

**THE HIGH COURT  
DUBLIN**

**KIERAN GOULD**

**Case No. 2006/2671P**

**PLAINTIFF**

**AND**

**MICHAEL MCSWEENEY, SUSAN GREENE,  
PAT O'SULLIVAN, BRENDAN HAYES,  
JAMES O'DRISCOLL, LIAM DALY,  
HARRY JENNINGS, DAN MCCARTHY,  
PAT MCCARTHY**

**DEFENDANTS**

**Judgment delivered by Mr. Justice Smyth on Tuesday, 23rd January, 2007.**

1. Mr. Justice Smyth: The Plaintiff is in his mid thirties and for many years, prior to June 2006 was greatly interested in the sport of road bowling and for many years was a member of Ból Chumann na hÉireann, (hereinafter referred to as "the Association"). He has been very successful in his sporting career and won numerous championships at different levels of the game and represented Ireland at international level. In June 2006 he considered that he was approaching a stage in his career where he would shortly be passed his prime.

2. The Plaintiff was scheduled to play a senior championship match (referred to in the parlance of the game as a score) on Sunday, 28th May 2006 against one David Murphy. This score was effectively the Cork County quarter-final, and in fact it attracted a large attendance and €9,000 per side was raised as a stake. A series of incidents occurred before the score proper began which were the subject of enquiry by the Executive Committee of the Association and such are the concern of this action. In the play of the day of the 28th May 2006 the Plaintiff won the score and in the normal course of events the Plaintiff would have gone on to play one John Creedon in the Cork County semi final on Sunday, 11th June 2006. However, as a result of a decision of the Executive Committee of the Association of 7th June 2006 (concerning the conduct of the Plaintiff on 28th May 2006) the Plaintiff was suspended for two years from participating in the game of bowls under the auspices of the Association. From such circumstances John Creedon had been allowed to proceed to the County Championship against one Philip O'Donovan on 28th June 2000. Laffoy J., by order dated 16th June 2006, restrained the Defendants from allowing the playing of the final of the Cork County Championship scheduled for Sunday 18th June 2006. The Plaintiff seeks now a declaration that the decision of the Association made on 7th/8th day of June 2006 in respect of the Plaintiff is invalid as it was made contrary to the rules of natural and constitutional justice and, in particular, contrary to the principles of audi alteram partem and *nemo iudex in causa sua*. The facts of this afternoon can be briefly stated. Each of the contestants got a bowl each from Brendan Hayes, a steward on the evening in question (he was and is the secretary of the Association) to play a practice shot prior to the score, which was due to begin at 1:30 p.m.. The shot was taken from in front of the starting line. At that time there was a large crowd congregating and there were a number of parked cars on the left-hand side of the road, some but not all parked (because there was no space for them) in a lay-by some 60 to 80 metres ahead of the start line. There are some differences as to the detail between the events recollected by the Plaintiff and the Steward, and any other person, and insofar as such differences exist I prefer to rely on the evidence and report of the Referee because of his impartiality and immediate proximity to the actual events on the issue of safety. In this regard the Referee avers that:

"4. I would say that most of Kieran Gould's shots went in that general direction of the lay-by, where the cars were parked and some of them hit the parked cars. I was standing behind them directly where they were throwing them.

5. I note that one of the shots thrown by Kieran Gould narrowly missed a gentleman in a wheelchair, who was just after alighting from his car and was in between two of the parked cars in the lay-by.

6. A lot of people had gathered and they were milling around the road way, talking in a casual manner and not as alert as people are when a score has commenced. At this point in time Brendan Hayes asked both players to move further down the road to avoid causing any injury to the spectators or damages to the cars in the lay-by. I saw that David Murphy did as he was told. Kieran Gould, however, did not abuse Brendan Hayes and moved backwards towards the start line to throw more bowls, some of them which he lofted over the heads of the people on the road.

7. After Brendan Hayes had warned him, I also warned him before he threw those further shots and I advised him that he himself would be responsible for any harm he would do. I had been thinking to myself before he had been warned by Brendan Hayes, Secretary of Ból Chumann, that the shots were dangerous and that somebody could be hurt or there could be damage to cars parked in the lay-by. 8. After one of the shots of the bowl was not returned from up the road and Kieran Gould took one of the bowls out of the container of spare bowls which I had in my hand. I did not give him a bowl; he had it taken before I knew it. He had already been told not to throw the bowl and therefore his attitude must have been that he was going to throw it regardless of what I said."

3. While Mr. Finbar Aldworth was not officiating on the day, he is Chairman of the Referees Committee of the Association and had appointed Mr. Willie Murphy as the Referee of the contest in which the Plaintiff took part and he, Mr. Aldworth, avers in paragraph 4 of his after affidavit that: "It was dangerous for him (the Plaintiff) to throw the shots in those circumstances", to which he refers, i.e. parked cars and about 3000 people, and the action of the Plaintiff, and he goes on as follows:

"4. No warning was given by him, and the stewards as a result could not warn people of the shots coming. It was only when the shots hit the parked cars on the road that the people heard the bang and scattered and knew anything of the shots being taken. 5. I saw Brendan Hayes, whom I know, warning Kieran Gould that he was not entitled to take practice shots when there were people on the road. He told him he had no permission to throw the shots and he would not be covered by insurance. I heard Kieran Gould's reply, that he was entitled to throw practice shots and he did abuse Brendan Hayes. I believe there was another Steward from the local club in and around that area and he was also warning him as well.

6. From my experience of being a Referee, and as a Chairman of the Referees, it certainly entered my head that it was possible that the score could have been stopped and Kieran Gould disqualified for his conduct. But that, of course, was a matter of decision for the Referee on the day."

4. In my judgment it would not be any defence at a Disciplinary inquiry to advance in justification or otherwise of conduct, such as I am satisfied as a fact on the evidence was conduct that in all the circumstances was dangerous and unsafe, that instead of immediate disqualification the referee exercised a very common sense judgment, where 3000 people were gathered and substantial

bets placed on the outcome, to permit the score to proceed when the circumstances in his judgment had become safe.

[The Referee subsequently made his report, attended the meeting on 7th June, but did not vote on the decision to discipline the Plaintiff.]

5. Where the evidence of the Plaintiff and the Steward are in conflict, on the issue of dangerous play, I prefer that of the Steward on the balance of probabilities and in substance consistent with and/or corroborated by that of the Referee, Mr. Aldworth and Mr. Lehané in their affidavits. The Steward wrote a report dated 29th May 2006 to the Chairperson of the Association and by direction of the Chairperson he, in his capacity as Secretary of the Association, wrote by letter dated and posted on 31st May 2006 to the Plaintiff notifying him and inviting him to attend a meeting to be held on 7th June, 2006 of the Executive Committee to consider his alleged breach of discipline under Rule XIV 5(d) and (i) of the Association. They provide as follows:

"5. Members may be expelled, suspended or otherwise disciplined for good and sufficient reason, and without prejudice to the generality hereof for:-

(d) assaulting, threatening, intimidating or otherwise interfering with any Referee, steward, officer or Executive Committee member or attempting to do so (i) failing to comply with safety regulations or the instructions of a Referee or Steward."

6. On the evening of 31st May 2006, at 11:45 p.m. the Plaintiff handed a manuscript letter to Mr. Brendan Hayes, addressed ( *inter alia*) in the following terms:

"For the attention of the Secretary of Ból Chumann na Éireann and anyone else concerned, especially the Referee Mr. Willie Murphy.

Dear Brendan,

There are a number of points I would like to make regarding my behaviour on this occasion:-

1. I sincerely apologise to both you, Brendan and Willie for any offence I may have caused to one or both of you with my behaviour and the language used at the score on the Sunday, 28th May, last.

3. I now accept that you, Brendan, and Willie Murphy, Referee, were concerned for the safety of everybody on the road, including myself, while making their request.

In conclusion, I wish to state that any offence caused by me on Sunday, 28th May to anybody is deeply regretted and I hope you will consider the contents of this letter."

7. On 6th June 2006 a meeting of the Officers of the Executive of the Association took place to set the agenda for the Executive Committee meeting. I am satisfied and find as a fact on the averment of paragraph 3 of the affidavit of Susan Greene, the Chairperson of the Association, sworn on 17th January, 2007, that there was no substantive discussion of the disciplinary hearing of the Plaintiff, it was simply mentioned as a matter coming before the Executive Committee on the following day and was put on the agenda as such.

#### **The meeting of 7th June 2006**

8. The agenda for the meeting, which was scheduled to begin at 8:30 p.m., comprised 16 items. The issue of the Plaintiff's conduct appears at item 12 and was taken up at or about 11:15 p.m.. There was a total of 35 persons at the meeting, two of whom had no vote, a Mr. Harrington who is a life member, a Mr. Edward O'Driscoll, who is the Honorary Legal Advisor but not member of the Executive. When the time came to vote neither Mr. Brendan Hayes, the Steward, or Mr. Willie Murphy, the Referee, voted, neither did the three representatives from the Gaeltacht region and two voting members excuse themselves. While there is a transcript of the meeting dealing with the issue of the events of 28th May 2006, and very detailed submissions were made by counsel on each side, in approaching this body of evidence I do so mindful that this is an amateur sporting organisation, made up of lay people whose relationship in law is governed by contract, as express in the Constitution and Safety Regulations (*Murphy -v- The Turf Club*, [1989] IR 171 applies), with which the Plaintiff avers in paragraph of his affidavit, sworn on 15th June 2006 and he says he is familiar with the rules and regulations. In the same paragraph he protests that he has never received copy of such safety regulations, either on renewal or otherwise, nor is there any evidence that he sought such at any stage or was in ignorance of their general purport. He made no such protest at the meeting on 7th June 2006; and indeed the terms of his apology accept the common sense that there were legitimate safety concerns raised by the Steward and the Referee which he ignored and defied, and at paragraph 2 of the apology he seeks to explain his conduct, that at the meeting when invited to address the meeting he said "he lost the head. I shouldn't have done it". (Transcript of the meeting at page 11)

9. I am satisfied and find as a fact the following:

"1. The Plaintiff was notified in writing in advance of the meeting of "the charges/complaints" being made against him. There was no substantial difference between the letter notifying the Plaintiff of the complaint against him and the "case he had to meet" at the meeting and, in my judgment, the Plaintiff was not actually prejudiced by not having sight of the reports before the meeting.

2. He was permitted to be represented at the meeting by a person who is a member of the Association. His request to be represented by a member of the legal profession was refused. The meeting was not advised by the Plaintiff that he had a solicitor and five witnesses on the premises, outside the meeting room.

3. At the meeting both the report of the Referee and the Steward were read in full in the presence of the Plaintiff and his representative Mr. Tom Hayes.

4. When the Plaintiff was invited by the Chairperson if he wished to add anything to the reports he replied in the negative and he thought they would accept his apology.

5. Mr. Tom Hayes asked a number of written prepared questions, which may have been drafted with the benefit of legal

advice, and I think probably were.

6. It is complained by the Plaintiff that there was no question of allowing him or his representative to cross-examine witnesses. This is true insofar as it was never raised by them at the meeting.

7. While a very wide margin of appreciation must be given to the participants at this meeting, and notwithstanding any view that may be taken of the responses to Mr. Tom Hayes's questions, his approach could objectively be viewed by any member of the Executive Committee as perplexing in the extreme in the context of the letter of apology and his response to respond to the Chairperson. I accept as a fair objective summary of the events of the meeting, when the Plaintiff and his representatives were present, paragraphs 7 to 12 of the affidavit of Edward O'Driscoll sworn on 7th July 2006. While Mr. O'Leary, as senior counsel for the Plaintiff, made several submissions critical of the events of 7th June 2006, I accept as having a fair basis the criticisms made by members in discussion that perceived Mr. Tom Hayes's contribution as based on the adage 'the best means of defence is attack'. His contribution was totally at variance with the apology and acceptance of the Plaintiff's letter of 31st May 2006 and could well lead to a view that the letter was insincere and Mr. Hayes's representation as intended to be equivocal. I do not accept the Plaintiff's evidence at paragraph 14 of his affidavit, that Mr. Hayes was clearly not competent or qualified to represent him. True, he was not a lawyer, but what was at issue were plain matters of fact, not legal case or a fine interpretation of rules.

Instead of dealing with matters in a direct, common sense way Mr. Hayes raised questions as to "whose heads did the bowl go over?", where a congregating crowd were in flux before the score. While laughter or sniggering may not have been a dignified response there is an element of the less than real about the enquiry. The enquiries as to the circumstances in which it was safe to throw the bowl should, all together from the apology, have been clear to the Plaintiff given his experience and his own expressed view "I am probably regarded as the fastest bowler in the country", paragraph 1 of his affidavit.

8. The Plaintiff, if he had five witness to give rebutting evidence to what the Referee and the Steward on the safety issue had to say, were never named or called, or their presence indicated directly or indirectly. Furthermore, when Mr. Tom Hayes enquired, in his fashion, as to whether there were any more witnesses who saw the Plaintiff throwing the bowl deliberately at the car or cars he would like to know their names (transcript page 6). In my judgment, it would have been the commonsense reaction to the question (formed rhetorically or in the knowledge or belief that the Stewards or Referee's report were in error) to indicate that evidence of the five witnesses, or more stated witnesses, would be given to rebut that of the Referee and/or the Steward. Further, when asked by the Chairperson if he had anything he wanted to say the Plaintiff confined himself in substance to "I lost the head".

Furthermore, a player of his experience and skill, I apprehend, throws the bowl with great deliberation to obtain maximum distance and effect from his effort and possible impeding obstacles would be avoided. I think it reasonably probable that such a commonsense view might most likely have occurred to the Executive Committee in their consideration, whether expressly articulated or not.

In addition, the letter of 31st May 2006 written by the Honorary Secretary to the Plaintiff specifically asserts that he deliberately "threw practice shots in an unsafe manner, hitting parked cars". Even if the letter of apology does not in express terms admit this detail in my judgment its terms were wide enough to cover this detail. However, the Steward's report refers to (inter alia) the Plaintiff throwing shots directly into the cars. When, as at the meeting, he was asked if he had anything further to say there was no denial of this fact, or that it was accidental. The attitude to the parked cars referred to in the evidence betokens a hostility to their presence and gives point to the view in the deliberations.

9. Mr. O'Leary, for the Plaintiff, submitted that there was an inequality of arms at the meeting, because while the Plaintiff was not permitted to be represented by a solicitor, Mr. Edward O'Driscoll, who was a solicitor, was the Honorary Legal Advisor to the Association and he was present at the meeting. In his affidavit of 7th July, 2006 Mr. O'Driscoll fully explains his position. It is not disputed in any replying affidavit. Furthermore, the transcript of the meeting, pages 13 to 14 and also at pages 18 to 21, clearly indicates that Mr. O'Driscoll drew to the attention of the meeting the matters upon which they had to decide in a very fair and evenhanded manner and specifically told the Committee that he would not guide them as to what decision to make. When the Committee appeared to confuse the issue with the Plaintiff and one Tim Pat O'Donovan, at pages 25/26, Mr. O'Driscoll clarified the difference between the two cases. Again on the question of sanction, Mr. O'Driscoll drew the attention of the Committee as to how they might mitigate a sanction, at pages 26 and 27. He confirmed to the Committee that he did not want in anyway to dictate to them what decision they should come to. In my judgment, Mr. O'Driscoll (a) took no part in the voting decision, (b) did not represent the Committee at the hearing, (c) to the extent of his 'involvement' at the meeting, it was as an impartial Honorary Legal Advisor. He did not represent either party to the issue, but properly drew the attention of the Committee to the relevant issues upon which they had to make a decision.

10. The number of persons at the meeting was as deposed to by the Chairperson.

11. On 28th May 2006 the Plaintiff did assert he would be responsible for all his shots (paragraph 5 of his affidavit sworn on 15th June 2006). The Referee's report to the Committee notes that the Plaintiff "was warned by me and Brendan Hayes that if he caused any damage he would be responsible. He took no notice of us and threw more bowls in the same direction, some of them were lofted over peoples heads". The affidavit of 7th July 2006 (paragraph 6) of the Chairperson of the Committee avers that "the cost of Ból Chumann insurance for road bowling is €38,250 per annum and there have been claims against Ból Chumann previously arising from injury to people. I say that almost without exception it is the Association or its representative officer that is sued in the event of an injury done by the player and not the individual road bowler who threw the bowl. I say that it is for this reason that any incident of alleged indiscipline and breach of the rules of play or of safety has to be dealt with very seriously".

10. In my judgment, these were proper and reasonable considerations the voting members were entitled to take into account in coming to their decision. As was the fact that a bowl, or bowl as I believe it is locally referred to, is a solid steel or iron ball which, if thrown by a man of the capacity and ability of the Plaintiff, if misdirected or were in anyway to come into contact with a person or property could cause severe damage.

11. The Law: The dictum of Costello J in *Doyle -V- Croke* (High Court, 6th May 1998 unreported) that -

"The courts must not interfere officiously in the affairs of private associations, and when considering what procedures can

properly be regarded as fair it must consider procedures which would be appropriate to the type of organisation or association which is to adopt them, and the nature and scope of the decision to which they relate."

12. It is, in my judgment, the frame of mind in which the Court should decide the issues in the instant case.

13. In summary, the Plaintiff's case is that there has been a breach of the principles of natural justice, and that the Defendants were in breach of the following binding maxims:-

1. *Nemo judex in causa sua*, and

2. *Audi alteram partem*.

14. Under the first of these headings it was submitted that because Mr. Brendan Hayes in his capacity of Steward was "the chief complainant" (as characterised by Mr. O'Leary) and was actively involved in the Committee's discussion that led to a decision, therefore the decision is vitiated by apparent if not objective bias.

15. In my judgment, the Referee is the person in charge of events specifically so far as discipline is concerned at a score. He had the assistance of Stewards, including Mr. Brendan Hayes. The Referee is the person who makes and made the final decision with which the Plaintiff failed to comply. The fact that the Steward was the first to notice and confront the Plaintiff about his conduct does not elevate his status. In his capacity as Secretary to the Committee Mr. Hayes had certain duties separate and distinct from those he had as a reporting Steward. The functions of the Honorary Secretary, as set out in Article 8 of the Constitution, oblige him/her to take the minutes of the Executive Committee meetings and the keeping of all books and records of the Association (including safety reports). The function of the Honorary Secretary can be temporarily assigned due to his/her absence, during such absence by appointment of the Executive Committee. While as a counsel of perfection it might have been preferable had Mr. Brendan Hayes either absented himself from the meeting during the discussion that led to the decision to suspend the Plaintiff, for all that there was nothing inherently wrong in his participation in his capacity as Honorary Secretary. While the maxim is directed to ensure impartiality, that no one would be a judge in his own cause, Mr. Brendan Hayes did not vote and, therefore, did not partake of the decision, even though it was common case he was involved in the discussion that preceded it in his capacity as Honorary Secretary.

16. Criticism was directed in the Plaintiff's supplemental submissions in writing to several contributions or interventions of Mr. Brendan Hayes in the discussion that led to the decision. (Equally, and by the by, I had no evidence that the letter of apology of 31st May 2006, referred to in the final line of paragraph 7 of the Plaintiff's first affidavit of 15th July 2006, was ever before Laffoy J at the ex parte application on 16th June 2006). I do not accept that Mr. Brendan Hayes as Honorary Secretary was running the entire meeting. It is true he expressed himself often and forcefully. I believe my apprehension to be reasonable, that having received a written apology it was watered down to a point of almost total equivocation by Mr. Tom Hayes. I think it not surprising that whatever justifiable annoyance Mr. Brendan Hayes may have had personally, or as a Steward, he was fully entitled as an Officer of the Executive Committee to advocate respect for the sport and the respect of contestants towards those entrusted by the Association as fit and qualified to officiate at its games or scores. Lawyers may well be critical of the order or the want of order with which the meeting was conducted -- but it is essential to look at events in the round and in the context. Even where the livelihood of an applicant was involved Keane J, (as he then was), in *The State (Boyle) -V- The General Medical Payments Board* [1981] ILRM 14 refusing an order of *certiorari* stated:

"A body such as the Appeal Committee retains a certain discretion as to the manner in which it conducts its proceedings."

17. In the course of this judgment I have refrained from referring to the issue of money, and I do so here to state that I do not accept the Plaintiff's submission that it had its fingerprints all over the decision making process. This is not a case of judicial review, as were so many of the cases open to the Court. It is not a case of "public rights" and the livelihood of the Plaintiff is not in issue. The cases of *Flanagan -V- UCD* [1988] IR 724 and *Quirke -V- B.L.E.* [1988] IR 83 are both cases of judicial review. In both, and expressly in *Quirke's* case, the moral implications of the adverse decision were referable to the notion that the applicants had cheated in a competitive situation. In my judgement, Mr. McCarthy, SC for the defendant, very properly drew my attention to the distinctions to be drawn from those lines of authority and I accept his submissions in that regard. There is no suggestion that the Plaintiff had cheated in the score. In my opinion, the cited cases are clearly distinguishable from the instant case, indeed Barr J in *Quirke's* case specifically refers at page 85 to the applicant being condemned unheard and that he was left in a situation quite different from that of the instant case.

18. Reliance was also placed by the Plaintiff on the decision of *Heneghan -V- The Western Regional Fisheries Board*, [1986] ILRM 255, where an employee was dismissed from his employment. In considering the issue of lack of natural justice raised in that case Carroll J, at page 228, stated:

"I am also of the opinion that there was a lack of natural justice in the way the dismissal was carried out. Mr. Kennedy was the prosecutor in the dismissal, it was at his instance, related to the behaviour of Mr. Heneghan to him personally that he sought to dismiss him. He was also himself in the position of gathering evidence. He heard representations and then acted as judge on the allegations, which he himself made and he then decided to dismiss". (Emphasis added)

19. Mr. Brendan Hayes in the instant case was not a person who decided as to whether the Plaintiff had transgressed the rules or as to the nature and extent of the penalty. In my judgment, the issue of bias must be referable to the deciding person or persons. There is no evidence of this. There were a wide range of views expressed in the discussion but other than the Steward and the Referee, who might be considered as coming to the meeting with views most probably consistent with their reports, neither participated in a decision arrived at by vote on a show of hands.

20. The reasons for the decision were clearly the breach of the rules alleged, and the Court is not to supplant the penalty on the basis of proportionality when it is clear a variety of penalties were considered and one decided upon by the body authorised by the rules to do so.

21. In my judgment, the argument based on the *maxim audi alteram partem* fails in the light of my findings of fact earlier referred to in this judgment. I decline the relief sought and vacate the order of 16th June 2006.

22. As a footnote I add. Sports organisations do best to resolve differences under their own governing codes, rather than resort to courts of law. Issues of natural justice are important, but the substance of matters rather than their form are important in seeking to resolve internal disputes in such organisation and recourse to the courts should be a last resort, and that only in the rarest of cases.

23. The relative importance of the game and the prowess of the Plaintiff are primarily but not exclusively, in this case, local. That does not diminish the concern of the parties, neither should it, as Patrick Kavanagh in his poem *Epic* concludes with this reflection:

"I inclined to lose my faith in Ballyrush and Gortin Till Homer's ghost came whispering to my mind

He said; I made the Iliad from such a local row. Gods make their own importance."