THE COURT OF APPEAL BACKLOG

Seth Barrett Tillman*

On 4 October 2013, Ireland held a referendum to create an intermediate court of appeal. The referendum passed, and the Court of Appeal went into operation on 28 October 2014. On 25 July 2017, the Courts Service published its *Annual Report 2016*. That report provides statistics in regard to the Court of Appeal's second complete calendar year of operation. We can now ask the question: Has the Court of Appeal successfully dealt with the judicial backlog of appellate cases which it was created to address? We can now also make a tentative answer. The expensive experiment[1] has not succeeded—or, at least, it has not succeeded so far.

There are four numbers in the *Annual Report 2016* of particular interest. First, the Court of Appeal had 1,814 pending cases[2] on its list on 1 January 2016. Secondly, 924 incoming civil and criminal cases[3] reached the Court of Appeal during 2016 through the regular appellate process. Thirdly, 917 cases were resolved[4] by the Court of Appeal in 2016. Fourthly and finally, the Court of Appeal ended 2016 with 1,821 outstanding cases.[5] In short, over the course of the Court of Appeal's second complete calendar year since inception, with millions spent and permanently committed in public funds, the number of pending cases started at 1,814 cases, and by the end of the year the number of pending cases *increased* to 1,821 cases. In other words, there was *no* net reduction in the number of cases in the backlog. The backlog grew, albeit modestly.

At this rate, even under the favourable assumption that the number of incoming appeals does not grow over time, the total backlog will not be solved—ever.[6] Indeed, the situation is not even heading in the right general direction. In effect, the Court of Appeal is treading water. There were 333 incoming criminal appeals, and 329 criminal appeals were resolved; thus, the criminal backlog went from 528 criminal cases to 532 by the end of 2016. There has been no systematic reduction in the net backlog of criminal appeals. To the extent that older criminal appeals are being systematically addressed, it is only because the more recent cases have been left unaddressed.

Similar considerations apply to the Court of Appeal's civil list. There were 591 incoming civil appeals, and 588 civil appeals were resolved; thus, the civil backlog went from 1,286 civil cases to 1,289 by the end of 2016. There has been no systematic reduction in the net backlog of civil appeals. To the extent that older civil appeals are being systematically addressed, it is only because the more recent cases have been left unaddressed. All that has happened is that the Court of Appeal has spent a full calendar year kicking the can down the road; it has, at best, partially solved the old backlog of legacy cases only by creating a new backlog of current cases left unaddressed. This is not success—this is failure.

2016 was the second full calendar year of the Court of Appeal's operation. It was to be expected that there would be some decline in judicial productivity.[7] Many of the legacy appeals the Court of Appeal addressed in its first year or so of operation were "low hanging fruit". By contrast, in 2016, the remaining legacy cases were likely to prove systematically more complex than the ones the Court of Appeal had already decided during 2015 (and during the first few months of the Court of Appeal's operation in 2014). Thus after 2015, the remaining cases in the backlog would take more effort, more judicial resources, and more time to resolve. That said, the precipitous decline in the Court of Appeal's productivity from 2015 to 2016 is remarkable. The Court of Appeal resolved 1,126 cases[8] in 2015, but in 2016, it only resolved 917 cases.[9] Indeed, the *Annual Report 2016* specifically notes the decline: "917 appeals disposed of—588 civil and 329 criminal—a 19 per cent decrease on 2015".[10]

Following the publication of the *Annual Report 2015*, which was published after the first full calendar year of the Court of Appeal's operation, some voiced criticism of the new court's productivity. In response, one anonymous civil servant working in the Courts Service affirmed that "once the [C]ourt [of Appeal] 'finds its rhythm' it would begin to process cases more efficiently".[11] Why a newly constituted appellate court composed entirely of sitting judges elevated from the lower courts (and one former Attorney General) would not hit the ground running,

and instead, would have to "find its rhythm," was left unexplained. In any event, it does not appear that the civil servant's optimistic prediction has come to pass.[12]

Likewise, the number of reported civil judgments issued by the Court of Appeal in 2015 was 304. But in 2016, the number of reported civil judgments collapsed to 221: a decrease of 27 per cent.[13] On the criminal side, in 2015, it took, the Court of Appeal, on average, 1,027 days to dispose of a case. In 2016, disposal time expanded to 1,582 days:[14] an increase of over 50 per cent. Additionally, all these decreases in productivity come notwithstanding that the Court of Appeal has expanded from nine members to its full complement of 10 members.[15] These are not hopeful signs.

One final set of statistics: oral hearings: In 2016, the Court of Appeal held an astonishing 533 hearings in civil cases.[16] It also adjudicated 329 criminal cases,[17] and apparently, an oral argument was held for all or a substantial majority of all these criminal cases. Assuming two hours of argument per case, and three judges per appeal, this amounts to 5,172 hours of judicial time occupied by oral argument.[18] That means each justice on the Court of Appeal is spending some 13 weeks at hearings.[19] Surely, a very substantial class of appeals could and should be decided on the papers alone. At the intermediate appellate level, oral argument should be the exception, not the rule.[20] Such papers-only decision-making would allow the Court of Appeal to reach a prompt decision without the initial delay associated with a hearing, and also without the cost of a hearing imposed on the judicial system and on litigants. Oral argument requires a justification. It should not be granted as a matter of right.[21] Where oral argument merely duplicates what appears in the record or in the parties' briefs or what could and should appear in the parties' briefs, it makes no sense to hold a hearing. Given that any number of cases before the Court of Appeal are on a trajectory of taking five or more years[22] before final resolution, removing the oral argument bottleneck should be a matter of the most urgent reform. Ending oral argument as a matter of right[23] has the potential to free up some 13 weeks or 25 per cent of all available judicial time. A 25 per cent increase in judicial productivity would be a good, low cost, first step towards resolving the judicial backlog.

Once this is done—once the antiquated tradition of oral argument as a matter of right[24] is terminated—other necessary institutional reforms should be debated and implemented. But there is no good reason to hold that discussion until and unless the diagnosis is widely accepted: the Court of Appeal has not, is not, and is not likely to solve the judicial backlog.

* *Lecturer, Maynooth University Department of Law. Roinn Dlí Ollscoil Mhá Nuad. Harvard Law School JD (2000), cum laude; University of Chicago BA (1984), with honours.*

1 *Irish judges do not come cheap. Post-Brexit, Irish judges will be the highest paid national judges in the European Union. See "Scottish judges are the highest paid in Europe", The Guardian (UK, 9 October 2014) <http://tinyurl.com/yd2obbq8> [accessed 26 July 2017]. Swiss and Norwegian judges make more than Irish judges, but Switzerland and Norway are not EU member states. See generally Constitution of Ireland, Art.35.5.3º (Amend. 29) (permitting "reductions to the remuneration of judges" made "by law").*

2 *1814 pending cases included 528 criminal cases and 1286 civil cases. See Courts Service, Annual Report 2016, pp.68–69 (reporting 528 pending criminal cases before the Court of Appeal as of 1 January 2016). <http://tinyurl.com/ybkzr6tg> [accessed 25 July 2017]. The 1286 civil cases included 380 cases which reached the Court of Appeal through the regular appellate process and 906 Article 64 transfer cases (i.e., cases transferred in 2014 from the Supreme Court to the Court of Appeal). See above at 67–68 (reporting 380 pending regular civil appeals before the Court of Appeal as of 1 January 2016, and 906 pending Article 64 civil appeals before the Court of Appeal as of 1 January 2016).*

3 *924 incoming cases included 333 criminal cases and 591 civil cases. See above fn.2 at 41, fn.2 at 67–68 (reporting 591 incoming regular civil appeals during 2016), fn.2 at 68–69 (reporting 333 incoming criminal appeals during 2016). But see above fn.2 at 40 (reporting 594, not 591, incoming regular civil appeals). The discrepancy in regard to the number of incoming civil appeals is puzzling.*

4 *917 resolved cases included 329 criminal cases and 588 civil cases. See above fn.2 at 68–69 (reporting 329 resolved criminal cases during 2016). The 588 civil cases included the resolution of 451 cases which reached the Court of Appeal through the regular appellate process and the resolution of 137 Article 64 transfer cases (i.e., cases transferred in 2014 from the Supreme Court to the Court of Appeal). See above fn.2 at 41, 67–68 (reporting 451 resolved regular appellate cases during 2016, and reporting 137 resolved Article 64 transfer cases, for a total of 588 resolved civil cases). But see above fn.2 at 40 (reporting 591, not 588, resolved civil cases). This discrepancy, i.e., in regard to the number of resolved civil appeals, is also puzzling. There was a similar (and perhaps more significant) discrepancy in the Annual Report 2015. See e.g. Seth Barrett Tillman, "Has the Irish Court of Appeal Solved the Judicial Backlog? Can it?" (2016) 34 Irish Law Times 210, and fn.9 (noting a discrepancy involving 41 civil cases between the 2014 and 2015 annual reports) (available on Westlaw.ie).*

5 *1821 = 1814 + 924 – 917. Annual Report 2016 indicates that, at the end of 2016, the number pending regular civil appeals is 520, the number of pending Article 64 (civil) transfer cases is 769, and the number of pending criminal appeals is 532. See above fn.2 at 67–69. Thus, the total number of pending cases is 1821, i.e., 520 + 769 + 532.*

6 *At the end of 2016, there were 769 pending Article 64 transfer cases on the civil list. See above fn.2 at 68. At the current rate—i.e. resolution of 137 Article 64 cases per year—it will take more than five years to resolve just that part of the legacy docket. See above fn.2 at 67–68. It is unclear from the three most recent annual reports how old these cases already were, back in 2014, at the time they were transferred to the Court of Appeal.*

7 *See e.g. Seth Barrett Tillman, "Has the Irish Court of Appeal Solved the Judicial Backlog? Can it?" above fn.4, 210 (available on Westlaw.ie). See generally Hilary Biehler, "Normal and 'Leapfrog' Appeals to the Supreme Court" (2017) 35 Irish Law Times 5 (available on Westlaw.ie); Seth Barrett Tillman, "Court of Appeal just a new version of Supreme Court—only more costly", The Irish Times (Dublin, 28 July 2014) 7 <http://ssrn.com/abstract=2465554> [accessed 26 July 2017].*

8 *See Courts Service, Annual Report 2015, p.55 (noting 366 new appeals resolved), p.56 (noting 387 Article 64 transfer cases resolved), and p.67 (noting 373 criminal appeals resolved) <http://tinyurl.com/y8tso55s> [accessed 25 July 2017]. In other words, 1126 = 366 + 387 + 373.*

9 *See above fn.4.*

10 *Courts Service, Annual Report 2016, p.41. To be pellucidly clear, the quotation is the blunt language adopted by the Courts Service's own Annual Report 2016. This language cannot be improved upon.*

11 *Connor Gallagher, "Court of Appeal backlog 'could take over a decade to clear'", The Irish Times (Dublin, 19 September 2016) 6 <http://tinyurl.com/jdnqfkn> [accessed 26 July 2017].*

12 *The anonymous civil servant was hardly alone in his optimism regarding the Court of Appeal. In 2013, immediately prior to the referendum, Ken Murphy, Director General of the Law Society of Ireland, affirmed: "[O]ne of the things that could happen [should the referendum pass] is that if the Supreme Court is allowed to develop principled jurisprudence and deeper cases and deeper judgments, the principles of law will become clearer and therefore there'll be fewer appeals. One of the reasons for so many appeals at the moment is because of uncertainty because the Supreme Court can't develop principles". Today with Sean O'Rourke, RTÉ Radio 1 (1 October 2013), transcript at p.8. In 2015, 302 criminal appeals were lodged in the Court of Appeal; in 2016, that number grew to 333. See above fn.10 at*

68. In 2015, 637 civil appeals were lodged in the Court of Appeal; in 2016, that number fell to 591. See above fn.8 at 55; above fn.10 at 68. Thus, the total number of appeals to the Court of Appeal dropped by 15 cases. However, that modest reduction in the number of appeals at the Court of Appeal level is more than offset by the explosive growth in the number of appeals to the Supreme Court. In 2015, there were 96 applications for leave to appeal (to the Supreme Court), and 13 applications were granted; in 2016, by contrast, there were 152 such applications, and 58 were granted. See above fn.8 at 57; above fn.10 at 7 & 70. Thus, there has been no system-wide decrease in the number of appeals. Compare above fn.10 at 21 (reporting a 63 per cent increase in applications for leave to appeal to the Supreme Court), with fn.10 at 41 (reporting a 58 per cent increase in applications for leave to appeal). The inconsistency—reporting both a 58 per cent and a 63 per cent increase—is puzzling. This error in the Annual Report 2016 was subsequently corrected in response to an inquiry from this author; it is possible that other such corrections have been made. See also above fnn. 3 & 4 (reporting other discrepancies). Such inconsistencies are disquieting. The Minister and the Department of Justice, the Chief Justice and the other members of the judiciary, the bar and the legal profession, academics and the wider public—all depend on the accuracy of the statistics supplied by the Courts Service's annual reports.

13 See above fn.10 at 68. Just to be clear: a decline in the number of full length reported judgments is not a bad thing if more cases are being resolved by fast track mechanisms, e.g. decisions by one-line written order, speaking orders from the bench issued at the conclusion of oral argument, or short memorandum judgments, etc. See e.g., "The Legal Limit; Ireland's courts system needs to be less like an academic common room and more like a busy branch of McDonalds", The Times (Irish edn) (27 September 2016, 12:01am GMT) <http://tinyurl.com/zymmkow> [accessed 26 July 2017]. But where the number of resolved cases has significantly dropped, it is difficult to explain a concomitant drop in the number of full length reported judgments. Furthermore, every case resolved by the Court of Appeal (or any court of record), i.e., every case excepting those cases settled or withdrawn by the parties, ought to result in some public, accessible written record, even absent a full length reported judgment. The continued failure of the Irish courts (and administrative bodies) to meet this minimalist standard amounts to a secret justice system inconsistent with basic norms of fairness and transparency. See e.g. Constitution of Ireland, Art.34.1 ("Justice ... shall be administered in public"); Sandra Fredman, "Public Access to Court Documents" (2015) Oxford Pro Bono Publico Programme Paper <http://tinyurl.com/z46gctm> [accessed 26 July 2017]; Seth Barrett Tillman, "Time to Open Courts and Let Justice Be Seen", The Irish Independent (Dublin, 22 August 2012) A14 <https://ssrn.com/abstract=2129771> [accessed 26 July 2017]; Kieron Wood, "Open Democracy Requires Free Media Access to Court Documents", The Sunday Business Post (Dublin, 14 July 2013) 21 <http://tinyurl.com/y7e3o5rf> [accessed 26 July 2017]; Rossa McMahon, "We can't all access the courts. We should at least have access to court documents" (A Clatter of the Law, 23 August 2012) <http://tinyurl.com/ycxwvv5g> [accessed 26 July 2017]; Eoin O'Dell, "Open justice and access to court documents" (CEARTA, 23 August 2012, 12:15pm) <http://tinyurl.com/bttxy2y> [accessed 26 July 2017]; NewsBrands Ireland "Open Justice" Conference, Dublin, 21 June 2017 <http://tinyurl.com/ycv6qjp8> [accessed 26 July 2017]. See generally Anastasoff v United States 223 F3d 898, 899–900 (8th Cir 2000) (Arnold, J.), vacated as moot 235 F3d 1054 (8th Cir 2000) (holding that rule precluding parties from citing to prior unpublished opinions is unconstitutional because it purports to grant the courts a "judicial power beyond the bounds of Article III").

14 See above fn.10 at 72. Shortly after the Court of Appeal opened for business, President Higgins took the position that the new court "has already benefited litigants, the community and the economy by reducing undue delays in processing appeals". "President Michael D. Higgins Opens New Court of Appeal Building" (2015) 17(5) Courts Service News 11 <http://tinyurl.com/y6v4u2k2> [accessed 31 July 2017]. Likewise, "[i]n an unusual move [prior to the referendum], senior figures from Fine Gael, Labour, Fianna Fáil and Sinn Féin issued a statement urging voters to approve the proposal to create a court between the High and Supreme courts". Colin Gleeson, "How the Referendum Campaigns Unfolded: A brief history of the Seanad abolition and Court of Appeal referendums", The Irish Times (5 October 2013, 11:56am) <http://tinyurl.com/ybppdr8z> [accessed 26 July 2017]. Perhaps it is now time to reassess all the cross-party early optimism?

15 See above fn.10 at 21.

16 See above fn.10 at 68.

17 See above fn.10 at 68.

18 5172 judicial hours = [533 (civil) hearings + 329 (criminal) hearings] * 2 hours per hearing * 3 judicial hours per hour. The estimates behind this calculation are quite conservative. A fair number of appeals extend beyond 2 hours. See e.g. above fn.10 at 68 (reporting that 15 civil cases had appeal hearings lasting two days or more).

19 13 weeks / judge is approximately equal to 12.93 weeks / judge = ((5172 judicial hours ÷ 10 judges) ÷ 40 judicial hours per week).

20 See e.g. Administrative Office of the U.S. Courts, 2016 Annual Report, Table B-10. U.S. Courts of Appeals—Cases Terminated on the Merits After Oral Arguments or Submission on Briefs, by Circuit, During the 12-Month Period Ending September 30, 2016, at p.1 (indicating that only 17.5 per cent of appeals before the intermediate federal courts of appeals had oral argument, and that the remaining 82.5 per cent of such appeals were decided on the papers alone) <http://tinyurl.com/ydxrwcml> [accessed 25 July 2017]. My own experience is that oral hearings before the intermediate federal courts of appeals are, in the great majority of cases, kept to one hour.

21 The issue is not whether any particular court rule (or other positive legal instrument) formally grants parties oral hearings as a matter of right. The fact is that there is a long established tradition in the Irish courts, i.e., a tradition which has fixed lawyers' and litigants' expectations—they know they will be granted an oral hearing in virtually any appeal, civil or criminal, both to the Court of Appeal and to the Supreme Court (among those cases where an application for leave to appeal has been granted).

22 See e.g. David Stone, "Justice delayed: in 2015, Karen Millen's 2007 design infringement case comes to an end" (2015) 37 E.I.P.R. 617, 617 ("Can we describe as fit for purpose a legal system that took eight years and 11 judges to decide a dispute that any bystander would have described as obvious?").

23 See above fn.21.

24 See above fn.21.