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Top Recent Welsh Cases
Jonathan Moffett

Introduction

1. I have selected my top eight Welsh cases of the last year or so. I have tried to avoid applying any rigid selection criteria, but I have mainly focussed on cases that raise either issues of public law or issues that otherwise arise in the local government context, and that are not purely fact-specific in nature. I have also tried to avoid cases that other speakers are dealing with, otherwise *R (Morris) v Rhondda Cynon Taf County Borough Council* [2015] EWHC 1403 (Admin) and *R (Diocese of Menevia) v City and County of Swansea Council* [2015] EWHC 1436 (Admin) would have made the list a more conventional "top ten".

2. I have tried to pick cases in a range of areas and, in particular, to avoid flooding the list with planning and environmental cases (which still seem to comprise the largest single category of public law litigation in Wales). One interesting point to note about the list is the fact that there is only one relating to North Wales, which reflects the relatively low level of public law litigation involving authorities, or issues arising, in North Wales generally.

3. I have grouped the cases thematically rather than attempting the impossible task of putting them in order of importance.

Negligence and public bodies

Michael v Chief Constable of South Wales Police [2015] UKSC 2, [2015] 2 WLR 343 Supreme Court

4. Ms Michael made a 999 call to the police on her mobile phone. She called from her home in Cardiff, but the mobile phone signal was received at a mast across the county border and the call was therefore routed to Gwent Police rather than the South Wales Police. Ms Michael told the call-handler that her former partner had come to her home, had found her with someone else, had bitten her ear and had taken the other person away in his car, saying that he would return to hit Ms Michael. Later on in the phone call Ms Michael reported that her former partner had said that he was going to return to kill her, but the call-handler apparently failed to hear her say that. The call-handler said that the call would be passed on to South Wales Police, who would want to call Ms Michaels back and she was asked to keep her phone available for that call. Ms Michael's call was automatically graded as requiring an immediate response envisaging attendance at her house within about five minutes. The-call handler then reported to the emergency control room at South Wales Police that the former partner had threatened to return to hit Ms Michael, but did not refer to the threat to kill her. The call was graded by South Wales Police at a lower priority level, requiring a response within 60 minutes. Before South Wales Police had responded to the original emergency call, and some 15 minutes after it had been made, the victim called 999 again when she was heard to scream. The police responded immediately but found that Ms Michael had been stabbed to death. Her former partner was subsequently convicted of murder. Ms Michael's estate and her dependants sued the two police forces for negligence and for breach of the right to life provided for by article 2 of the ECHR. The police forces applied to strike out the claims and/or for summary judgment and, although the application failed at first instance, the Court of Appeal granted summary judgment on

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the negligence claim. The claimants appealed against the grant of summary judgment on the negligence claim, and the police cross-appealed against the refusal to strike out the article 2 claim.

5. The appeals were heard by a seven member Supreme Court (Lord Neuberger PSC, Lady Hale DPSC, and Lords Mance, Kerr, Reed, Toulson and Hodge JJSC). Lord Toulson gave judgment for the majority (Lady Hale and Lord Kerr dissented in relation to the negligence claim).

6. In relation to the claimants' appeal against the grant of summary judgment on the negligence claim, the majority held that the duty of the police in relation to the preservation of the peace was a duty that was owed to members of the public at large and it did not involve the kind of close or special relationship necessary for the imposition of a private law duty of care. In particular, just because a protective system had been established that was resourced by a public body, that did not mean that if it failed to achieve its purpose (whether through organisational defects or fault on the part of an individual) the public at large should bear the additional burden of compensating a victim for harm caused by the actions of a third party for whose behaviour the public body was not responsible. If such a duty were to be imposed, it could not be limited in scope and it would be contrary to the ordinary principles of the common law. Further, such a development of the law of negligence was not necessary to comply with the rights guaranteed by articles 2 and 3 of the ECHR, because such rights could be vindicated by a claim under the Human Rights Act 1998. Ultimately, it was a matter for Parliament to determine whether there should be a scheme (which would go beyond that already established by the Criminal Injuries Compensation Scheme and the Human Rights Act 1998) for public compensation of victims of certain types of violent crime in cases of pure omission by the police to perform their duty of crime prevention.

7. The police's cross-appeal against the refusal to strike out the article 2 claim was dismissed on the basis that that the question of what Gwent Police's emergency call-handler ought to have made of Ms Michael's original 999 call was a matter of fact which was to be decided at trial.

Care Home Fees

***R (Forge Care Homes Ltd) v Cardiff and Vale University Health Board* [2015] EWHC 601 (Admin)**
Hickinbottom J

8. Local authorities are responsible for paying the residential costs of individuals who are in care homes (subject, in certain respects, to means-testing). However, under s 49 of the Health and Social Care Act 2001, a local authority has no power to pay for "nursing care by a registered nurse", and the cost of nursing care is to be met by the relevant health board, by way of a funded nursing care contribution.

9. Eleven care home providers challenged the rates payable for nursing care that had been set by each health board in Wales for 2014 and the following five years. Every local authority in Wales, and the Welsh Government, were named as interested parties.

10. The 2014 rate was based on the rate that had been set for 2013. That rate had been fixed by a review group, which had identified the tasks that could be performed only by a

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registered nurse and then had calculated the funded nursing care rate by reference to the cost of the time taken to undertake those tasks. This approach resulted in an unfunded gap between what the health boards were paying to the claimants and what the local authorities were paying to them. The claimants argued that the health boards had misdirected themselves as to the scope of "nursing care by a registered nurse". The health boards argued that the definition of "nursing care by registered nurses" in s 49 of the 2001 Act was not determinative of their obligations, as they provided NHS services under s 3 of the National Health Service (Wales) Act 2006, which gave them a broad discretion as to the services considered to be reasonable and appropriate in any particular case.

11. Hickinbottom J upheld the claim for judicial review. The services that a health board was required to provide by way of funded nursing care were defined by s 49 of the 2001 Act. Section 49 required a line to be drawn between what was provided by the health boards and what was provided by local authorities, and where that line was drawn could not depend on the exercise of some general discretion vested in the relevant health board; indeed, it was clear that s 49 was intended to avoid such a discretion. A health board provided nursing services to a care home resident pursuant to s 3 of the 2006 Act, which imposed a duty on the health board to meet reasonably required nursing care needs. A health board could not properly conclude that it was not necessary to meet care home residents' needs to have a registered nurse on site at all times to deal with specific nursing and medical requirements that might arise from time-to-time. It was necessary to meet such needs, and they could only be met by having a registered nurse working on site at all times. The health board was therefore responsible for providing such a nurse, and that responsibility was not diminished simply because the nurse was not always performing specific tasks that only a registered nurse could perform. Where the reasonable needs of residents were such that more than one registered nurse was required to satisfy them, a health board could not conclude that it was not necessary to provide those additional services. However, if, and the extent to which, such additional nursing services were necessary were matters of judgment for the relevant health board. Accordingly, by restricting the services that s 49 prohibited local authorities from providing to those individual tasks that, by virtue of his or her expertise and experience, only a registered nurse could perform, the approach of the review group had been fundamentally flawed and the rates set by the health boards were unlawful.

12. Tom Cross of 11KBW appeared for the Welsh Government.

Environmental Law

***R (Friends of the Earth) v Welsh Ministers* [2015] EWHC 776 (Admin)**
Hickinbottom J

13. The Minister for Economy, Science and Transport adopted a plan to build a new section of the M4 to the south of Newport, in order to relieve a long-standing problem with congestion on the current M4, along a route that crossed several sites of special scientific interest (SSSIs). The plan was formulated with regard to the Welsh Transport Planning and Appraisal Guidance (WelTAG), the aim of which was to ensure that transport proposals contributed to the wider policy objectives for Wales.

14. Friends of the Earth challenged the decision, contending that the Welsh Government had failed to comply with EU Directive 2001/42 and the Environmental Assessment of Plans and Programmes (Wales) Regulations 2004, which require the strategic environmental

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assessment of plans or programmes likely to have a significant effect on the environment. They relied on article 5(1) of the Directive, which required the environmental report on the proposed plan to identify and assess "reasonable alternatives" to the proposed plan, and argued that the Minister had adopted the wrong approach to reasonable alternatives. In particular, they argued that the Minister had failed properly to deal with an alternative supported by them, known as the "Blue Route". Friends of the Earth also argued that, contrary to s 28G of the Wildlife and Countryside Act 1981, no reasonable steps had been taken to further conservation and enhancement of the flora and fauna of the SSSIs over which the proposed route ran.

15. Hickinbottom J dismissed the claim. He held that the Directive required the environmental report to identify, describe and evaluate all, and not merely a selection, of the alternatives capable of meeting the plan objectives. He noted that neither the Directive nor the Regulations defined "reasonable alternatives" to the preferred plan, but the most helpful approach to what was a "reasonable alternative" was to identify alternative options that were capable of meeting the objectives of the plan, as determined by the relevant decision-maker; an option which the decision-maker considered "viable", having regard to the full planning context, was also a helpful and appropriate way to characterise a "reasonable alternative". It was primarily for the Minister to identify objectives, give each appropriate weight, and determine whether they were met by a particular option. If a particular plan was incapable of meeting the identified objectives such that in practice it would never be pursued, there was no point in subjecting it to an environmental assessment. In the present case, other than the plan and the alternatives assessed in the environmental report, none of the options considered (including the Blue Route) came close to meeting the objective of solving the problems of the M4 around Newport. It was clear from both the environmental report and the WelTAG appraisals that the options discarded before the strategic environmental assessment process commenced had been rejected because they would not significantly improve the problem with congestion. Thus, the Welsh Ministers had used the correct legal test and had chosen the option which they considered best met the transport planning objectives under the WelTAG. They had included, as reasonable alternatives, other options which they considered to be capable of meeting those objectives. The decisions they had made with regard to the selection of objectives, the weight given to each, and the selection of the preferred option and reasonable alternatives were all in accordance with the relevant legal tests, rational and otherwise lawful.

16. In relation to s 28G of the 1981 Act, that did not impose a general duty whereby the decision-maker had to have particular regard to the desirability of protecting and preserving SSSIs. The analogy drawn by Friends of the Earth with s 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 (to have special regard to the desirability of protecting and preserving listed buildings) was not apt. The s 28G duty did not seek to protect SSSIs by weighting the desirability of their protection as against other factors by requiring relevant authorities to take reasonable steps. In the instant case, the SEA assessment had properly considered the potential harm to the SSSIs and the available mitigation measures, and its conclusion that the plan would give rise to minor negative harm overall was unassailable as a matter of law.

17. I appeared together with Tom Cross, also of 11KBW, for the Welsh Government.

The Devolution Settlement

18. Part 4 of the Government of Wales Act 2006 confers on the National Assembly for Wales the power to enact primary legislation on subjects within its legislative competence. In

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particular, s 108(4) of the 2006 Act confers on the Assembly the power to pass primary legislation which relates to one or more of the subjects listed in Part 1 of Schedule 7 to the 2006 Act and which does not fall within any of the exceptions specified in that Part of that Schedule. Section 108(5) of the 2006 Act confers on the Assembly the power to pass primary legislation which provides for the enforcement of a provision of an Assembly Act, which is otherwise appropriate for making such a provision effective, or which is otherwise incidental to or consequential on such a provision.

19. The subjects listed in Part 1 of Schedule 7 to the 2006 Act include "agriculture" and "health and health services", each of which was considered in the two most recent Supreme Court decisions on the scope of the Assembly's legislative competence.

In re Agricultural Sector (Wales) Bill **[2014] UKSC 43, [2014] 1 WLR 2622**
Supreme Court

20. The Agricultural Sector (Wales) Bill 2013 was introduced into the Assembly in July 2013 as an emergency Bill and was passed nine days later. The Bill proposed the establishment of a regime setting minimum terms and conditions of employment for agricultural workers, including minimum wages and sickness and holiday entitlement. The Attorney General, contending that such provisions were outwith the competence of the Assembly because they related to employment matters, which were neither listed in Part 1 of Schedule 7 nor fell within any of the exceptions specified in that Part, made a reference to the Supreme Court for a determination as to whether the Bill was within the legislative competence of the Assembly.

21. The Supreme Court (Lord Neuberger PSC, Baroness Hale DPSC, Lord Kerr JSC, Lord Reed JSC and Thomas LCJ) held that the Bill was within the legislative competence of the Assembly. The term "agriculture" in the context of the 2006 Act had a broad meaning which encompassed the industry of agriculture, and the purpose and effect of the Bill was to regulate wages so that the agricultural industry in Wales could be supported and protected. Accordingly, the Bill could appropriately be described as relating to agriculture for the purposes of s 108 of the 2006 Act. Even though the Bill could also be described as relating to employment and industrial relations (which were neither listed in Part 1 of Schedule 7 nor fell within any of the exceptions specified in that Part), the 2006 Act did not require that for a provision to be within the legislative competence of the Assembly, it had to be capable of being described as relating *only* to an issue that was listed in Part 1 of Schedule 7. In a case where a matter legitimately fell within both the scope of a devolved matter and the scope of a matter which was not one of the specified exceptions, the question of whether it fell within the Assembly's legislative competence depended upon the Bill's purpose and, since the purpose of the Bill related to agriculture, it was within the Assembly's legislative competence.

22. Jonathan Swift QC and Joanne Clement, both of 11KBW, appeared with the Attorney General and Elisabeth Laing QC, formerly of 11KBW but now Laing J, appeared with the Counsel General.

In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill **[2015] UKSC 3, [2015] 2 WLR 481**
Supreme Court

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23. The Recovery of Medical Costs for Asbestos Diseases (Wales) Bill was introduced into the Assembly with the aim of providing that where a person ("the victim") was treated by NHS Wales for any asbestos-related disease and that person received compensation from a former employer or other body for contracting that disease, whether by way of a settlement, court judgment or agreement, the cost of the medical treatment could, by s 2, be recovered from that former employer or other body ("the compensator"). Under s 14, where the compensator's liability to the victim for contracting the disease had been covered by an insurance policy, whether issued before or after the enactment of the Bill, that policy was to be treated as also covering the compensator's liability under section 2.

24. The Presiding Officer of the Assembly made a statement in discharge of her functions under section 110(3) of the 2006 Act that in her view the provisions of the Bill would be within the legislative competence of the Assembly. The Bill was passed but, before it received the Royal Assent, the Counsel General referred it to the Supreme Court, asking whether s 14 of the Bill was within the legislative competence of the Assembly. The Association of British Insurers intervened to argue that s 14 was outwith the Assembly's legislative competence.

25. The Supreme Court (Lord Neuberger PSC, Baroness Hale DPSC, Lord Mance JSC, Lord Hodge JSC, Thomas LCJ) held that both ss 2 and 14 of the Bill were outwith the Assembly's legislative competence.

26. In relation to s 2 of the Bill, because the Assembly had no general fiscal or revenue-raising powers, that section would only be within the Assembly's legislative competence if it related to the "organisation and funding of national health service" sub-category of the "health and health services" heading in paragraph 9 of Part 1 of Schedule 7 to the 2006 Act. However, even if the expression "organisation and funding of national health service" was capable of extending to a provision for the levying of charges for services provided by the NHS Wales, the need for the provision to "relate to" the organisation and funding of the health service required a direct connection between the liability imposed and the service provided. In the case of the Bill, the connection arising by reason of the actual or alleged wrongdoing which had led the compensator to make payment to or in respect of a sufferer from an asbestos-related disease was no more than an indirect, consequential connection. The expression "organisation and funding of national health service" could not have been conceived with a view to covering the imposition of a new form of quasi-tortious statutory liability for economic loss on persons not directly connected with the National Health Service. Accordingly, s 2 was outwith the Assembly's legislative competence.

27. In relation to s 14 of the Bill, whether it fell within the Assembly's legislative competence depended upon it falling within section 108(5) of the 2006 Act as providing for the enforcement of, or being incidental to or consequential on, s 2. However, even if s 2 were within the Assembly's legislative competence, s 14 was more than incidental to or consequential on that provision, and did more than merely provide for its enforcement: it was a free-standing provision amounting to the imposition on insurers of new contractual liabilities under old insurance policies years after they had been made. Section 108(5) of the 2006 Act was not directed to, or wide enough to cover, what amounted to a separate scheme for the provision of financial recourse against third party insurers by compensators. Accordingly, s 14 was outwith the Assembly's legislative competence.

28. Further, because the Bill had the potential to deprive both compensators and their insurers of their possessions, within the meaning of article 1 of the First Protocol to the ECHR, by retrospectively altering their existing legal liabilities and imposing on them potentially

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increased financial burdens arising from historic events pre-dating the Bill, article 1 was engaged and a special justification was required before the court would accept that a fair balance has been struck between the demands of the general interest of the community and the requirement to protect individual rights. However, no such special justification had been shown for the retrospective expansion of such new obligations on insurers.

Practice and Procedure

***R (Williams) v Secretary of State for Energy and Climate Change* [2015] EWHC 1202 (Admin) Lindblom J**

29. On 12th September 2014, the Secretary of State granted development consent for a major wind farm at Clocaenog Forest, near Ruthin in Denbighshire. The order was put on the Planning Inspectorate's website that day (and the claimant was notified by e-mail and post), it was put on the legislation.gov.uk website on 15th September 2014, and notices announcing the decision were published in the Denbighshire Free Press on 24th September and in the London Gazette on 25th September. The claim form was not filed until 24th October 2014. After the hearing of the claim, but before judgment had been handed down, the interested party (the developer) raised the issue of whether the court had jurisdiction to entertain the claim, contending that the claim was issued one day out of time.

30. Under s 118 of the Planning Act 2008, where a claimant wished to challenge a development consent order, the claim form had to be filed during the period of six weeks beginning with the day on which the order was published or, where later, the day on which the statement of reasons for making the order was published (the section was amended in April of this year to provide that the claim form must be filed before the end of the period of six weeks beginning with the day after the day on which the order/statement of reasons is published).

31. Lindblom J held that the court did not have jurisdiction to entertain the claim. The order was published, within the meaning of s 118, on 12th September 2014: the placing of the order on the website, together with the decision letter and the examining authority's report and, on the same day, the notification of interested parties by email and post, was enough to constitute publication of the order and the reasons. The fact that the secretary of state also went on to publish the order in other ways did not mean that he had failed to publish it on 12th September 2014. Although the order had to be contained in a statutory instrument, the procedures by which statutory instruments had to be promulgated, were not mentioned in or relevant to the question of publication under s 118 of the 2008 Act.

32. Lindblom J also held that there was a clear distinction between statutory time limits where a claim had to be issued within a period "from" the date of a decision and those with a period "starting with" that date and, under s 118, the period of challenge included the day on which the order and reasons were published. Accordingly, the claim was filed one day late. Although the jurisdictional point had not been raised in the acknowledgment of service, once the court's jurisdiction was challenged, it had to resolve the issue. The six week period for challenge laid down by s 118 of the 2008 Act was fixed and certain, and a claim issued even one day out of time was outwith the court's jurisdiction. As a result, the court had no discretion to extend time, even when it might wish to do so. In addition, the time limit was not in breach of either EU law or the ECHR.

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Shaw v Merthyr Tydfil County Borough Council **[2014] EWCA Civ 1678**
Maurice Kay, Elias and Pitchford LJJ

33. The claimant had brought proceedings against Merthyr Tydfil County Borough Council arising out of injuries sustained following a tripping accident. She was unsuccessful in a fast track trial before a District Judge, but succeeded on appeal before the Circuit Judge, receiving an award of £6,510 total damages. Her solicitors had sought settlement of the claim prior to issue, writing a letter headed "Part 36" offering to accept the sum of £2,000 inclusive of interest, and asking for reasonable costs to be assessed in default of agreement. The letter did not result in settlement, and the matter proceeded to trial. Following the grant of permission to appeal from the District Judge to the Circuit Judge, the claimant again offered to settle, this time for £5,000. That offer was rejected, and the claimant made a further offer to settle for £32,000 inclusive of costs. Following the claimant's successful appeal on the issue of liability, the claimant made a further offer to settle for £7,250.

34. The claimant contended that she was entitled to an award of costs in her favour on the indemnity basis by reference to her initial offer of £2,000. The Council argued that the letter offering £2,000 did not constitute a proper Part 36 offer, and costs fell to be considered simply by reference to the general provisions in CPR Part 44. On this basis, it said that, having regard to the partial rejection of the special damages claim, the appropriate award was 60% per cent of the claimant's costs on the standard basis. The Claimant argued that, even if the offer of £2,000 was not a proper Part 36 offer, she should still be awarded indemnity costs pursuant to the provisions of CPR r 44.2, on the basis that the Council's conduct should count against it. The District Judge held that the offer of £2,000 was not a proper Part 36 offer and he awarded the claimant her costs on the standard basis, save for the costs of the costs hearing, which he awarded to the Council. The Claimant appealed, and the appeal was referred to the Court of Appeal.

35. The Court of Appeal held that the provisions of CPR Part 36 that lay down the consequences that will normally follow a judgment which is at least as advantageous to the offeror as the terms of the rejected Part 36 offer are all predicated upon the offer having been compliant with the requirements of Part 36, which are mandatory. The claimant's letter, whilst headed "Part 36 Offer", failed to state that it was intended to have the consequences laid down by Part 36 and it did not comply with other aspects of Part 36. Accordingly, the claimant's letter was not a Part 36 offer and it did not give rise to the consequences laid down by Part 36.

R (Sturgess) v Swansea County Court **[2014] EWHC 608 (Admin)**
Hickinbottom J

36. The claimant moved from Oxford into a house in West Wales with an attached holiday cottage. He fitted out the holiday cottage with covert CCTV cameras, which he used to watch holiday-makers without their knowledge. As a result, he was convicted of voyeurism. Despite an unsuccessful appeal against conviction and sentence, he continued to assert his innocence and claimed that his convictions resulted from perjured evidence by his former partner and by police officers. He also made complaints in relation to his arrest, the

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investigation of his case, the evidence given at trial and alleged failures by the police to investigate reports of harassment by his neighbours following his release from prison. S brought a whole raft of proceedings: against the police, against his former partner for libel and in relation to the beneficial ownership of the property, against his mortgage lender which had commenced possession proceedings against him, and against several of his neighbours. He also made claims for judicial review against the Independent Police Complaints Commission and the Chief Constable. An extended civil restraint order was made in June 2013, striking out his claims and restraining him from issuing any new claims or applications against his partner or relating to the matters concerning his arrest, investigation, prosecution and convictions for a period of two years.

37. The claimant then issued further applications in the Administrative Court against the police and seeking review of a county court decision to refuse a stay on an eviction order. He also sought permission to bring new claims against the mortgage lender, his former partner, and several of his neighbours.

38. Hickinbottom J variously dismissed the claims and refused permission to issue them. He held that the claimant's remedy as against the county court was the right of appeal rather than a claim by way of judicial review. However, any appeal would have been legally hopeless and, in any event, it would have required permission to proceed under the civil restraint order. Permission to proceed with the claims for judicial review against the police was refused as they were totally devoid of merit and indemnity costs were awarded against the claimant because there was no reason why a public body should have to bear any costs reasonably incurred in responding to the claim. There was no argument whatsoever in favour of staying the eviction order. Such misconceived collateral challenges by way of judicial review to justifiable orders for possession, and to refusal for stays of eviction, were to be deprecated.

39. Moreover, Hickinbottom J held that he was bound by CPR 3.3(7) to consider whether to impose a general civil restraint order. Such orders were made to prevent abuse of the court by parties who made unmeritorious claims and applications. A general civil restraint order prevented an individual from making any claim, application or appeal in any court below the Court of Appeal without permission. The claimant had had claims and applications marked as totally without merit on many more than two occasions; therefore, the first part of the two-stage process under CPR Practice Direction 3C for imposition of a general civil restraint order was satisfied. The second part involved the exercise by the court of its discretion. Without a general civil restraint order, the claimant was likely to continue making meritless claims and applications, having regard not only to the number of such claims already made, but also to the seriousness of the allegations made in them. Moreover, those claims had been brought within the period covered by an extended civil restraint order. It was therefore appropriate and necessary to make a general civil restraint order against the claimant, covering all courts. Given that meritless claims were unfair to those required to respond to them, and that such claims were detrimental to the interests of justice, nothing less restrictive would do.

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