scope for holding the external IT contractors responsible for the loss. Through swift intervention, it proved possible to have the funds frozen in the Latvian bank and, with the assistance of a local firm of solicitors, the funds were successfully recovered in full following a court action, leaving the firm at no loss

Professional Activities

- Member of Forum of Insurance Lawyers (FOIL)
- Member of Professional Negligence Lawyers Association (PNLA)
- Delivers tutorials to PPC1 students on civil litigation, Law Society of Ireland, Blackhall Place
- Leading industry speaker at national and international conferences upon a diverse array of topics including professional negligence, commercial litigation, insurance, data protection and cyber security risks
- Member of the Law Society of Ireland.

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PRESENTATION ON DATA BREACH RISKS FOR PROFESSIONALS

Michael Murphy, Partner
08 June 2023

Guiding you with experience and integrity for over fifty years.

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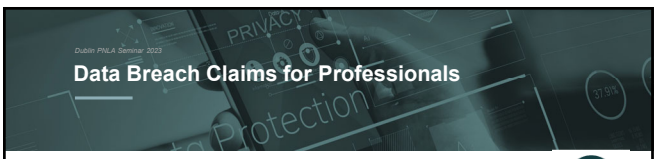

Dublin PNLA Seminar 2023

Data Breach Claims for Professionals

From managing data privacy, to responding effectively to DSARs, monitoring for data breaches, dealing with litigation and regulatory investigations stemming from data security incidents and data privacy breaches, all professionals need to understand, manage and mitigate against the risk of data breaches at all levels of their organisations.

What we will be talking about today:

- Why Data Breaches Matter for All Professionals
- How the Pandemic has increased the Risk for Professionals
- Why Data Breaches Particularly Matter for Solicitors
- Global Examples of Data Breaches at Law Firms
- Quantifying Claims: Material v. Non-Material Damage
- Data Breach Decisions in Ireland, the UK and Europe
- Practical Steps to Help Protect Your Firm from Data Breach Claims

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What is a Data Breach, as defined by GDPR?

A personal data breach means a breach of security leading to the **accidental or unlawful destruction, loss, alteration, unauthorized disclosure of, or access to, personal data** – meaning any information concerning or relating to an identified or identifiable individual.

Personal data breaches include incidents that are the result of both accidents (such as sending an email to the wrong recipient) as well as deliberate acts (such as a third party hacker sending phishing attacks to gain access to customer data and/or misappropriate client funds)

Any security incident **negatively impacting the confidentiality, integrity or availability** of personal data whereby a controller is unable to ensure compliance with the principles set out in Article 5 of GDPR for processing personal data.

Data has never been such a valuable commodity

Why Professionals all need to concern themselves with Data Breach Risks…

Almost one in five Irish firms hit by cyber attack or data breach in 2022

Research finds most senior business leaders plan to increase investment in cyber security and resilience in the coming years

According to the results of our National Data Protection Survey - more than half of Irish companies say that they have suffered a data breach in the last 12 months.

The results also show that data breaches, hacking attacks and employee negligence have all risen in the last year in Irish organisations.

External attacks have also increased, with almost one in five Irish companies claiming to have fallen victim to some form of malicious external attack.

Other findings include:

- One in three Irish companies have no corporate data breach policy and almo half are poorly trained for data breaches.
- Only two in five Irish firms have any internal sanctions for non-compliance with data protection rules.
- Most Irish companies have no guidelines on transferring data outside the country, despite a majority engaging in such transfers.

The survey has shown that Irish companies' biggest threat continues to be "negligent employees", with one in five singling out inept staff as the biggest issue they face in keeping sensitive data secure.

In its annual report, the DPC said there were 5,828 GDPR data breaches reported last year, down 12% on 2021.

The most frequent cause of reported breaches was from correspondence inadvertently being sent to the wrong recipients, at 62% of the overall total.

Of the total 5,828 breach notifications that the DPC received, 3,014 related to the private sector, 2,568 to the public sector and the remaining 246 came from the voluntary and charity sector.

As of 31 December 2022, the DPC was pursuing 88 statutory inquiries, including 22 large-scale cross-border inquiries.

The DPC has also imposed administrative fines ranging from €1,500 to €17 million on six different organisations; all of these funds have been collected and transferred to the Exchequer.

Among the organisations were Limerick City and County Council, fined €110,000 in December 2021; Bank of Ireland, fined €463,000 in March, and Meta Ireland, fined €17 million in March.

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Integrated advice for the most challenging cases

The Post-COVID Hybrid Workplace and Data Breaches

Forbes

The Pandemic's Lasting Effects: Are Cyber Attacks One Of Them?

Jesper Zerlang

As CEO of LogPoint, Jesper is an expert on business and cybersecurity innovation.

Remote working makes firms feel more vulnerable to data breaches

Remote working has left employers feeling increasingly vulnerable to data protection breaches and cyber-attacks, according to a new survey from the Association of Compliance Officers Ireland (ACOI).

Increased cyber threat level requires heightened vigilance

The threat posed by cybercriminals has increased significantly since the onset of the Covid-19 pandemic

No organisation is too small or too large, or insignificant to escape the attention of the cybercriminals. Photograph: Getty Images

Holmes is one of Ireland's largest and longest established insurance law practices.

Globally recognised as a top tier insurance practice, we have been at the cutting edge of insurance litigation in Ireland over fifty years. Our strength lies in the breadth and depth of our experience, technical ability and vision of our team.

"…it is not a question of if an Irish business will be subjected to an online attack, but a question of when."

Mike Harris
Grant Thornton

Why should Solicitors specifically be concerned about Data Breach Risks?


Increase in cyberattacks on solicitors - Garda Notice

The Law Society has been informed by members and separately by the Garda National Cybersecurity Bureau of a surge in cyberattacks.

Members of the profession have provided details of successful cyberattacks on their practices in Munster, Connaught and Dublin in the past week. In each of these cases, the solicitors' email system has been compromised, resulting in emails being sent requesting funds to be transferred to the fraudster's bank account.

Independently, An Garda Síochána have also advised of a recent surge in cyberattacks resulting from business emails being compromised and noted that there appeared to be a number of ongoing campaigns against legal firms here in Ireland. As a result, substantial amounts of money were redirected, presumably in order to fund criminality and its beneficiaries.


Forbes

The time to act is now.

Law firms must take notice of the recent court decisions and understand the importance of protecting their clients' private data. With the legal and financial liabilities for data breaches now becoming clearer, firms must take proactive steps to secure their systems and implement strong data protection measures.

By reducing identity sprawl and adopting a ZTA, regularly assessing and updating their security posture, and training employees on the importance of data security, law firms can reduce their risk of a data breach and protect their client's sensitive information. The legal industry's future depends on the protection of client data, and law firms must rise to the challenge and take the necessary steps to secure their systems and protect their clients.


MARKETING TECHNOLOGY UPDATE

Hackers are aggressively targeting law firms' data


Law Firms: Cyber Criminals' Next Top Target?


Irish Examiner

NEWS SPORT BUSINESS VIEWS LIFE EXAM/RIAL PROPERTY MOTORS TECH

A third of Ireland's 'top 20' law firms hit by cyber attacks in the past 12 months

Monday, November 23, 2015


legalfutures

"Over-excited" firms risk ChatGPT data breaches

Practical Examples of Data Breaches at Law Firms Globally – and the Consequences…

Who was hacked: New York City's Law Department

How they did it: Using an employee's stolen credentials, bad actors infiltrated the law department network. The department employs thousands of people and holds sensitive data, including evidence of police misconduct. To prevent further access to their data, the department disabled their computer system, leading to delays in court proceedings and much more.

The takeaway: The law department network had yet to roll out their multifactor authentication at the time of the cyberattack, despite it being required two years prior. All hackers needed was one employee password to access the network and disrupt legal affairs citywide. Though the department is still unsure how the employee's credentials were acquired, it's likely that the password was easy to guess or recycled, which would have been prevented with a password manager.

Who was hacked: Lady Gaga and other A-Listers

How they did it: In 2020, the firm Grubman Shire Meiselas & Sacks was the target of a cyberattack, resulting in 756 gigabytes of stolen PII (personally identifiable information).The firm represents clients including pro athletes and Hollywood A-listers like Lady Gaga, whose legal documents were leaked in the attack. This ransomware attack on the law firm was achieved using REvil ransomware, which often uses phishing emails or stolen credentials to access a network remotely as the initial vector. The hackers demanded $21 million in ransom, doubling their price when the firm failed to cooperate.

The takeaway: Given the high stakes of securing legal documents, especially for high-profile clients, make sure your firm has robust ransomware and malware defenses by employing zero-trust technology. Employees should also be trained on detecting phishing emails.

Practical Examples of Data Breaches at Law Firms Globally – and the Consequences… (continued)

Who was hacked: Fortune 500 companies

How they did it: The IP law firm Vierra Magen Marcus, whose clients are made up of Fortune 500 companies, experienced a damaging breach in 2020. Using REvil ransomware, hackers were able to acquire 1.2 terabytes of stolen data including NDAs and patents, which they auctioned on the dark web.

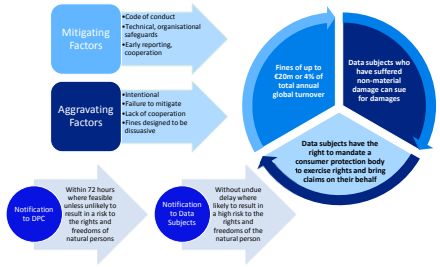
The takeaway: With clients like Fortune 500 companies, it's only a matter of time before your firm is targeted by hackers. Shore up your malware and ransomware defense. Law firms can also run a dark web scan to see if data has been leaked.

Who was hacked: Panama-based Law Firm Mossack Fonseca

How they did it: Known as the biggest data leak ever, hackers supposedly exploited a vulnerability of a WordPress site and accessed an email server of Mossack Fonseca. The attackers stole 11.5 million files from the firm, which manages off-shore transactions for major clients including heads of state and celebrities. Emails, documents, and images were leaked to the media, resulting in a coordinated effort by the press to expose the firm's clients for tax evasion and more. The damage to both the firm's and their clients' reputations resulted in Mossack Fonseca going out of business within two years of the attack.

The takeaway: Barring any criminal activity, it's a firm's responsibility to protect information about their clients. A strong cybersecurity culture and the right defensive tools are the best way to protect the reputation of your firm as a secure place for clients' data.

The Regulatory and Litigation Risks presented by Data Breach Claims



Data Breaches: The Insurance Dimension for Solicitors

Seven Years into GDPR: Quantifying Data Breach Claims - Where are we now?

Article 82 of GDPR provides that any person who has suffered material – *or non-material* – damage as a result of GDPR being infringed shall have the right to receive compensation for the damage suffered – pre-GDPR only material damage was compensable.

The term non-material damage essentially means non-economic loss, i.e. pain and suffering, inconvenience and anxiety which might arise from a data rights breach, as opposed to any kind of financial damage (which would be material damage).

So how will the Irish courts quantify non-material damage in data breach claims? This remains an open question – but there has been some guidance from the Irish courts, the UK courts and the European Court of Justice in recent months…

Pre-GDPR Case law concerning Data Breach Claims

01

Ireland:

Collins v. FBD: A Circuit Court award of €15,000 relating to an invasion of privacy of a policyholder was over turned on appeal as the award was for non-material damage which was not compensable at the time.

The Circuit Court also dismissed with an order for costs a claim brought by an Ulster Bank customer where no loss could be demonstrated, notwithstanding that a breach of duty had taken place by the Bank.

England & Wales:

Google Inc v Vidal-Hall, Hann and Bradshaw the English Court of Appeal accepted that the concept of damage included non-pecuniary losses including loss of personal dignity and autonomy, anxiety and distress. I

Lloyd v Google LLC: loss of control over personal data was acknowledged as being damage capable of compensation, subject to the qualification that no damage would be awarded for a trivial breach

Mainland Europe:

Nikolaou v. Commission: the Applicant was award €3,000 for non-material damage arising from the unlawful disclosure to media outlets of his personal information

V v European Parliament: €20,000 was awarded to the Applicant for the non-material damage aspect of her claim where annulment could not take place due to the serious nature of the data breach

Post-GDPR Case law concerning Data Breach Claims

01

Ireland:

Cunniam v. Fastway Couriers: The Circuit Court placed a stay on the proceedings pending the determination of a number of issues by the ECJ.

The Circuit Court threw out a claim against SIPTU in October 2022 for inadvertently disclosing personal data of its members – however, no written decision was handed down by the Judge.

NB: Data breach claims can only be brought in the High Court and Circuit Court – not the District Court..

England & Wales:

Rolfe v Veale: the English High Court held that there is a *de minimis* threshold implicit in English case law which claimants have to show has been exceeded before they can seek damages for actual loss or distress.

Johnson v Eastlight Community Homes Ltd, the English High Court ruled that the *de minimis* concept applies to claims taken under the GDPR and the UK Data Protection Act 2018.

Mainland Europe:

Österreichische Post: The ECJ endorsed much of the Advocat General's opinion in terms of requiring litigants to prove a causal link between the damage complained of and the GDPR infringement.

However, the ECJ was not satisfied that compensation for non-material damage should be subject to a *de minimis* threshold as this was not stipulated in GDPR and was instead a matter for each national court within the EU.

Seven Years into GDPR: Quantifying Data Breach Claims - What does the future hold?

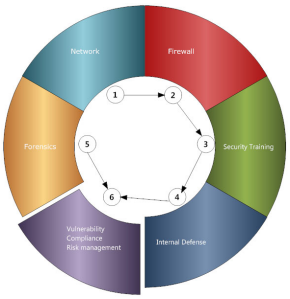
There is still no written Irish decision quantifying non-material damages by an Irish court so that will be an important next step, particularly given the ECJ's emphasis upon the discretion of national courts to assess the value of awards for non-material damage claims – and whether or not mere worry or upset is enough for an award or if something more is needed.

The UK case law is only persuasive in nature for Irish judges, of course, but it will be interesting to see the extent to which, post-Brexit, the UK courts' approach to the *de minimis* non-material damage principle will inform the thinking of judges in both Ireland and the ECJ going forward. German courts already tend to look for the existence of 'perceptible harm' when assessing damages, for instance.

The German Federal Labour Court has referred to the ECJ two questions: if GDPR has a special or general preventative character and if the degree of fault of a controller or processor are factors relevant to assessing non-material damages. The ECJ's answer to those questions will be interesting per the *Österreichische Post* decision.

Prevention is better than cure…

- When exposed to a data breach, professionals can face regulatory investigations, negative media attention, interruption of business operations, litigation, and customer complaints. Therefore, wherever possible, *prevention is better than cure.*
- Professionals accordingly need to protect themselves against data breach risks by reviewing and prepare data and cyber policies and procedures and ensuring appropriate training is provided to staff to ensure that all personnel know how to avoid data breaches.
- Not every data breach will need to be notified to the DPC nor give rise to civil compensation claims, however all such potential incidents should be logged to assess potential patterns and areas that might require intervention – data breach claims are difficult to fully avoid but the scope for such claims to arise can be *minimised* through proper governance.



Creating A Coordinated Approach to Data Breach Risks

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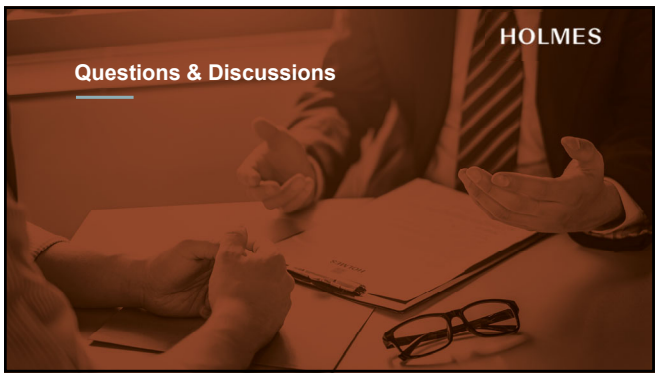
Summary of Data Breach Risks for Professionals

All professionals need to engage with GDPR in terms of ensuring compliance and, in particular, mitigating against data breaches and dealing with them when they arise, as they inevitably will. Proper procedures and training are key aspects of any professional's approach to such issues, all of which should be fully documented.

Professionals should check the terms of their insurance policies to confirm if they are covered for such claims – both their general professional indemnity policies but also any specific cyber insurance policies in place. A proper, timely response to a data breach will invariably help when dealing with any subsequent claims.

At present, it is difficult to say precisely what level of compensation will be awarded for non-material damage breach claims given the absence of any written decision in Ireland and the potentially divergent approaches to the *de minimis* threshold between the UK, some European courts and the ECJ's recent decision – this is an evolving area.



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Rossa Fanning SC
Attorney General of Ireland

"Keynote Address"

Rossa A. Fanning SC

Attorney General of Ireland

Rossa A. Fanning is an Irish barrister and legal academic. He has served as the Attorney General of Ireland since December 2022.

His practice at the Bar has been primarily focused on commercial litigation and insolvency.

Rossa Fanning graduated from UCD in 1997 (BCL, First Class Honours, First Place & Swift McNeill Memorial Prize) and in 1999 (LL.M, First Class Honours, Postgraduate Research Scholarship), from King's Inn in 1999 (BL, First Place, John Brooke Scholarship) and from the University of Michigan in 2000 (LL.M, Fulbright Scholar & University Fellow).

Rossa has been in practice at the Irish Bar since 2000 and took silk in 2016. He combined practice at the Irish bar with a teaching position as a College Lecturer at UCD from 2001 – 2009, where he taught Constitutional and Company Law.

Before taking office has broad commercial, chancery, insurance defense & media litigation experience.

He acted for banks, insolvency practitioners, newspapers, technology companies and for insurance companies in catastrophic cases, product liability, professional negligence & construction litigation.

https://en.wikipedia.org/wiki/Rossa_Fanning

PNLA
Professional Negligence
Lawyers Association

Notes: -

Joan O'Connor B.Arch. Dip. Arb. FRIAI RIBA FCI Arb.
Joan O'Connor Consultancy Ltd

"Architects - BCAR and the Assigned Certifier"

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00 353 [0]87 2575208/jockngy@gmail.com
May 2023

Joan O'Connor is a Chartered Architect, Chartered Arbitrator and one of Ireland's leading project managers. She is a gold medal graduate from The School of Architecture, University College Dublin [1975], a diploma holder from the Faculty of Law at the same University and a Fellow of the Chartered Institute of Arbitrators [1998]. She is a Fellow of the Royal Institute of Architects of Ireland [RIAI] and of the Royal Institute of British Architects [RIBA]: she was elected as the first woman - and youngest to date - President of the RIAI in 1994.

She is a past Chairman of the RIAI Board of Examiners in Professional Competence and served on the RIAI Technical Assessment Board. She was an extern examiner for the Glasgow School of Art [Macintosh Schoolof Architcture] final year Diploma and is an occasional lecturer to post-graduates and the profession on the following topics :

- Construction contracts : law and administration
- Leases, covenants and licences
- Project management
- Commercial and institutional development and refurbishment.

She has over 35 years' experience of development in Ireland, England and Eastern Europe having worked with developers and funding institutions on complex projects in centre city sites. She acted as technical adviser and due diligence lead for New Ireland's Evergreen Fund [active in Ireland] and for AIB's Polonia Property Funds I and II [active in Hungary and Poland].

She has served on a number of public and private boards related to architecture and development. She served on the Forum for the Construction Industry and was twice appointed to the Boards of the National Building Agency and the Dublin Docklands Development Authority [DDDA], the latter of which was charged with the re-development of 475 hectares of brown-field urban land adjacent to Dublin's CBD. At DDDA, she chaired the Masterplan Development and Review and the Planning Sub-Committees.

She has chaired and/or acted on numerous juries for architectural competitions, including :

- The Holyrood Parliament, Edinburgh, Scotland
- Millennium Monument [The Spire], O'Connell Street, Dublin
- The National Gallery Extension, Clare Street, Dublin
- The Hugh Lane Gallery Extension, Parnell Square, Dublin
- The Grandstand, Royal Dublin Society, Dublin.

Until end-2010, she was the proprietary director of Interactive Project Managers Ltd., a specialist firm, providing professional advice and service covering all aspects of infrastructure and building procurement from inception to completion. Projects completed under her direction include :

- Simmonscourt Office Complex, RDS, Dublin
- Westin Hotel and Bank, Westmoreland Street Dublin
- Refurbishment Ilac Shopping Centre, Dublin
- An Post Sorting/Distrubution Centres, Cork, Kilkenny, Waterford, Kildare
- Cork City and County Courthouse Refurbishment, Washington Street, Cork
- Office Development, Lubicz, Krakow, Poland
- Office and Retail Development, Wroclaw, Poland
- Refurbishment, East-West Business Centre, Budapest, Hungary.

Since 2011, she is an independent consultant in matters relating to development and construction and to the professional practice of architecture : she also acts as a mediator, conciliator and arbitrator on construction and property disputes and she provides expert witness services in these areas.

Architects
BCAR and the Assigned Certifier Risk

Joan O'Connor
Architect, Project Manager, Conciliator, Arbitrator, Expert Witness

Where from?

- The Building Bye-Laws
- The Local Authority
- The Building Inspector

The Brave New World

- Building Control Act 1990
- An Act to provide for -
  - the establishment of Building Control Authorities and
  - the making of Building Regulations and
  - Building Control Regulations and
  - to provide for matters relating to the construction of buildings and
  - to provide for other matters connected therewith ….
- Re-casting of obligations of designers and builders
- De-regulation?

Opinions on Compliance

- The Opinion on Compliance
- Extent of Author's involvement during construction
- Periodic inspection, or
- Superficial visual inspection
- Limitations of Opinion
- Immunity from action - *" none of the alleged defects are such as would warrant enforcement proceedings as provided for in the Building Control Act*

BC[A]R 2014

- The Building Control [Amendment] Regulations 2014
- No change to or impact on Building Regulations
- Does not prohibit use of Opinions on Compliance [but will comply with BCAR 2014]

BC[A]R 2

- BC[A]R requires –
  - A Building Control Authorly to set up/maintain a register
  - Responsible and knowledgeable building owners
  - Compliant design – competent designers
  - Competent builders
  - Responsible oversight and supervision of construction work
- Leading to -
  - More comprehensive certification - the Assigned Certifier and others
  - Improved quality of building

The Notices

- Commencement Notice – Building Owner
  - The 7-Day Notice [where FSC required]
- Certificate of Compliance [Design] – Designer [architect, engineer ….]
- Notice of Assignment of Assigned Certifier – Building Owner
  - Confirms that AC is "on a register"
  - Confirms the competence of the AC
- Undertaking by Assigned Certifier – Assigned Certifier

More Notices

- Notice of Assignment of Builder – Building Owner
  - Statement of satisfaction re Builder's competence …
  - What happens if the Building Owner and Builder are closely related?
- Undertaking by Builder – Builder
  - Undertakes to be competent [absent criteria for competence?]
  - Undertakes to build in accordance with ….

Yet More Notices

- Certificate of Compliance on Completion – Builder and Assigned Certifier
- Ancillary Certificates - Various

What If?

- Restrictions on use or occupation
- Provision for retrospection – regularisation certificate
- What if AC cannot or will not certify?
  - Change of design not approved during construction
  - Poor construction
  - Non-payment of fees
- Independence of the AC – from Builder and/or Designer
- Design-Build Contracts

The Code of Practice

- Government Code of Practice for Inspecting and Certifying Buildings and Works
- Article 20(G] - compliance with the Code … prima facie compliance with the regulations
- "*Where works or a building to which these Regulations apply is inspected and certified in accordance with the guidance contained in the Code of Practice for Inspecting and Certifying Building Works, this shall prima facie indicate compliance with the relevant requirements of these Regulations.*

The Value of the Code

- Only a code and is thus not mandatory
- "unlikely that the Code of Practice is sufficient to create a legal obligation" [Ralston SC]
- May mean little more than it is taken at face value unless it is shown not to be in compliance

Inspections

- Para 7 of the CoP –
- An Appropriate Inspection Plan
  - Which takes full account of relevant factors for the building work concerned
  - Relevant factors should be assessed at the outset and regularly reviewed
  - Effective control is maintained for the duration of each project
  - As good as the person inspecting …. none so blind?

Why Inspect?

- Objectives [Hudson "Supervision and Inspection" Para 2.096]
  - the prevention, detection and correction of defective work by the contractor
  - the more difficult and delicate role of intervention or non-intervention …… if the contractor's working methods or temporary works prove unsuccessful or cause for concern
  - should there by an indications of potential failure of the permanent design, intervention to correct it

When to Inspect

- Insufficient for the architect to make inspections only after site meetings
- Timing and duration of inspections …. to be tailored to the nature of the works taking place on site
- If inspections were timed to always coincide with site meetings, the contracts would know that at all other times their work effectively remains safe from inspection
- *McGlinn V Waltham Contractors (2007) 111 CON. L.R.1*

The Code of Practice

- Para 7.2 of the CoP –
- The Inspections
  - *"the inspection plan should be incorporated in a formal written plan which should be kept under review"*
  - *"Periodic inspections should be carried depending on the size and nature of the particular building project. This should include critical milestone inspections and inspections as set out in the Inspection Notification Framework (INF)."*
- Multiple templates and formats available, including in CoP
- Records, records, records ……..

The Design Certificate

- 4. I confirm that the plans, calculation, specifications, ancillary certificates and particulars included in the [Commencement Notice/7-day notice] to which this certificate is relevant, and
- which have been prepared exercising reasonable skill, care and diligence by me,
- and by other members of the design team and specialist designers whose design activities I have co-ordinated
- have been prepared to demonstrate compliance with the requirements of the Second Schedule to the Building Regulations insofar as they apply to the building of works concerned.

The Design Certificate 2

- 5. I certify,
- having exercised reasonable skill, care and diligence, that,
- having regard to the plans, calculation, specifications, ancillary certificates and particulars which have been prepared by me
- and others
- and having relied on the ancillary certificates and particulars referred to under 4 above,
- the proposed design for the works or building is in compliance with the requirements of the Second Schedule to the Building Regulations insofar as they apply to the building or works concerned.

The Completion Certificate [A.C.]

- 7. I now confirm that
- the inspection plan, drawn up have regard to the Code of Practice for Inspecting and Certifying Buildings and Works, or equivalent,
- has been undertaken by the undersigned
- having exercised reasonable skill, care and diligence,
- and by others nominated therein, as appropriate,
- on the basis that all have exercised reasonable skill, care and diligence in certifying their work in the ancillary certificates scheduled.

The Completion Certificate [A.C.] 2

- 8. Based on the above, and
- relying on the ancillary certificates scheduled,
- I now certify,
- having exercised reasonable skill, care and diligence,
- that the building or works is in compliance with the requirements of the Second Schedule to the Building Regulations insofar as they apply to the building or works concerned.

Architect NOT A.C.

- Ancillary Certificate RIAI ACCD 01 – Compliance of Design on Completion, signed by Architect NOT acting as AC
- Ancillary Certificate RIAI ACI 01 – Inspection, on Completion , signed by Architect NOT acting as AC

B. Regs and TGDs

- Differentiate between the Building Regulations and Technical Guidance Documents ["**TGDs**"] to assist in compliance with the Regulations
- Regulations are simply worded and provide general rules for the purposes outlined in Section 3(2) Building Control Act 1990
- The primary purpose -
  - making provision for securing the health, safety and welfare of—
    - persons in or about buildings, and
    - persons who may be affected by buildings or by matters connected with buildings;
- Regulations are not intended to provide insurance against all possible defects

TGDs

- Technical Guidance Document provide further technical details and dimensional recommendations
- Couched in terms of "should" and "may", leaving the matter of compliance with the governing Regulation open to interpretation and professional opinion.
- Used [and abused] as a shield and a sword
- Can lead to defensive design and additional cost ….

Examples

- Regulation K1 re "Stairways, ladders and ramps"" simply states that "*Stairways, ladders and ramps shall be such as to afford safe passage for the users of a building*".
- Regulation F.1 re "Means of Ventilation" states that "*Adequate means of ventilation shall be provided for people in buildings. ….*"

Examples 2

- Regulation B6 re "Fire Safety" simply states that
- "*A dwelling house shall be so designed and constructed that there are appropriate provisions for the early warning of fire and there are adequate means of escape in case of fire from the dwelling house to a place of safety outside the building, capable of being safely and effectively used*".

Liability

- S21 of the Building Control Act 1990
- "*Persons shall not be entitled to bring any civil proceedings pursuant to this Act by reason only of the contravention of any provision of this Act, or of any order or regulation made thereunder.*"
- Exoneration from civil liability for any person providing a certificate of design or compliance, purely on account of that certificate?

Liability 2

- The mandatory form of the statutory certificate[s]
- The absolute nature of the certificate – "I certify ….."
- No "substantial" compliance or any other equivalent modifier
- No apparent latitude for the exercise of professional judgement

Indemnity insurance

Office of Government Procurement Guidance Note 1.1.1 March 2014

- *The level of Professional Indemnity insurance sought for the Assigned Certifier should be no more than 15% of that sought for the lead designer on the project subject to a minimum limit of €500,000*

Because

- The AC is not a Designer, and
- The Contractor is responsible for supervising construction

Responsibilities

- Do the certificates required under BCAR constitute warranties?
- Does the Architect and/or AC assume responsibility for the work of other designers or 3rd parties such as specialist suppliers?
- Does the AC accept any responsibility for design?
- Does the issue of certificates extend the Architect and/or AC's responsibility to others such as subsequent purchasers, tenants, etc. ?
- What degree of compliance with the Second Schedule to the Building Regulations is required?

Whither bound?

Yet nothing seems to change ……..

- Continuing professional development
- Educating and registering experts?
- Registration of builders
- Licensing?
- Effective grievance procedures
- Defects Insurance
- Review joint and several liabilityy
- Simplify the administrative aspects of building control to focus on essentials such as education, inspection and insurance.

References

- RIAI Agreement between Building Owner and Architect for Appointment as Assigned Certifier
- RIAI BC[A]R Code of Good Practice for Designers and Certifier Roles
- Government Code of Practice for Inspecting and Certifying Buildings and Works
- CIC Practice Notes re Ancillary Certificates
- Office of Government Procurement Guidance Note 1.1.1 BCAR 2014 Procurement Implications for Contracting Authorities

Dr Hugh O'Donnell
Senior Consultant
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"Construction - ESG and Mitigation of Professional Risk"

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ESG x25
Sustainability by Design

Over 32 years' experience in multiple sectors, working with leaders across a global environment, specialising in the provision of investment, governance, technology, leadership and culture advisory services.

- Current board/advisory roles include ***Ingenium Consulting***, ESG, Strategy, Culture, Leadership & Talent Development, Digital Solutions, and Business Performance Improvement; ***i3PT***, Digital Building Systems Validation; ***Novus Technical Services***, Global Energy Services; ***Teckro***, Pharmaceutical and Bio-Tech Digital Clinical Trials; ***HR Locker***, SaaS HR ERP; ***Holmes*** Legal Services; ***MACX3 Investments Holdings***, Investment.
- Former CEO Kentz Corporation – Energy Services in 36 countries & London Stock Exchange listed.

  Strong focus on organisations with international growth mindset, enabled through strategy, people development, cross-cultural leadership - working in partnership with leaders to achieve transformational change & performance.
- EY EoY International Category winner 2009.
- Education:

  B. Eng.1987 UL
  MBA 1999 Surrey University, UK;
  Doctor of Management and Organisational Behaviour, 2002, Southern Cross University, Australia.

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Embracing ESG

An Emerging New Portal to Risk Management Insights for Insurance Companies

ESG x25 Sustainability by Design

June 2023

ESG Overview

Hugh O'Donnell

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ESG – Leading Indicators for Risk Prediction

- Adoption creates an ESG Strategy, performance KPIs, measurement reporting framework.
- Accountability context in emerging legal requirements; collection and consolidation of baseline company data; together with recommendations, goals, action plans and initiatives - collated to develop an organisational Sustainability Policy, Plan, and Report.
- Important for boards, senior executives, and other team members to create greater organisational context & accountability for ESG & Sustainability.
- Important for insurance companies as this provides greater transparency with leading indicators in emerging or latent risk.

Environmental x7

Social x7

Governance x11

ESG x25 Sustainability by Design | Comprehensive framework with a **menu** of 25 ESG measures to select from.

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ESG Overview

Environmental x7

1. Carbon Footprint
2. Energy Efficiency & Waste
3. Water Efficiency & Waste
4. Other Resource Depletion
5. Greenhouse Gases
6. Deforestation*
7. Climate Change & Climate Action

Social x7

1. D&I Companywide
2. Employee Relations
3. Local CSR in Communities
4. Health & Safety
5. Human Rights & Labour Standards
6. Product & Service Responsibility
7. Working Conditions

Governance x11

1. Executive Remuneration
2. Board & Executive D&I
3. Board & Committee Effectiveness
4. Ethics & Compliance
5. Accounting & Tax Avoidance
6. Customer Relationships
7. Shareholders' Rights
8. Data Privacy & Security
9. Wellness
10. Risk Management
11. Horizon Scanning

ESG x25 Sustainability by Design

A comprehensive ESGx25 framework, measured against best practice to develop a unique ESG Sustainability Report – something that can shared with key internal & external stakeholders.

*Company specific measures to be reviewed for inclusion or not, depending on company activities.

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Risk for Insurers (12)

Environmental x7

7. Climate Change & Climate Action

Social x7

2. Employee Relations
4. Health & Safety
5. Human Rights & Labour Standards
6. Product & Service Responsibility
7. Working Conditions

Governance x11

3. Board & Committee Effectiveness
4. Ethics & Compliance
5. Accounting & Tax Avoidance
7. Shareholders' Rights
8. Data Privacy & Security
10. Risk Management

ESG x25 Sustainability by Design

Emerging risk in compliance with national climate action directive and legal taxonomy. Potential fines for non-compliance, particularly relevant for listed companies

Worker injury and fatality risk, employment dispute risks, and organisational performance and dispute related risks and responsibilities.

D&O Risks, Regulatory and CRO fines. Listed company fines for protected disclosure compliance. Emerging AI Governance considerations.

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Emerging AI Corporate Adoption & Governance

Platforms

- Dall-e 2 Image Generator
- Canva image generator AI image generator
- ChatGPT AI written document generator

AI Corporate adoption through regulation, internal policy and ethics & compliance training.

Case Study

On 22th June 2022, the Cosmopolitan Magazine team asked the AI DALL-E platform to 'provide' an image represented by "a strong female astronaut warrior walking on the planet Mars, in a digital art synthwave. It should be a wide-angle shot from below with an athletic feminine body walking with swagger toward camera. And it should be on Mars in an infinite universe."

Using Dalle- 2, in 20 seconds they had their cover…

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ESG Maturity Assessment Model

MATURITY – determined from current ESG awareness & initiatives in operation within the organisation.

Framework streamed across four (4) levels, based on **organisation's size** and **experience** in ESG.

A menu approach allows each organisation to select the appropriate measures and the level of assessment, relative to the sector and organisational maturity.

Examples of sector variables include GHG in manufacturing, Deforestation in material and supply chain use, and Human Rights in supply chain – excluded if not applicable.

Client directed measures selected

Environmental x7

Level 1
Entry level for Companies with poor process and measurement adoption

Level 2
For Companies with segregated measurement with no consolidation & goal setting

Level 3
For Companies with segregated measurement with partial consolidation & goal setting

Level 4
For Companies with integrated measurement framework with established goal definition & delivery

Social x7

Level 1
Entry level for Companies with poor process and measurement adoption

Level 2
For Companies with partial measurement with no consolidation & goal setting

Level 3
For Companies with established measurement with partial consolidation & goal setting

Level 4
For Companies with complete measurement framework, together with goal definition & delivery

Governance x11

Level 1
Entry level for Companies with poor process and measurement adoption

Level 2
For Companies with partial measurement with no consolidation & goal setting

Level 3
For Companies with established measurement with partial consolidation & goal setting

Level 4
For Companies with complete measurement framework, together with goal definition & delivery

Environmental Standards – The ESG Lexicon

ESG Standards, Laws, Best Practice & Platforms

E ISO 14001
Environmental Management System

E ISO 20121
International standard for sustainable events management.

E WRI GREENHOUSE GAS REPORTING
World's Resources Institute (WRI) GHGP international standard for reporting GHG Scope 1, 2 & 3 emissions based on source. WRI led.

E ESOS & SECR
Energy Savings Opportunity Scheme (ESOS), a mandatory energy assessment scheme Streamlined Energy & Carbon Reporting (SECR), both for large organisations in the UK.

E ISO 14064
Climate Policy : Green House Gas (GHG) Quantification, monitoring, and verification

E PAS 2060
International (BSI) standard to verify the accuracy of carbon neutrality claims, created from a previous PAS 2050 version.

E BEIS/DEFRA REPORTING GUIDELINES
UK Government voluntary reporting guidelines, formerly (DECC).

E DEFRA REPORTING GUIDELINES
UK Government carbon measurement DEFRA guidelines.

E ISO 50001
Energy Management System

E CDP
CDP (Carbon Disclosure Project) intl. organisation to provide structured disclose environmental impact. Investor Led.

E CLIMATE ACTION & LOW CARBON DEVELOPMENT BILL 2021
Irish Government legal framework to transition economy to climate neutrality by 2050

E EU CSRD REPORTING GUIDELINES
EU Corporate Sustainability Reporting Directive (CSRD) independent audit guidelines.

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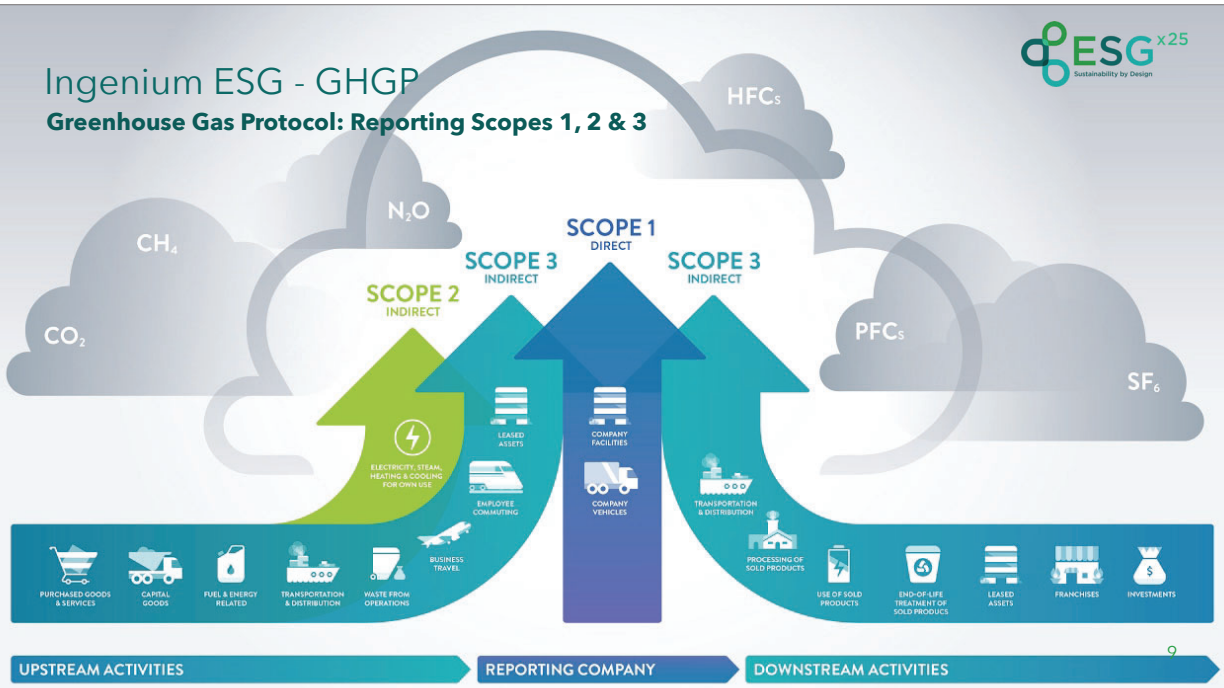
Ingenium ESG - GHGP

Greenhouse Gas Protocol: Reporting Scopes 1, 2 & 3



Ireland's Climate Action & ESG Context

gov.ie Departments Consultations Publicat

Publication

Climate Action and Low Carbon Development (Amendment) Bill 2021

From Department of the Environment, Climate and Communications
Published on 23 March 2021
Last updated on 20 July 2021

The Climate Action and Low Carbon Development (Amendment) Bill 2021 will support Ireland's transition to Net Zero and achieve a climate neutral economy by no later than 2050. It will establish a legally binding framework with clear targets and commitments set in law, and ensure the necessary structures and processes are embedded on a statutory basis to ensure we achieve our national, EU and international climate goals and obligations in the near and long term.

Key Elements

- Statutory 'national climate objective', which commits to achieve a climate neutral economy no later than 2050
- Embeds the process of carbon budgeting into law, including **sectoral targets** for each relevant sector, on a rolling 5-year basis, starting in 2021
- **Actions** for each **sector** will be detailed in the Climate Action Plan, updated annually
- Introduces a requirement for each **local authority** to prepare a **Climate Action Plan**, which will include both mitigation and adaptation measures and be updated every five years. Local authority Development Plans will also align with their Climate Action Plan
- **Public Bodies** will be obliged to perform their functions in a manner consistent with national climate plans and strategies, and furthering the achievement of the national climate objective

Updated by July & September 2022 Irish Climate Change Advisory Council Publications & Sector Targets

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Published in September 2022 by the Irish Climate Change Advisory Council

Ireland's Climate Action & ESG Sectoral Targets

Table - Sectoral Emission Ceilings[3]

(Figures for $MtCO_2eq$ for 2018 and 2030 have been rounded. This may lead to some discrepancies)

	2018 Baseline (MtCO2eq.)[4]	Sectoral Emission Ceilings for each 5-year carbon budget period (MtCO2eq.)		Indicative Emissions in Final Year of 2021-2025 carbon budget period (MtCO2eq)	Indicative Reduction in Emissions in Final Year of 2021-2025 budget period compared to 2018	Emissions in final year of 2026-20230 carbon budget period (MtCO2eq)	Reduction in Emissions final year of 2026-2030 carbon budget period compared to 2018	Agreed CAP21 Ranges
Sector	**2018**	**2021-2025**	**2026-2030**	**2025**	**2025**	**2030**	**2030**	**2030**
Electricity	10	40	20	6	~40%	3	~75%	60 – 80%
Transport	12	54	37	10	~20%	6	~50%	40 – 50%
Built Environment - Residential	7	29	23	5	~20%	4	~40%	45 – 55%[5]
Built Environment - Commercial	2	7	5	1	~20%	1	~45%	
Industry	7	30	24	6	~20%	4	~35%	35 – 40%
Agriculture	23	106	96	20	~10%	17.25	~25%	20 – 30%
LULUCF[6]	5	XXX	XXX	XXX	XXX	XXX	XXX	40 – 60%
Other (F-Gases, Waste & Petroleum refining)	2	9	8	2	~25%	1	~50%	N/A
Unallocated Savings[7]			-26			-5.25		
TOTAL[8]	*68*	*XXX*	*XXX*	*XXX*	*XXX*	*XXX*	*XXX*	*N/A*
Legally binding Carbon Budgets and 2030 Emission Reduction Targets[9]	-	295	200	-	-	34	51%	-

4%/yr

c.9%/yr

[3] Table reflects what was agreed by Government on 28 July 2022
[4] Million tonnes of carbon dioxide equivalent.
[5] CAP21 outlined 45-55% range for all buildings i.e. it did not split out residential and commercial buildings
[6] Finalising the Sectoral Emissions Ceiling for the Land-Use, Land-Use Change and Forestry (LULUCF) sector has been deferred for up to18 months to allow for the completion of the Land-Use Strategy
[7] Unallocated savings on an economy-wide basis in the second 5-year carbon budget period from 2026-2030, before factoring in net LULUCF sector emissions
[8] Following finalisation of the Sectoral Emissions Ceiling for the Land-Use, Land-Use Change and Forestry (LULUCF) sector, total figures will be available
[9] As provided by section 6A(5) of the Climate Action and Low Carbon Development (Amendment) Act 2021

Selected Example Sectors

%/yr Average Annualised Reduction Targets for two 5-year Periods

Social Standards – The ESG Lexicon

ESG Standards, Laws, Best Practice & Platforms

S ISO 45001

International standard for management systems of occupational health and safety (OH&S) in 2018.

S SA8000/ISO 26000

International standard. The world's leading social certification program, advancing human rights at the workplace. ISO 26000 CSR Guidance

Governance Standards – The ESG Lexicon

ESG Standards, Laws, Best Practice & Platforms

G ISO 31000 & COSO

ISO 31000 risk management standard. COSO Internal Control Framework (advisory: Committee of Sponsoring Organizations)

G SWIFT 3000/ISO 27001

SWiFT 3000, an Ireland standard – developed by NSAI & IoD. A Code of Practice for Corporate Governance Assessment. See next slide. 27001 is an international standard to manage information security.

G GAAP & IFRS

Generally Accepted Accounting Principles (GAAP); International Financial Reporting Standards (IFRS), both part of Financial Reporting Council (FRC) standards.

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Standards – The ESG Lexicon

GOVERNANCE & SWiFT 3000

- **NSAI** and the **Institute of Directors in Ireland** (IoD) launched a new **Code of Practice for Corporate Governance** on March 2010 for assessment for Irish companies and State bodies.
- Provides a best practice standard for an independent evaluation of an organisation's compliance with existing corporate governance codes such as the OECD principles, the Combined Code on Corporate Governance and the Code of Practice for the Governance of State Bodies.
- The code, SWiFT 3000: 2010 Code of Practice for Corporate Governance Assessment in Ireland, is the first of its kind in the EU and the first to award certification to companies which meet the required standard.
- Evidence based evaluation of an organisation's **corporate governance practices** will be carried out by **independent assessors** who have met **comprehensive qualification** and **experience criteria**. Companies which meet the specifications of the Code will be awarded the **SWiFT 3000 Certification** by independent accredited certification bodies.
- Assessment focuses on **three core areas**: i) Board **composition**; ii) Board **processes** and iii) Fulfilment of board **responsibilities**, as well as looking at other aspects of governance procedures including Chairman-CEO separation.
- Completion by **boards** of a **questionnaire** based on the principles enshrined in these codes.
- Interviews with company directors, Chairpersons, CEO and other directors as deemed appropriate.
- Reviewing a company's compliance with relevant corporate governance codes.

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ESGx25 Certification

A standard that assimilates one sustainability standard – ESGx25

SELECTED RELEVANT TAXONOMY OF LEGLISLATION, STATUTES, STANDARDS, PROGRAMS, & REGULATION

ESG x25 Sustainability by Design

ISO 14001	ISO 14064	WRI GHGP	CDP
ISO 50001	SA8000	ISO 45001	SWIFT 3000

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Summary – Key Consideration

- ESG organisational adoption growing in all sectors for all companies, underpinned by:
  - Climate action compliance,
  - Need to engage in capital transitions,
  - Desire to differentiate with clients and staff attraction/retention,
  - Emerging AI Corporate Adoption & Governance.
- Organisational maturity development leads to greater risk mitigation.
- Transparency with stakeholders in sustainability disclosures: mandatory and preferential.
- Additional, complementary framework for insurers to gain access to leading indicators in emerging or latent risk – and price risk accordingly with competitive advantage.
- Insurance company ESG awareness and capabilities in understanding taxonomy and assessment.
- Self assessment for insurance companies, including Horizon Scanning for sector specific ESG taxonomy, regulations, policies, programs and trends.

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Ingenium
STRATEGY & CHANGE MANAGEMENT

Eoin Leonard
CEO
i3PT

"Risk Mitigation Measures in the Construction Sector"

EOIN LEONARD

CEO AND FOUNDER

I3PT & OBI®

Eoin@i3pt.ie

Eoin is the CEO and founder at i3PT, an international professional services firm working in the built environment, which provides ESG services and technical advice. Eoin also founded obi®, i3PT's SaaS business, which helps companies to deliver safer, more sustainable buildings. He holds an MBA from UCC, alongside several industry-specific technical qualifications, and he is a recent graduate of Enterprise Ireland's Leadership 4 Growth programme.

PNLA
Professional Negligence
Lawyers Association

Notes: -

Grainne Bryan
FTI Consulting

"The use of E-Discovery"

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Gráinne Bryan is a Senior Managing Director in the Technology segment and is based in Dublin. Ms. Bryan is a member of the E-Discovery Consulting & Services practice and has worked in the legal industry for more than two decades.

Throughout her career, Ms. Bryan has worked in a consultative capacity with law firms and corporate legal departments enabling them to effectively leverage technology and resources in all areas of legal practice. With deep expertise in general management, consulting, project management and legal professional experience, Ms. Bryan is an experienced leader and team builder in professional environments with a reputation for people management, talent sourcing, mentoring and communication.

A solution-orientated project manager who can formulate and drive a consistent approach towards all aspects of a project, Ms. Bryan has many years corporate exposure in delivering individual solutions to specific projects and has standardized workflows and processes for many projects involving all aspects of data identification, collection, production and review.

Prior to joining FTI Consulting, Ms. Bryan was instrumental in the setting up of some of Ireland's primary and largest in-house e-discovery, project services and technology teams, assisting on many notable e-discovery, AI, corporate and regulatory projects.

Ms. Bryan is a frequent writer and speaker on a variety of topics ranging from e-discovery, AI technology, the future workforce and legal cost control to leadership development, performance management and staff mentoring in today's workplace. She was recognized at the 2018 Dublin Tech Summit at the Women in Tech Awards in the Digital Transformation category.

Ms. Bryan holds an LL.B. in Law from Griffith College.

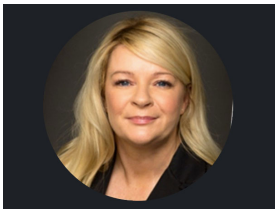
Presentation for the Professional Negligence Lawyers' Association - Dublin

Emerging Data Sources

How the emerging data climate change is transforming and changing the e-discovery industry

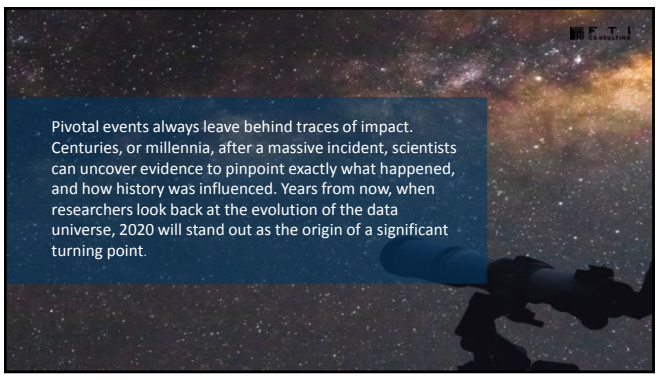
June 8, 2023

Today's Session is Presented by Gráinne Bryan, Senior Managing Director, FTI Dublin



Who am I ?

Who is FTI ?

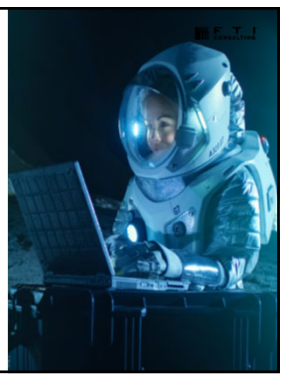


Almost Overnight, Our Workforce Shifted To Remote

Prior To COVID, **10% of the workforce worked from home.**

As stay at home orders and social distancing came to the forefront, the workforce shifted to **65% remote.**

Adjusting to new work from home conditions has proven challenging. In addition to at home distractions, employees have been forced to adapt how they work and communicate with one another.



Collaboration and Communication Platform Usage and Adoption

Skype's average daily users have **increased to 40 million**, a month-over-month rise of 70 percent

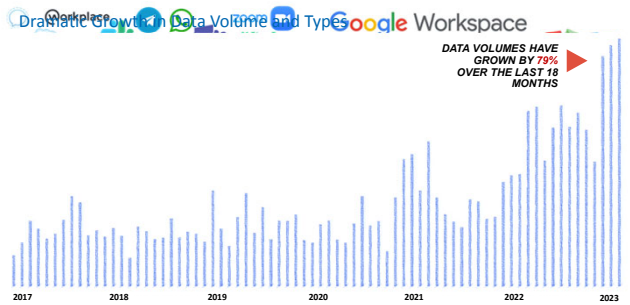
Slack's paid customer **base is nearing 120,000** (*more than 80 percent growth over preceding quarterly reporting*)

During weekdays, the cumulative number of active minutes on Slack now exceeds 1 billion

Microsoft Teams boasts more than **44 million daily active users**, and reported **1,000 percent growth** in video calls as of March 2020

Zoom's daily active users **spiked to 200 million in the first quarter** of 2020, up from **10 million at the end of 2019 Okta's 2019** Business @ Work report

Dramatic Growth in Data Volume and Types



The Looming Data Iceberg

35%

In 2021, approximately 35 percent of the data processed was from non-traditional emerging data

The pandemic has increased visibility and usage of emerging data, and we anticipate that emerging data will become FTI's primary source of data in the years ahead

The Seven "V"s of Emerging Data

1. **VOLUME** — Representing over one-third of data processed at FTI
2. **VARIETY** — Over 50 different sources that FTI has handled
3. **VELOCITY** — Rate of change and new sources appearing daily
4. **VISIBILITY** — As a result of pandemic, more of a focus on these sources
5. **VERSIONS** — How to handle linked content and historical versions?
6. **VERACITY** — How to authenticate the emerging data sources?
7. **VOICE** — How to determine the actors and custodians of data?

Emerging Data Sources: The Four Pillars of the Paradigm Shift

Shared Access

Nuanced shared access roles add complexity to custodian identification and data authentication while also increasing data volumes

Chat Messaging

Chat, channel, and short-form messaging increase volume and remove context

Linked Content

New ways of sharing data via hyperlinks challenge the existing document attachment paradigm

Versions

Access to multiple versions of files provides a previously difficult-to-access historical view of content

The Problem – Impact on Existing Workflows

Identification	Preservation	Collection	Processing/Review
Ease of adoption driving the **proliferation of new applications** making identification more challenging	Complex collaboration ecosystems **introduce gaps in retention and hold capabilities**	Modern collaboration platforms provide **modern forms of integration** that don't support legacy methods of data collection	New **complex data formats** introduce processing and review challenges

Continuous deployment is **rapidly increasing the pace of change**, impacting existing workflows

Limited case law, **no standards**, and few best practices

Discovery of ESI is still discovery, governed by the same Federal Rules of Civil Procedure as all other civil discovery. Brown v. Tellermate Holdings, Ltd., No. 11 CV 1122, 2014 WL 2987051, at *1-2, 2014 U.S. Dist. LEXIS 90123, at *4 (S.D. Ohio July 1, 2014) ("[T]he underlying principles governing discovery do not change just because ESI is involved."). **So don't freak out.**

Magistrate Judge Iain Johnston, City of Rockford v. Mallinckrodt ARD Inc., 2018 WL 3766673 (N.D. Ill. Aug. 7, 2018)

Dealing With New Data Types

Considerations for Dealing With New Data Types

What is it? Understanding the function of the underlying system

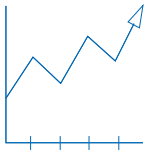
- General category of business function
- Who uses it; how do they use it; how often do they use it

Not all platforms are created equal. Determining data interface capabilities for governance and discovery

- Built-in (Google Vault, Microsoft Purview, Slack Corporate Export)
- Third-party (Onna, Exterro, Smarsh, Global Relay)
- Custom/home-grown

16

Considerations for Dealing With New Data Types



Increased volumes of data require new analytics and methods of review

- Brainspace
- Radiance
- Microsoft Advanced eDiscovery

Reviewing short form messages

- Message density and grouping messages to provide context
- Reducing alert and notification noise

What constitutes privilege in a shared messaging platform?

- Can those elements be easily pulled from the source system?

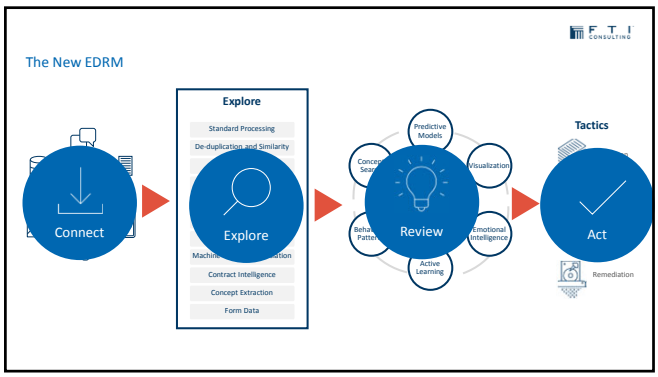
Handling linked content

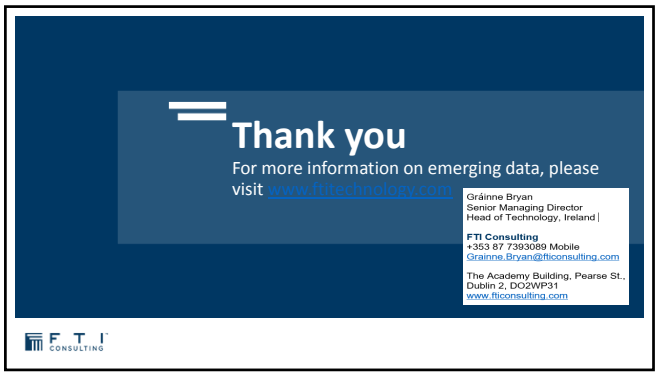
- How are links to live documents in collaboration platforms handled?

17

New EDRM

18


The New EDRM
Explore
Standard Processing
De-duplication and Similarity
Contract Intelligence
Concept Extraction
Form Data
Connect
Explore
Predictive Models
Visualization
Emotional Intelligence
Active Learning
Review
Tactics
Act
Remediation


Thank you
For more information on emerging data, please visit www.fticonsulting.com
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Closing Remarks

5 hrs 10 mins – Total talk time
1 hr - Conference Pack Review

Total CPD – 6 hours 10 minutes

To complete your feedback form please go to

https://www.pnla.org.uk/event/pnla-dublin-conference-8-june-2023/