

How Codifying the Law Is Our Future Present

Or

Let's Talk About Leading Legislation As Well as Leading Cases

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Sutherland Law Seminar Series 2020

27th February 2020

What I'll Talk About

- What a seminar about leading cases could have looked like
- What legislation can do that case law can't
- Legislation can be about stories, as well as principles and rules
- Bad cases can sometimes make good law (good legislation)
- Codifying Irish law is our future present (in the digital age)

What a talk about leading cases could have looked like

Who's this?



Would this help?



Common law rules can be clear

“The rule that you are to love your neighbour becomes in law: You must not injure your neighbour, and the lawyer’s question: Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”

A previous application of the Good Samaritan parable

Buch v Amory Manufacturing Co (1897)



Charles Cavanaugh, Working as a Back-Boy in the Mule Spinning Room, King Philip Mills, Fall River, Massachusetts, USA (Lewis Hine for National Child Labor Committee, June 1916)

Common law rules can be clear (but cruel?)

“With purely moral obligations the law does not deal. For example, the priest and Levite who passed by on the other side were not, it is supposed, liable at law for the continued suffering of the man who fell among thieves, which they might and morally ought to have prevented or relieved. Suppose A, standing close by a railroad, sees a two-year-old babe on the track and a car approaching. He can easily rescue the child with entire safety to himself, and the instincts of humanity require him to do so. If he does not, he may, perhaps, justly be styled a ruthless savage and a moral monster; but he is not liable in damages for the child’s injury, or indictable under the [New Hampshire] statute for its death. P.S., c.278, s.8.”

What legislation does that case law can't

Donoghue v Stevenson is a civil liability, after-the-event, case

Food safety legislation does what a case can't: before-the-event prevention

In 2018, there were 49,268 registered food businesses in Ireland

The Food Safety Authority of Ireland (FSAI) has a wide range of supervisory and enforcement powers:

- standard-setting codes and guidance,
- entry and inspection,
- formal warnings,
- closure orders and
- criminal prosecution

In 2018, authorised food safety inspectors in Ireland served 230 improvement notices, 95 closure orders and brought 9 prosecutions

The Food Safety Authority of Ireland is linked to the EU-wide Rapid Alert System for Food and Feed (RASFF)

Legislation can have major historical significance

Section 2 of the US Voting Rights Act 1965

“No voting qualifications or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.”



The story behind the law on unaccompanied learner drivers

- Noel Clancy campaigned for the “Clancy Amendment” after his wife Geraldine Clancy and their daughter Louise Clancy were killed in a collision with a car driven by an unaccompanied learner driver
- *Road Traffic (Amendment) Act 2018*: new offence where owner of car allows a learner driver to drive their car unaccompanied



Bad cases [can] make good law [legislation]

- Some of the core principles and rules of insurance contract law date from 18th and early 19th century case law
 - Disclosure and “utmost good faith”: insured must disclose information that a hypothetical “prudent insurer” might have thought relevant, even if this particular insurer might not have
 - Insurance warranties: an irrelevant breach of contract can allow the insurer to repudiate (burglar alarm broken, fire alarm okay; claim for fire damage can be repudiated)
 - Insurable interest: you need to have a direct financial interest in the insurance contract; otherwise, it is void because it amounts to gambling (holiday insurance taken out by parent that includes cover for injury to children could be invalid)

Mind the policy wording

Three Little Pigs v The Big Bad Wolf



"Your policy does cover wind damage, but not from huffing and puffing."

Making good law [legislation] from bad cases

- Law Reform Commission 2015 *Report on Consumer Insurance Contracts* (LRC 113-2015)
- Recommended wide-ranging reforms, including replacing the 18th and 19th century principles and rules
- Report included draft *Consumer Insurance Contracts Bill*
- *Consumer Insurance Contracts Bill 2017* (Private Member's Bill sponsored by Pearse Doherty TD) based on Commission draft Bill
- Cross-party support for 2017 Bill, and significant additions and improvements made during Oireachtas debates
- *Consumer Insurance Contracts Act 2019* was the last Act enacted before the General Election
- 2019 Act applies to individual consumers, and also business consumers (businesses with annual turnover of €3 million or less)
- It's a mini-code

Legislative rules can be clear

Pre-contractual duties of consumer and insurer

8. (1) The duties in this section replace, at the pre-contractual stage of a contract of insurance, the principle of utmost good faith (*uberrima fides*) and any duty of disclosure of a consumer (including any duty on the consumer to volunteer information) that applied prior to the commencement of this section (whether that principle or duty arose at common law or under an enactment).

(2) The pre-contractual duty of disclosure of a consumer is confined to providing responses to questions asked by the insurer, and the consumer shall not be under any duty to volunteer any information over and above that required by such questions.

(3) Where the insurer requests the consumer at the pre-contractual stage to provide information to the insurer, the insurer shall be under a duty to ask specific questions, on paper or on another durable medium, and shall not use general questions.

How they codify in Maryland Legislative Code of Maryland

1. Agriculture
2. Business Occupations and Professions
3. Business Regulation
4. Commercial Law
5. Corporations and Associations
6. Correctional Services
7. Courts and Judicial Proceedings
8. Criminal Law
9. Criminal Procedure
10. Economic Development
11. Education
12. Election Law
13. Environment
14. Estates And Trusts
15. Family Law
16. Financial Institutions
17. Health - General
18. Health Occupations
19. Housing and Community Development
20. Human Services
21. Insurance
22. Labor and Employment
23. Natural Resources
24. Public Safety
25. Public Utility Companies
26. Real Property
27. State Finance and Procurement
28. State Government
29. State Personnel and Pensions
30. Tax - General
31. Tax – Property
32. Transportation

Steps towards codification in Ireland

- Irish legislation (“Irish Statute Book”) consists of about 3,100 In-Force Acts, from 1204 to 2019
 - Beginning with: *Fairs Act 1204* (6th year of the reign of King John)
 - Most recent (for now): *Consumer Insurance Contracts Act 2019* (2019, No.53) (signed by President Higgins on 26th December 2019)
- *Statute Law Revision Act 2007*: 1,364 pre-1922 Public Acts (mostly 19th Century) retained in force (about 1,100 now)
- About 2,000 post-1922 In-Force Acts
- Online database of Acts as enacted: eISB
- Consolidation/Codification Acts: *Social Welfare Consolidation Act 2005*; *Land and Conveyancing Law Reform Act 2009*; *Companies Act 2014*
- Revised Acts: text of over 360 Acts as amended: on eISB, linked to www.lawreform.ie (similar to UK Legislation Database and other eLegislation databases)

Classified List of In-Force Legislation in Ireland: 36 headings

1. Agriculture and Food
2. Arts, Culture and Sport
3. Business Occupations and Professions
4. Business Regulation, including Business Names, Company Law and Partnership
5. Citizenship, Equality and Individual Status
6. Civil Liability
7. Commercial Law
8. Communications and Energy
9. Courts and Courts Service
10. Criminal Law
11. Defence Forces
12. Education and Skills
13. Election and Referendum Law
14. Employment Law
15. Enterprise, Economic Development and Tourism
16. Environment
17. Family Law
18. Financial Services and Credit Institutions
19. Foreign Affairs and International Relations
20. Garda Síochána (Police)
21. Health and Health Services
22. Irish Language and Gaeltacht
23. Land Law, Succession and Trusts
24. Licensed Sale of Alcohol
25. Local Government
26. National Government
27. Natural Resources
28. Oireachtas (National Parliament) and Legislation
29. Planning, Development and Housing
30. Prisons and Places of Detention
31. Public Safety (including Building Standards, Fire Safety and Product Safety)
32. Social Welfare, Pensions, Charities and Religious Bodies
33. State Finance and Procurement
34. State Personnel and Superannuation/Pensions
35. Taxation
36. Transport

Classified List of In-Force Legislation

- Classified List of In-Force Legislation on www.lawreform.ie
 - 36 subject headings (like US federal and state Codes)
 - Over 2,000 post-1922 Public Acts
 - Over 100 pre-1922 Public Acts
 - Over 15,000 Statutory Instruments
- It's a searchable database
- Not quite a comprehensive Code of Irish Legislation, but indicates that we're getting there

<http://revisedacts.lawreform.ie/classlist>

And finally, how an individual can influence legislation in Ireland

Lavinia Kerwick

Criminal Justice Act 1993: victim impact statements and appeals against unduly lenient sentences

Talking about her experiences on *No Country for Women*, RTÉ, 19th June 2018



Thank You
Any Questions?

