

Eugene Creally QC

Queen's Counsel: 2011

Year Of Call: 1993

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Practice profile

Eugene has a broad civil law practice with particular emphasis on public law litigation. He has vast experience in bringing and, in particular, defending judicial review cases having been Standing Counsel to both the Scottish Ministers and the Advocate General in both civil and criminal matters. He has also appeared in several extradition cases involving human rights challenges. Most recently, he has represented Police Scotland in a number of criminal appeals involving the recovery of privileged information including *Coates & Wade v HM Advocate*. He has also undertaken advisory work for Police Scotland in relation to the compatibility of certain police practices with human rights. He has regularly appeared for both pursuers and defenders in personal injury cases including those involving industrial disease and more recently represented pursuers in clinical negligence claims including complex brain and cerebral palsy injuries and clients are left with his ability *"to explain the process in a concise and non patronising manner"* and *"to step in at the last minute and get to grips with the case"*. He has appeared in public inquiries and planning law challenges in the Court of Session. He has a broad based commercial practice which includes professional negligence claims; insolvency disputes, building contract claims, private international law and jurisdiction, and intellectual property disputes. In addition he has undertaken work in other civil law areas including agricultural tenancies, trusts and succession and property law disputes.

Education

- 1983: LL.B (Hons) Second Class Division I (Queens University, Belfast)

- 1986-7: Scots Criminal Law and Criminal Procedure, Taxation, Scots Private Law, Scots Mercantile Law, Conveyancing, Evidence and Civil Procedure, Scottish Legal System, Constitutional Law, Jurisprudence, Roman Law, International Private law (Faculty of Advocates & University of Edinburgh)
- 1988: Diploma in Legal Practice (University of Edinburgh)
- 1988: PhD (University of Edinburgh)

Professional Qualifications

- 1988: Trainee solicitor with Messrs Bird Semple Fyfe Ireland WS
- 1990: Qualified as a Solicitor and worked until 1992 as part of the Construction law team in the Litigation Department of Messrs Bird Semple Fyfe Ireland WS.
- 1992: Devilled to J Gordon Reid QC, Sheriff Neil McKinnon and Paul McBride QC
- 1993: Admitted as a Member of the Faculty of Advocates
- 2011: Appointed Queen's Counsel

Appointments

- 1998-2005: Standing Counsel to Lord Advocate
- 1996-2005: Legal Education & Admission Committee (Faculty of Advocates)
- 1996-2005: Board of Examiners (Faculty of Advocates)
- 1996-2005: Member of the Dean's Council (Faculty of Advocates)
- 1999-2003: Clerk (Faculty of Advocates)
- 2003 - : Vice Chairman of the Faculty of Advocates Free Legal Services Unit
- 2004-2011: Member of the Court of Session Rules Council
- 2009-2012: Standing Counsel to Advocate General

Publications

- 1992: Judicial Review of Anti Dumping and Other Safeguard Measures in the European Community: Butterworths

Lectures

- 1995: Direct Effect – The EU Directives and the UK Health and Safety Regulations
- 1996: Quantification of Damages in Personal Injury Cases
- 1997: Health and Safety Legislation in the EU Context - An update
- 2002: The Expert Witness
- 2010: What is “vexatious” – the legal perspectives
- 2012: Essential Error

Administrative and Public Law

Administrative Law (including judicial review)

Inverness Taxi Owners and Drivers Association v Highland Council 1999 SLT 1316

A taxi operators' association, sought judicial review of two decisions of Highland Council, the

licensing authority, that the Highlands be considered a single licensing area with no restriction on the number of taxis. It asserted that the Council had fettered the future exercise of its discretion to refuse a licence on the ground of no significant unmet demand. The Court held that the right conferred under the Civic Government (Scotland) Act 1982 Act was to object, and was exercisable only in relation to a relevant application. The petitioners did not have title because their right to object had not yet arisen.

Gray v Criminal Injuries Compensation Board 1999 SC137

The Inner House held that CICB were entitled to refuse the application on the basis that there was no crime of violence. The only crimes which might have been committed were bigamy, which was plainly not a crime of violence, and obtaining sexual intercourse through fraud, a crime of fraud rather than of violence.

SD, Petitioners 2003 SLT 1323

Judicial review of the Scottish Ministers' decision to allow an appeal against the decision of the Local authority to open a record of needs for the Petitioners' child.

Human Rights Law

Bourib v Secretary of State for the Home Department 2000 GWD 33-1294

The Secretary of State was entitled, if not bound, to reject the petitioner's fresh representations as not meeting the test in rule 346. The decisions on the first application were that the petitioner had entered the UK for economic reasons and was not a genuine refugee and the conduct of the Algerian military was irrelevant; and the decision to refuse to entertain the reapplication was therefore not unreasonable and that even if the Secretary of State had failed to take into account the matters complained of, these were not capable of having produced a different outcome to the petitioner's first application.

Ahmed (Saleem) v Secretary of State for the Home Department 2001 SLT 1347

Application by an illegal entrant for leave to remain in circumstances where he married a UK citizen who had a child by a previous marriage and had given birth to another child after enforcement action commenced. The Court held that the relationship between the petitioner and the child of the previous marriage only came into existence after the commencement of enforcement; that it did not constitute an exceptional circumstance; and that there was not such disproportion between the continuation of enforcement action in the public interest and the consequent interference with family relationships that came into existence after its commencement as to render the decision unreasonable.

Dove v Scottish Ministers 2002 SC 257

The decision of the Scottish Ministers to end the self-governing status of St. Mary's Episcopal school in Dunblane was held not to infringe the petitioners' rights under Article 14 read with the First Protocol Article 2 of the European Convention on Human Rights. The decision was affirmed on appeal (See: 2002 SLT 1296)

EU Law

Booker Aquaculture Ltd (t/a Marine Harvest McConnell) v Scottish Ministers (C-20/00); Hydro Seafood GSP Ltd v Scottish Ministers (C-64/00) [2003] 3 C.M.L.R. 6

Preliminary ruling sought from the European Court of Justice on the validity of Council Directive 93/53/EEC of 24 June 1993 introducing Community measures for the control of certain fish diseases. Reliance placed on the fundamental right to property to found a claim for compensation against an EU Member State. [See also: *Hydro Seafood GSP Ltd v Scottish Ministers* 2000 GWD 7-260]

Tax Law

AR Communications and Electronics Ltd v Revenue and Customs Commissioners [2011] UKFTT 637 (TC)

An appeal by AR Communications & Electronics Ltd (“ARC”) against the refusal by HMRC to make a repayment of input tax of £1,214,801.88 in respect of 16 purchases of mobile phones made in June and July 2006. HMRC argued that ARC knew or ought to have known that these transactions were connected with the fraudulent evasion of Value Added Tax. The Tribunal held it should have been clear to the Appellant that the “only reasonable explanation” for the nature and pattern of the disputed transactions was that they were tainted with MTIC fraud.

Local Government Law

Inverness Taxi Owners and Drivers Association v Highland Council 1999 SLT 1316

A taxi operators' association, sought judicial review of two decisions of Highland Council, the licensing authority, that the Highlands be considered a single licensing area with no restriction on the number of taxis. It asserted that the Council had fettered the future exercise of its discretion to refuse a licence on the ground of no significant unmet demand. The Court held that the right conferred under the Civic Government (Scotland) Act 1982 Act was to object, and was exercisable only in relation to a relevant application. The petitioners did not have title because their right to object had not yet arisen.

SD, Petitioners 2003 SLT 1323

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Cameron v Cottam (No.2) [2012] HCJAC 31

The retroactive effect of the decision that the Criminal Justice and Licensing (Scotland) Act 2010 section 58 was not law would be limited to any case in which bail had been granted which had not yet proceeded to trial or in which the trial was still in progress, and any appeal which had been brought timeously but had not yet been concluded.

Mental Health Law

M, Petitioner 2003 SC 52

The Court held that the provisions of the Mental Health (Scotland) Act 1984 which authorised the administration of medication without the consent of patients detained in psychiatric hospitals did

not automatically violate the Human Rights Act 1998 Schedule 1 Part I Article 6 and Article 8.

Eugene has assisted in the Faculty of Advocate's Training Program and presented talks to various audiences. He has tutored in European and Mercantile law at the University of Edinburgh.

WS v Mental Health Tribunal for Scotland & Ors [2010] CSIH 74

An appeal against a decision of the Mental Health Tribunal for Scotland refusing to make an order to return a patient to a medium secure facility in England following his transfer to the state hospital in Scotland in terms of the Mental Health Act 1983, section 80 was entirely misconceived where the appeal was purportedly taken under the Mental Health (Care and Treatment) (Scotland) Act 2003, section 220 and that right of appeal arose only where the patient had been transferred under section 218 of the 2003 Act.

Commercial Law

Company Law

Third v North East Ice & Cold Storage Co Ltd 1997 SLT 1177

The events following on the sale of the majority shareholding and the granting of the service contracts demonstrated that the members of the company did not have the necessary form of personal relationship which gave all shareholders the right to participate in the conduct of the business, and thus that there was no relevant case for a purchase at a pro rata valuation.

Secretary of State for Trade and Industry v Barnett (Re James Blake Ltd) 1998 SLT 63

Under the Company Directors Disqualification Act 1986 section 6(3) jurisdiction is to be determined at the time when proceedings are raised and not at the date of insolvency.

Commercial Law

Keenan v Aberdeen Slating Co Ltd 2000 S.C. 81

Contract for sale of land; delay in giving vacant possession; interest paid on balance of price; right of set off against balance of price; and right to damages for loss of profit

Green v Moran 2002 SC 575

An out going partner was entitled to payment of a sum equal to the value of his interest in the firm at the date of resignation, which required a valuation of all the assets and liabilities of the firm at that date. Such a partner could sue for payment of a specific sum, but must in that event make relevant averments addressing the proper measure of his entitlement, and sufficiently specific averments giving fair notice to the defenders of the way in which he contends the valuation of assets should be undertaken.

Bankruptcy And Insolvency Law

Sports Law

The Court held that organisations who arranged international football matches did not owe a duty of care to spectators to ensure that ground was suitable and that flood lighting was adequate. Further the point in proceedings at which jurisdiction fell to be determined was when the action began.

Shipping Law

Littlejohn v Wood & Davidson Ltd 1997 SLT 1353

For the purposes of section 31(1) of the Merchant Shipping Act 1988, a ship is being operated when at sea, afloat in port, under repair, or loading and unloading cargo. Although failure to comply with the section is a criminal offence, civil claims for damages can also be allowed as the legislation is aimed at protecting a particular class of persons, i.e. all those on board ship, whether at sea or not.

Reparation Law (including Professional Liability)

Health And Safety Law

Littlejohn v Wood & Davidson Ltd 1997 SLT 1353

For the purposes of section 31(1) of the Merchant Shipping Act 1988, a ship is being operated when at sea, afloat in port, under repair, or loading and unloading cargo. Although failure to comply with the section is a criminal offence, civil claims for damages can also be allowed as the legislation is aimed at protecting a particular class of persons, i.e. all those on board ship, whether at sea or not.

Medical/Clinical Negligence Law

Personal Injury Law

Davies v McGuire 1995 SLT 755

Neither section 2 nor section 3 of the Civil Evidence (Scotland) Act 1988 Act warranted the leading of such evidence in advance of the evidence of such eyewitnesses, but that it was competent to recall a witness to give such evidence after the eyewitnesses had given evidence.

Littlejohn v Wood & Davidson Ltd 1997 SLT 1353

For the purposes of section 31(1) of the Merchant Shipping Act 1988, a ship is being operated when at sea, afloat in port, under repair, or loading and unloading cargo. Although failure to comply with the section is a criminal offence, civil claims for damages can also be allowed as the legislation is aimed at protecting a particular class of persons, i.e. all those on board ship, whether at sea or not.

Saunders, Petitioner 1999 S.C. 564

An application was brought in terms of Chapter 58 for reduction of a decree of the sheriff granting a

reponing note. The respondent argued that the petition was incompetent, being excluded by RCS 58.3(2) in that the application could be made by “appeal or review under or by virtue of any enactment”. The word “enactment” comprehended the Rules of Court and RCS 53.2, provided for just the sort of application that had been made in that case. The Respondent founded on Lord Marnoch’s observations in Bell v Fiddes. The Inner House held that the petition was incompetent. [NOTE: This decision has been doubted – D Petitioner 2011 SLT 101]

Saunders v Royal Insurance Plc 1999 S.L.T. 358

The proprietors of a hotel had a public liability insurance policy with the defenders the terms of which provided that every writ or document would be sent to defenders immediately. The pursuer was injured on the hotel premises and he claimed against the owners in terms of their public liability insurance. Subsequently, the hotel owners disappeared. The pursuer obtained permission to cite them by advertisement and obtained decree in absence against them. The pursuer then raised an action for payment against defenders in terms section 1 of the Third Parties (Rights against Insurers) Act 1930. The Court held that it was not possible to describe citation by advertisement as being equivalent to receipt. The only remedy available to defenders was to seek the reduction of the decree in absence.

Gray v Criminal Injuries Compensation Board 1999 SC137

The Inner House held that CICB were entitled to refuse the application on the basis that there was no crime of violence. The only crimes which might have been committed were bigamy, which was plainly not a crime of violence, and obtaining sexual intercourse through fraud, a crime of fraud rather than of violence.

Professional Liability

Bank of Scotland v Fuller Peiser 2002 SLT 574

Surveyors had valued a property for a private client subject to a disclaimer, and the pursuers had lent money to the private client in reliance on that survey. The court held that the disclaimer had to be considered in deciding whether a duty of care existed at all and that it negated the assumption of responsibility for the statement.

Planning and environmental law

Flood Prevention

Retail

Compulsory Purchase Law

Planning And Environmental Law

Samuel Smith Old Brewery (Tadcaster) v Edinburgh City Council (No.2) 2001 SLT 977

Whether planning authority's grant of permission for waste water pumping station conflicted with greenbelt policy in structure plan and whether failure to notify Scottish Ministers of substantial body of objection breached Article 6 the European Convention on Human Rights. The court

rejected both challenges.

Cannell v Scottish Ministers 2003 S.C. 404

The Appellant contended that the expenses incurred by him in the course of his, ultimately successful, appeal against a listed building enforcement notice requiring him to restore certain panels to his private house, a listed building, was contrary to Article 1 of the First Protocol and Article 8 ECHR. The Inner House held that the decision by the respondents to refuse to reimburse him for his costs did not impose on the petitioner an excessive burden disproportionate to any aim legitimate for the state to seek to achieve and his rights under Article 1 of the First Protocol and Article 8 of the Convention were not infringed.

Collins v Scottish Ministers 2004 S.L.T. 228

C, party litigants, appealed under the Town and Country Planning (Scotland) Act 1997 section 239 against the decision of R, a Scottish Executive Development Department reporter, dated July 2, 2002, dismissing their appeal against refusal of planning permission for the erection of a dwelling house. C appealed out of time but was allowed to appeal although late. The Inner House dismissed the appeal holding that sections 237 and 239 rendered the appeal incompetent as it was commenced outwith the six week period provided for and the court had no power to extend that period or excuse any failure to comply with it.

Bellway Homes (Scotland) Limited v Stirling Council & Anr [2008] CSIH 42

An appeal under section 238 of the Town & Country Planning (Scotland) Act 1997 concerning the proper construction of the relevant Structure Plan and, in particular, the Key diagram and other indicative figures in the context of a challenge to the Council's decision to adopt a Local Plan.

Blue Circle Industries plc v Scottish Ministers 2002 SLT 894

The petitioners challenged the Reporter's refusal of their motion that their appeal be sisted pending the outcome of a challenge against East Lothian Council's adoption of the housing chapter of the East Lothian Local Plan. The held that the Reporter had exercised his discretion appropriately and that there was no procedural unfairness or impropriety.

Bourib v Secretary of State for the Home Department 2000 GWD 33-1294

The Secretary of State was entitled, if not bound, to reject the petitioner's fresh representations as not meeting the test in rule 346. The decisions on the first application were that the petitioner had entered the UK for economic reasons and was not a genuine refugee and the conduct of the Algerian military was irrelevant; and the decision to refuse to entertain the reapplication was therefore not unreasonable and that even if the Secretary of State had failed to take into account the matters complained of, these were not capable of having produced a different outcome to the petitioner's first application.

Forbes v Aberdeenshire Council [2010] Env LR 36

Interim suspension and interdict of a grant of planning permission for stabilisation works to sand dunes as part of outline planning permission for a golf course development fell to be refused where a prima facie case of sufficient interest under Directive 2003/35 had not been shown, and

the balance of convenience favoured the grant of permission as the works were already underway.

Forbes v Aberdeenshire Council [2011] SLT 909

Following abandonment of a petition for judicial review of decisions of a local planning authority the court found the respondents entitled to an award of expenses to date there being no good reason to hold that petitioner should not be liable for them.

Other Specialisms

Family Law

SD, Petitioners 2003 SLT 1323

Judicial review of the Scottish Ministers' decision to allow an appeal against the decision of the Local authority to open a record of needs for the Petitioners' child.

Employment And Discrimination Law

M's Guardian v Advocate General for Scotland 2010 SLT 621

Section 73 of the Social Security Contributions and Benefits Act 1992 in so far as imposing a lower age limit of three years for entitlement to the mobility component of disability living allowance, was not incompatible with Article 8 and Article 1 Protocol 1 of the European Convention on Human Rights as it was rational and pursued a legitimate aim, and was therefore proportionate.

DWP v Joshua Hoggan [2010] UKUT 456 (AAC)

This decision concerns the application of regulation 12(6)(c) of the Social Security (Disability Living Allowance) Regulations in relation to the severe mental impairment behavioural problems test for high rate mobility component. This requires the claimant to exhibit disruptive behaviour which "is so unpredictable that he requires another person to be present and watching over him whenever he is awake." The claimant's appeal was rejected because the evidence indicated that he could be left alone for long periods of time.

AB v Scottish Social Services Council 2012 SLT (Sh Ct) 1999

There was an absence of explicit reasoning in a decision by the conduct sub committee of the Scottish Social Services Council to remove an individual from the register of social workers, however, all the committee was obliged to do was act lawfully, and the informed reader would be left in no reasonable or real doubt by its decision as to its conclusions on the substantial issues, and it had given adequate reasons; there was no requirement in law for it to go further than it had in the circumstances of the case, in particular, to give reasons for its findings in fact.

Criminal Law

HM Advocate v McLean (Duncan) 2010 SLT 73

The Court held that the guarantees available under the Scottish system were sufficient to secure a

fair trial for a person who, while detained, was interviewed by police officers without access to a lawyer and whose responses were relied on by the prosecution at trial and the fact that legal representation was not available did not of itself constitute a violation of article 6(1) and article 6(3) (c).

Cadder v HM Advocate [2010] 1 WLR 2601

The Supreme Court held that the decisions in Paton (Gary Alexander) v Ritchie 2000 J.C. 271, Dickson v HM Advocate 2001 J.C. 203 and HM Advocate v McLean (Duncan) [2009] HCJAC 97, 2010 S.L.T. 73 could not survive in the light of the decision in Salduz v Turkey (36391/02) (2009) 49 E.H.R.R. 19. A person detained under the Criminal Procedure (Scotland) Act 1995 section 14 had to have access to a lawyer from the time of his first interview unless there were compelling reasons in the particular circumstances of the case that made the presence of a lawyer impracticable.

International Law

Engler (Krzysztof) v Lord Advocate 2010 JC 235; Kropiwnicki (Adam) v Lord Advocate 2010 JC 229

An extradition request seeking the return to Poland of a Polish national to serve prison sentences imposed there was not incompatible with the European Convention on Human Rights 1950 article 3 due to systemic overcrowding in Polish prisons where no evidence had been produced to establish substantial grounds for believing that there would be a real risk of article 3 ill treatment if he were returned.

W (India) v Secretary of State for the Home Department 2012 CSOH 170

A petition for reduction of a decision of the Secretary of State for the Home Department refusing to treat further representations made on behalf of a foreign national as a fresh claim for asylum, and certifying his claim as clearly unfounded in terms of the Nationality, Immigration and Asylum Act 2002 s.94(2). The Court held that the Petitioner had failed to identify any flaw in the decision making process.

Trusts And Executry Law

Property Law And Conveyancing

Moray Estates Development Co v Butler 1999 SLT 1338

The Court held that there was an absence of indicia, notwithstanding the survivorship clause in the lease of an agricultural holding, indicating that it was the intention of the parties in the present case that the lease be in favour of a house (that is a lease in favour of the business so long as it continued with any one or more of the original partners remaining as partners).

Keenan v Aberdeen Slating Co Ltd 2000 S.C. 81

Contract for sale of land; delay in giving vacant possession; interest paid on balance of price; right of set off against balance of price; and right to damages for loss of profit

Achievements

Standing junior counsel (past)