Lack of the Irish no more: time to look west?

The Republic of Ireland has grown in significance in recent years. Blip of the current recession aside, its economy has flourished through improved commerce, and its court reporting and publishing have risen accordingly. As legal globalization continues apace, barristers in England and Wales are increasingly looking beyond our borders for persuasive precedent. And the higher up the court structure they go, the more likely judges are to look favourably on the burgeoning portfolio of cases from Ireland, the only non-UK common law jurisdiction inside the European Union.

By Alistair King of Justis Publishing

"Ireland was the first 'adventure' of the common law."

Inspired by W.J. Johnson's article in a 1920 edition of the Law Quarterly Review, the words are as resonant 90 years on as they were in that shaky period leading to official independence.

At least that's the impression I'm left with after meeting Dr Eamonn G. Hall, eminent solicitor, notary public and constitutional law examiner of the Law Society of Ireland. Quoting a man who went on to become an early judge of the High Court of the Irish Free State, he expanded on Johnson's theme, convincing me to investigate the implications of this observation.

In Dublin for the launch on to the Justis platform of Irish publisher First Law's current awareness service, I'd originally planned to chat to Hall – guest speaker at the event – about the benefits to Irish practitioners of this technical development, which unites First Law's electronic material with reams of English law, along with the Irish Reports and Digests, which have been on Justis for 10 years.

It should surprise few that barristers across the Irish Sea have cited English cases alongside their own for generations: their legal system is based on England's, which has a much larger population and therefore more cases; English cases are easy to find and persuasive in Irish courts; and for most of the last century, law reporting in Ireland was far less developed than in England.

But in the past 10 to 15 years, thanks in part to the foresight of First Law MD, Bart Daly, there's been a revolution in access to Irish law reports and related material, particularly online. So through interviews with lawyers on both sides of the watery divide and prompted by my chat with Hall, this article both demonstrates the small but growing trend of English barristers extending their research nets west, and shows how others might benefit from following suit.

So who at the English Bar has cited Irish case law? How and why have they done so? How is it received in court? To which practice areas is it particularly pertinent? And does it carry benefits over and above simply increasing the pool of common law cases?

Jurisprudentially, Ireland and England have much more in common with each other than either has with close neighbour Scotland. Referring to a number of supporting cases in Halsbury, Hall explains that, though not technically binding, Irish cases have for many years been "entitled to the highest respect in English courts," despite independence.

This stance doesn't appear to have been diluted over time: Hall draws my attention to In Re Ellis and Gilligan, [2001] 1 AC 84 and [2000] 1 All ER 113, in which Lord Steyn noted that "The United Kingdom and the Republic of Ireland are neighbours with close ties. There are no immigration controls between Ireland and the United Kingdom. Ireland is also excluded from the definition of a foreign state in section 3 of the Extradition Act 1989." Lord Steyn goes on to allude to the "special position of Ireland in each part of the law of the United Kingdom".

Yet there's a relative dearth of journal articles on the subject of Irish Law in England – Hall names two, both of which he says are "considered dated": one from International and Comparative law Quarterly in 1960; the other from the same publication a year later.

Is this because it's common knowledge that Irish cases can be cited very persuasively in England or might it actually suggest the opposite?

Certainly Hall provides a long list of areas for which Irish cases are ripe for the picking in England – "contract, tort, administrative law, European Law, human rights, employment and a host of other categories would be a fruitful source of persuasive precedent in British courts," he says, and "extradition law, commercial law and criminal law in general would be useful."

But does this theory convert into practice?

Perhaps it's starting to.

With over 30 years at the English Bar under his belt, an experienced practitioner on the London scene spoke to me off the record about his experiences of using Irish law.

A regular user of the full-text online Justis legal library, which he praises for its "most useful" printable PDFs, he appreciates the directness of the Irish, whose laws, he says, give "a corner of the picture not painted elsewhere." Though there's a strong "similarity in law," he highlights their "have a go at it" attitude and willingness to "try something unusual." In other words, we can look back and learn from their sometimes pioneering approach both to business and related transactions, and to the application of law on the same.

"There was a lovely Irish case on *donatio mortis causa*," he tells me. Meaning "gift on the occasion of death," this legal term refers to a complex set of conditions by which such transfers of assets can be considered legitimate.

Entering the phrase into a quick search of Justis – which potentially includes case law and legislation from all parts of the UK, the Republic of Ireland and a growing list of other common law jurisdictions – returns a substantial number of Irish cases on the first page.

(Similarly enlightening results can be investigated on Justis's sister service, the provider-neutral JustCite citator, which cross-references cases, legislation and articles from the UK, Ireland, Canada, Australia and beyond, and provides hyperlinks directly into third-party full-text platforms.)

The precedent this barrister found and used, which could easily have been generated from such searches, involved "someone getting on a train and giving some documents to his nephew." Soon after getting off the train, he explains, the man was found to have committed suicide. The question: "Did he know?"

The answer, though too complicated to go into here, proved useful for his case, and he says it was persuasive in court.

Is this often the case with Irish case law, even with post-independence material?

That "wouldn't make a difference," according to my source, who says that judges over here would be – and are – "intrigued by other judges' opinions" if they offer a useful new angle.

That you have found a new angle can be demonstrated if you confine your search to one platform, a set-up that appeals to our man, who wasn't specifically looking for an Irish case in this instance. This particular Irish case "just happened to have considered it," he explains.

It's a strategy familiar to Philip Coppel QC, a member of 4-5 Gray's Inn Square chambers in London.

Practising "public law in the widest possible sense," the respected silk believes Irish law "can be helpful." Caution must be exercised when citing it if there's English precedent, but he uses it – and other common law country authorities – "to provide a normative dimension" when the jurisprudence is consistent with English law; an Australian who once practised law in his homeland, his expertise in using other countries' cases is no doubt long- and well-established.

"I give it a try to see if it yields anything useful," he adds, "and the default on Justis [which he often uses] is set-up to search for Irish as well as English law." (Series can, however, be specified within the cases search screen.)

To Coppel, a clear benefit of recourse to non-English law is that one can see how similar laws have developed in similar countries, which can indicate how things might develop in this country, including unforeseen difficulties.

He continues: "You can say to the Court: 'Here's another jurisdiction with a common juridical heritage; they've followed this path [something that hasn't yet been done in England] and there doesn't appear to have been reported adverse consequences or any back-tracking.'"

Coppel warns that judges can occasionally be reluctant to be shown foreign authorities: we have, after all, got our wealth of authorities, so "a measured approach is needed". But in general "courts [in England] are receptive – the higher up, the more so; they're more curious."

On this note, as the author of an authoritative book investigating freedom of information, Coppel has looked in depth at five comparative nations, one of which was Ireland. "They had a Freedom of Information Act in 1997," he says. "The UK's wasn't [enacted] until 2005. They had a head-start [and demonstrated that they are] robust. They still had a public administration that functioned" after the act had gone into force.

But even when he decides not to cite or acknowledge it in court, Coppel will often look for helpful guidance elsewhere.

So does he think that England's barristers at large are using persuasive Irish law more these days? After all, I didn't have to make many calls to practitioners at Irish Reports-subscribing sets in England before finding some willing to talk to me about their experiences.

Coppel's not so sure. "We should be willing to see what's going on abroad" he says. But some "practitioners don't understand the court hierarchy [in Ireland] and just occasionally one senses a bit of a Little England attitude."

Back in Ireland, telecoms and public law expert Patrick McGovern picks up on the issue of England being in-step with similar jurisdictions, tying in, as it does, with Ireland sometimes getting a head start.

A partner at leading Dublin law firm Arthur Cox, McGovern points to the benefit of studying "analogous statutory law, if [case law] decisions spring from a common EU font." With echoes of Coppel's point on freedom of information and its roots in Europe, McGovern highlights Britain's and Ireland's telecoms/electronic communications and public procurement regimes, which both now filter down from European directives. He says: "other countries might do things differently but [England looking to Ireland and vice versa] is a natural first port of call."

This is an astute observation: the process of turning EU legislation into national legislation of member states is still in its infancy, relatively speaking. So to have access to otherwise scant case law relating to such legislation could be a real boon, particularly if it's written in the same language and applies to such a similar jurisdiction.

But McGovern is quick to point to better established use of Irish Law in England as well. The People v Edge, [1943] IR 115, is one such example. A case of kidnapping – a common law issue in many respects – it's been cited with considerable approval in English cases. JustCite points to nine; and those are just the ones that have been reported.

If you delve deeper, it's clear that that's just the tip of an enormous legal iceberg.

And yet I still sense that English barristers aren't yet fully attuned to seeking and using precedent from Ireland, whether they look for it expressly or come across it accidentally through subscriptions that include it as part of a wider package of common law.

It's clear from my interviews that its benefits are more than just increasing the pool of common law cases, particularly in light of Ireland's shared EU member nation status. But despite good qualitative evidence to the contrary, I suspect that a quantitative study of its use would support my final analysis.

But even if other barristers are slow to cotton on to the appropriate and innovative use of Irish precedent, the judiciary might yet applaud your efforts if you're starting to do so yourself.