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Annual Irish Insurance Seminar

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 15 October 2015

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Employment Practices Liability

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 15 October 2015

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Employment Practices Liability

- Recent legislative developments.
- Relevant recent EPL decisions.
- Background – a rise in employment claims as a result of the recession. As the country comes out of the recession, the number of claims are reducing.

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Statistics from Employment Appeals Tribunal ("EAT")

- 8778 cases were disposed of by EAT in 2010
- 4403 cases were disposed of by the EAT in 2014 (an 18% drop on the previous year)
- EAT can award compensation, re-instatement or re-engagement
- Average award for compensation by EAT was €7,588.00

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Statistics from EAT (continued)

- However, the EAT can and does make significant (six figure) awards for unfair dismissal. It can award a maximum of the equivalent of two years' remuneration. For example when a senior executive mounts an unfair dismissal claim, taking into account an entire package (salary, bonus, pension, share options, health insurance, car allowance), it can add to a substantial sum.
- €1.25 million awarded by EAT to Philip smith (ex RSA)

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Old system

- Prior to 01 October 2015:
 - Labour Court
 - Labour Relations Commission
 - Employment Appeals Tribunal
 - Equality Tribunal
 - National Employment Rights Agency
 - Health and Safety Authority
 - Courts

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Recent Legislative Developments

- Workplace Relations Act 2015
 - Commencement date 01 October 2015
 - Amalgamation of the services of the Equality Tribunal, the National Employment Rights Authority, the Labour Relations Commission and the first instance functions of the EAT to establish a single body for all first instance complaints under the auspices of the Workplace Relations Commission
 - All first instance complaints will now be made to the Workplace Relations Commission which will offer two options for resolution: mediation or adjudication
 - All appeals from first instance will be to the Labour Court, with the only further appeal to the High Court being on a point of law
 - Time limits will be standardised (6 months, extendable to 12 where "reasonable cause" can be shown)
- Hearings before the Workplace Relations Commission will be in private; appeals to the Labour Court will be in public

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Protected Disclosures Act 2014

- Came into effect on 15 July 2014
- Aims to protect workers from being penalised for whistle-blowing
- Features:
 - Maximum award of 5 years' remuneration for dismissal on the grounds of having made a protected disclosure
 - Public sector bodies have a mandatory obligation to put whistle-blowing policies in place
 - Where an employee has brought a claim for unfair dismissal as a result of making a protected disclosure they are entitled to apply to the Circuit Court for interim relief pending the final determination of their claim, that relief can include re-instatement or re-engagement
 - Employers cannot contract out of the obligations placed on them by the legislation
 - "Stepped" disclosure – disclosure should be made to someone within the employer in the first instance
 - The identity of the whistleblower should be protected (by the person to whom the disclosure is made)
 - Applies to "workers" and not just "employees"

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Recent decisions from EAT

- **Dan Philpott v Marymount University Hospital and Hospice Limited**
- Circuit Decision June 2015
- Injunction sought restraining his dismissal until such a time as his unfair dismissals case dealt with
- Court refused the relief
- Held disclosures were not protected disclosures within the meaning of the Act

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Recent Decisions from EAT (continued 1)

- **Philip Smith v RSA 1673/2013**
- EAT decision May 2015
- Claim for Constructive Dismissal
- Award of €1.25 million, equivalent to 2 years salary
- Highest award ever made by EAT
- RSA have appealed the decision

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Recent Decisions from EAT (continued 2)

- **The Governer and Company of Bank of Ireland v James Reilly**
- High Court decision April 2015
- Dismissed for gross misconduct following the detection of inappropriate/pornographic emails in his inbox
- Reinstated to his position in the bank
- Award translated to payment of 6 years back salary to the Claimant by the Bank

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Conclusion

- With the enactment of the Workplace Relations Act and the introduction of the new Workplace Relations Commission, the inherent complexities in dealing with Irish Employment claims should be lessened.
- The Workplace Relations Commission is all about efficiency and it is hoped the delays encountered in obtaining hearing dates will cease in terms of any EPL disputes that you are dealing with in Ireland.
- I would advise that written settlement terms are entered into in order to protect both the Insured and Insurers in respect of their obligations.

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Third Party Rights and claims against insurers, including those under Section 62 of the Irish Civil Liability Act

Sarah Conroy, Partner

15 October 2015

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Section 62, Civil Liability Act 1961

“where a person (hereinafter referred to as the Insured) who has effected a policy of insurance in respect of a liability for a wrong, if an individual, becomes a bankrupt or dies or, if a corporate body, is wound up or, if a partnership or other unincorporated association, is dissolved, monies payable to the Insured under the Policy shall be applicable only to discharging in full all valid claims against the Insured in respect of which those monies are payable, and no part of those monies shall be assets of the Insured or applicable to the payment of the debts (other than those claims) of the Insured in the bankruptcy or in the administration of the Estate of the Insured or in the winding-up or dissolution and no such claim shall be provable in the bankruptcy, administration, winding-up or dissolution.”

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Where does it come from?

Section 76 of the Road Traffic Act 1961

- This enables a Third Party who has suffered injury or damage as a result of a road traffic accident to sue the insurer of a motor car involved in the accident directly in the circumstances outlined in the section. It is not necessary for the injured person to establish the liability of the vehicle owner or user, or the liability of the insurer, under the motor policy covering the vehicle which caused the injury.
- The original wording of section 76(4) of the Act mirrored almost identically the current wording of section 62 of the Civil Liability Act. It was then repealed and the Civil Liability Act was amended to include this section, applying it to all insurance contracts (not just motor policies).

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Browne –v- Norwich Union Insurance Society Limited and Austin O’Connor 4 February 1985

- The Court found that it had to be established that there was a valid insurance policy in effect. It could not decide this on an interim basis and as such would not strike out the claim against the insurer.

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Michael Dunne –v- PJ White Construction Company Limited (in liquidation) 1989 ILRM 803

- High Court – dismissed the claim by the plaintiff
- Supreme Court – allowed the appeal by the plaintiff, finding that the onus of proof was on the insurance company to prove that the repudiation of the policy by the insurer was valid.
- This moved matters on somewhat as it provided that the insurer had to prove that the repudiation was valid. In Browne this was not specified.

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McManus -v- Cable Management Ireland Limited, Radford Communications Limited and Hibernian Insurance Plc 8 July 1994

- The plaintiff sustained injuries at work. The insurer refused to indemnify the employer under the EL policy. The third defendant (insurer) sought to strike out the plaintiff’s claim for failure to disclose a cause of action.
- The court found that the plaintiff had no entitlement to the benefits payable under the policy (as matters then stood) and struck out the claim against the insurer.

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Peter Kilcoyne -v- Westport Textiles Limited (in voluntary liquidation) and Royal & Sun Alliance Plc 2006 IEHC 256

- This was important from the insurer's perspective, not least because there were approximately 140 claims in relation to the same employer and the same subject matter lining up behind this one. It seems to indicate that if the other 140 plaintiffs particularised their claims against the insurer properly, they might have been held entitled to proceed against the insurer.

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Power -v- Guardian PMPA Insurance Limited 2007 IEHC 105

- The plaintiff's claim was dismissed for a number of reasons, not least that the defendant was not obliged to provide insurance for passenger cover for this type of vehicle. Therefore there was no claim as against the insurer to which the policy could be answerable – no valid claim under the policy as required under section 62.

- Note: this was unusual as it involved a motor policy and not an EL policy.

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McCarron -v- Modern Timber Homes (in liquidation), Sean McColgan, Daniel McColgan and Quinn Insurance Limited 2012 IEHC 530

The High Court granted the order sought. It indicated that:

- The insured party's rights did not arise until the existence and amount of his liability to a third party was established.
- Section 62 was designed to protect an injured party to ensure that the monies payable on a policy to an insured who is dead/bankrupt or in liquidation would not be taken by creditors but would go to the satisfaction of the compensation. The court found that this gave the injured party the right to sue the insurer directly.
- Such a claim was not valid until liability as against the insured was established and quantum was assessed.
- It is not open to the plaintiff to join the insurer of a defendant to the proceedings in which the defendant was being sued.
- The onus of proof in relation to whether there has been a valid repudiation of the policy is on the insurer.
- In this decision, the court seems to give with one hand and take away with the other. The insurer succeeded but a modicum of hope was given to plaintiffs in similar situations. The insurer has to prove that the repudiation was correct and the plaintiff can sue an insurer direct.

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Hu -v- Duleek Formwork Limited (in liquidation) and Aviva Direct Ireland trading as Aviva 2013 IEHC 50

- Judge did note that there should be a procedure in place that it would require information to be revealed in order to make Section 62 workable.

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Murphy -v- Allianz 2014 IEHC 692

- The high water mark of the court's jurisprudence in this regard.
- Demonstrates its strict adherence to the technical requirements of section 62.

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Law Reform Commission

2015 Report on Consumer Insurance Contracts

- They should be entitled to certain information about the insurance policy held by an insured person.
- They should not be limited to seeking disclosure of information regarding the insurance policy from the insurer but also entitled to seek that information from other parties including an insured person, former officers, liquidators and insurance intermediaries.
- If a notice of disclosure of information is received, a person receiving must be required to respond within a particular amount of time or explain why this is not possible.
- They should be provided with information about where to locate the information if it is not possible to obtain it from the person receiving the notice, and should be entitled to obtain a court order compelling compliance in default of this.

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Position in other jurisdictions

- UK
- Australia
- New Zealand

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The future

- Careful consideration of information requests
- Consideration of any valid policy points
- Seeking legal advice if served with a third party request for discovery of information on indemnity
- Seeking advice on the options open to them if proceedings are served to join Insurers pursuant to Section 62
- If an insurer has a case where section 62 is likely to be come an issue (if an insured dies, is rendered bankrupt or is wound up), consider carefully the steps that are taken to advance the defence of the proceedings. A number of the decisions relate to situations where plaintiffs have delayed in advancing their claims to their own detriment. Care should be taken that insurers are not pressing on with the defence of proceedings if it is the case that plaintiff is not in any rush to advance his own case.

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Trends – Irish Professional Indemnity claims

Tara Cosgrove, Partner

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Economy



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Complaints and Client Relations Committee –
Undertakings

Year	Complaints re Undertakings	Other Admissible Complaints	Total Admissible Complaints	Undertakings as % of Total
2006/07	231	1,232	1,462	15.8%
2007/08	555	1,177	1,742	32.4%
2008/09	614	1,140	1,754	35.0%
2009/10	1,134	983	2,117	53.6%
2010/11	1,647	975	2,622	62.8%
2011/12	1,732	721	2,453	70.6%
2012/13	1,288	828	2,116	60.9%
2013/14	703	823	1,526	46.1%

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Solicitors Disciplinary Tribunal

- 18% increase in applications in 2013
- 104 findings of misconduct
- 41 respondents with 21 referred to High Court
- 10 solicitors appear to be struck off

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Practices

- 9,226 solicitors issued with Practising Certificates
- 41% of firm recruited in 2014
- Top 20 firms grew by 9% in 2014
- Smaller firms – less growth
- 92% of solicitors employ five or less

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NUMBERS OF FEMALES AND MALES WITH PRACTISING CERTIFICATES SINCE 1926

Year	Females	Males
1926	10	10
1930	15	15
1940	20	20
1950	30	30
1960	40	40
1970	50	50
1980	60	60
1990	70	70
2000	80	80
2014	9,226	9,226

This is the first time a female majority has existed in any legal profession anywhere in the world.

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Common proposal form

- Now just 18 pages but many using short form
- Conveyancing questions shortened
- Consolidation in risk management questions

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Conveyancing

- Still largest group of notifications – 71%
- Solicitors seeing increased activity
- Competition on fees could be a risk
- Improved risk management on undertakings
- Distance from boom transactions
- Commercial Property Transactions Regulations

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Other areas of activity

- Litigation – mainly missed statute
- Wills and Probate – complex area
- Commercial transactions – severity an issue
- Litigants in person

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PII Regulations 2015

- New statutory obligation on solicitors to ensure no material non-disclosure or misrepresentation
- Obligation is on the firm
- Must be "material" and "non-innocent" to fall foul
- Failure to comply – misconduct
- PII Committee may take action including suspending Practising Certificate, refusal of issue of Certificate, refer to Disciplinary Tribunal or High Court

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Changes to the MTC

- New Financial Sanctions Exclusion
- Amendment to Conduct of Claims Clause
- Cooperation Clause

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Legal Services Regulation Bill

- Final stages of the legislative process
- Progress slow and has been unpopular with both solicitors and barristers
- Office of Legal Costs Adjudicator may provide guidelines for legal costs and scales
- Multi Disciplinary Practices – six month consultation

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BCAR

- New 2015 Regulations
- Future single dwelling owners can opt out
- Two tier system?
- Still obliged to comply with regulations
- What will lenders and solicitors do?
- Subsequent purchasers

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Fire Safety



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Valuers




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