Peter Charleton

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Documents submitted for assessment

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To: The Dean of Graduate Studies, Trinity College, University of Dublin

From: Peter Charleton, graduate in Legal Science, 1980

This is a statement by Peter Charleton upon admission to the register of those being considered by the University of Dublin for a higher degree, in this case of doctor of laws. The purpose of this is to further that process of examination through the scrutiny of examiners external to the university.

The Dean instructs me to choose from my publications five core works which concisely demonstrate four key attributes of my work, namely:

- international standing;
- sustained contribution;
- major contribution to knowledge within the discipline;
- impact on developments in the field, most often through seminal publications that have led to developments by others, but other evidence may also be appropriate.

1. Charleton & McDermott's Criminal Law and Evidence (Bloomsbury Professional, 2020)

This work evolved. In so doing, it demonstrates sustained contribution. The book began as *Cases and Materials on Criminal Law* (Butterworths, Dublin, 1992) by Peter Charleton. The idea was to put together the cases most often referenced as establishing the principles governing indictable and regulatory criminal offences. The narrative was longer than in comparable case-books to enable decisions to be put in their proper context and as both a teaching aid while assisting as a handy *vade mecum* for practitioners. My late friend, Kevin Haugh, later Haugh J, humorously but pointedly made a reference in conversation about an ongoing trial "maybe the answer is in your book Bits and Pieces of Criminal Law". I laughed, but there was a serious point; the need for a proper Irish text-book covering every aspect of criminal law theory together with a treatment of the main offences for the benefit of practitioners. The late Paul Anthony McDermott was drafted in to assist in writing that and Marguerite Bolger, both of them starting their career at the Bar, also wrote a chapter. Hence, the evolution of *Irish Criminal Law* (Butterworths, Dublin, 1999). Since we three were all barristers, the unique feature of that book, the entire middle section, was not surprising. It consisted of a manual of indictments followed by the common law definitions guiding what had to be proven to establish the offence or followed by the statutory provisions to the same effect.

That book lasted as the main criminal text-book in Ireland over 20 years but Paul McDermott and Peter Charleton decided to rewrite it in a way that kept a practitioner orientation but which enhanced the theoretical analysis; *Charleton & McDermott's Criminal Law and Evidence* (Bloomsbury, Dublin, 2020). Stephen Byrne provided a draft of a chapter and Ciara Herlihy, a judicial assistant to the Supreme Court at the time, wrote another chapter; that on sexual offences. Everything that was written was revised by Peter Charleton since PA McDermott died in December 2019 while the book was in preparation.

Here, I want to speak personally. Fashions have changed. When I was in college, a lecturer who I was friendly with was Jeremy Phillips. He taught intellectual property law. Jeremy and I discussed my future during a chat in his room and during that he mentioned his own, telling me that if he managed within five years to become the editor of a major text-book, that was what he could expect as furthering his career in a serious way. That was 1980. Now, apparently, in academic circles, it's all about articles in journals. But, just think, a text-book clarifies the law, sets out principles in digestible form, brings together a mass of authorities and scholarship and enables

reform through placing the current rules in a format that enables serious consideration of how improvements may be made. It takes a vast commitment of work. This text-book is used by every practitioner in Ireland. It is one of the core texts that is given on appointment to judges in Ireland together with *McMahon and Binchy's Law of Torts* and *Kelly's Constitutional Law*. That is the impact.

Furthermore, the book suggests reform, codification options and addresses theory critically. For law reform and debate on the nature of offences, the book enables reasoned consideration. For jurisdictions outside of this Republic, it is the book kept in libraries as to criminal law in Ireland. The section attached is written by me and Paul's great contribution before his early death was in the latter sections on the defences and elsewhere.

PA McDermott and PMA Charleton

2. Cuban Missiles (2022)

Including Charleton, Peter (2022), "Cuban Missiles: A Warning on the Uncertainty of War", published after peer-review in the Irish Judicial Studies Journal: 91–113, may seem unusual. But, three points need to be made. Firstly, law is not merely theory, it is the application of rules that strive towards justice to the crisis situations that make people come to court. Here, the purpose was to analyse fact so that from a jumble of sources and opinions a clear narrative could be put across. Secondly, this topic is one which I lectured on to various groups around Ireland, most especially on two occasions here in the Four Courts as part of the Hardiman Lecture Series, which is open to all practitioners and to students on the Chief Justice's Intern Program, for those studying

in Northern Ireland, Ireland, Bangor in Wales, Fordham and Missouri in the USA. Secondly, since the study of law enhances analytical ability, it is the duty of lawyers to engage publicly with serious issues; here one I remember from my early childhood as presaging doom and an example of what Gary Sick in *All Fall Down : America's Tragic Encounter with Iran* (Random House Inc, New York, 1985) characterises as a movement from the slow chess-like manoeuvring of states to one suddenly seizing the chessboard and throwing the lot into the air. Thirdly, one cannot adopt Winston Churchill's adage that the only thing that history proves is that mankind never learns. Perhaps said humorously, nonetheless, it is an expression of despair.

We have to try. All you can do is to put stuff out there and then it is for those who want to learn to engage and perhaps influence. Other similar articles by me are out there, on the heroes of the Czechoslovak resistance, on Carl Jung and Father White and on the nature of evil in my book *Lies in a Mirror: an Essay on Evil and Deceit* (Blackhall, Dublin, 2006). Thinking more deeply on the nature of homicide, I have addressed the drivers of the impulse to kill in lectures in Ireland and to the International Association of Forensic Mental Health Professionals.

I narrowly chose this over the full text of *Lies in a Mirror*, but I feel there is enough to read, what with the text-book being the first hurdle. But, I have sought to affirm the fictional Professor Pargetter's advice to David Staunton as a young lawyer in Robertson Davies' novel *The Manticore*.

3. Exploitation of those with Health Issues (1984)

Charleton, Peter (1984). "Criminal law - Protecting the mentally subnormal against sexual exploitation". DULJ 6 (165) is a short article and essentially simple in the point it makes. In 1983, I was engaged for the defence in a criminal trial of a quite-young man charged with having unlawful sexual intercourse with a neighbour, one who was mentally handicapped. That expression now borders on offensive, however, the legislation then current, the Criminal Law (Amendment) Act 1935, s 4 made it an offence to "carnally know" a woman who "is an idiot, or an imbecile, or feeble minded". Perhaps that improved on the earlier Victorian language of "cretinism", but not much. But, like much legislation, everything proceeded without a definition or with a woolly description. Here, and remember barristers are obliged to promote any point to the assistance of their client, the argument was that the victim was not within those categories. Those with a mental disability could not testify because they could not comprehend the nature of an oath; a promise to tell the truth more serious than relations between people because the promise is to God. This girl, examined by the prosecution did explain the difference. Hence, an application to dismiss the charge because the intellect shown put her outside the categories of victims who could not consent to sexual relations. The charges were dismissed.

The article highlighted the 'Morton's Fork' as Alex Schuster, the editor of the Dublin University Law Journal, suggested I call the issue: if you had the problem you could not testify; if you could testify you fell outside the protected category. In consequence, the 1990 Law Reform Commission report recommended change in categorisation and in entitlement to testify. The current law, in its most recent iteration, is the Criminal Law (Sexual Offences) Act 2017 which follows earlier reforms in enabling evidence from those who can give "an intelligible account of events", rather than take an oath and categorises victims as those who fall into a precise definition of being a "protected person". This case, how it came about, and the reform that it helped push, is one I have used several times in lectures to students.

4. Blasphemy (2017)

Charleton, Peter; Pratt-O'Brien, Ross; Libreri, Emma (2017), "Blasphemy: religion challenges freedom of speech", Irish Judicial Studies Journal, 1: 15–30 provides evidence of international impact, since the original paper was lodged by the judges of the Conseil d'État in the French Senate on it being received for the 2017 Colloque Franco-Brittanique-Irlandais. I gave papers to that group of French, British and Irish judges, meeting bi-annually, on four occasions, this being one. Afterwards I was asked by the Cour de cassation to give two papers for their public *séances*. The point here was to argue that while there was an impulse to abandon blasphemy as an offence, because of the way society had changed since that crime had first been recognised at common law, insult to religion has returned as a dynamic to occasion violent response. The offence of blasphemy had been constitutionally mandated via Article 40.6.1, which carried the imperative that publication or utterance of "blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law." Hence, s 31(1) of the Defamation Act 2009 provided that "a person who publishes or utters blasphemous matter shall be guilty of an offence and shall be liable upon conviction on indictment to a fine not exceeding €25,000." With the proposal to remove that portion of the Constitution, which in fact passed the following year in the 37th Amendment of the Constitution, an argument needed to be put forward that minority communities nonetheless required legislative protection. This is particularly so in the Islamic community, since Surah 57 states: "Surely those who offend Allah and His Messenger are condemned by Allah in this world and the Hereafter. And He has prepared for them a humiliating punishment." As we know, this can lead to violence. Surely, the article argued, it was better to protect the sensibilities of minorities where common courtesy would have eschewed resort to insult.

The Criminal Justice (Hate Offences) Act 2024 amended the Criminal Justice (Public Order) Act 1994, by creating a category of persons whose characteristics were protected, which included both religion and descent, thereby enabling, as the article had argued, the State to step in and punish hateful disparagement of religion. That is what the article had strongly argued for. By the way, there is a section of the Department of Justice which studies scholarly publications and bases reform on arguments which the Government consider worthwhile.

The entire text of this article was written by Peter Charleton. A few footnotes were added by the second author who, because he was then working as a judicial assistant in the Supreme Court of Ireland, was added; Emma Libreri was noted as a co-author due to her work in translation to French.

5. Data nullification (2025, doi:10.1017/S0008197325100962)

While Ireland is supposedly exempt from criminal law changes through EU legislation, nonetheless, the scope of competence in law-making enables the CJEU to act as an apex court and through judicial expansion of authority to make the most far-reaching changes that bypass that exemption. The genesis was a presentation to the intellectual property conference in Fordham in 2024, to which I have given a number of papers. I needed slides and with Victoria O'Connor, my judicial assistant, we produced talking points. From the reception, it was clear that more needed to be said, especially as Europe is connected in data export to the US, through agreements refined in consequence of *Shrems* and other cases. This was an article that badly needed to be written. I asked Victoria to be my collaborator on a paper for wider publication; a task she engaged magnificently.

Central to the argument is a general observation that courts which engage in legislative measures through judicial reasoning, because judges lack the preparatory scoping that keeps legislation within acceptable bounds, are liable to create unworkable rulings or ones that defy sense. The

series of cases, culminating in *Graham Dwyer*, are a paradigm. In so far as there is a central theme, that of privacy dressed up as data protection, the protection of data has undermined the investigation of missing persons, the right to life and the basic entitlement of courts to have all relevant evidence. The Omagh bombing case, the *Dwyer* case, the Veronica Guerin murder, none of these would have been solved except through harvesting unintelligible commercial data as to numbers phoned by mobile devices, billing which occurred from a particular time to a particular time, and utilising routing masts that can establish both identity, as in Dwyer, or a journey in furtherance of murder, as in Omagh. This data can, in the most serious cases, constitute the only lead in a majority of serious cases. Yet, now that investigative tool has been nullified through judicial fiat.

Where a principle is stated, the exceptions should inform the good sense of the principle. Here, the exception of copyright, a lesser right than privacy and certainly far down the scale of human rights abuse from murder, is blithely excepted while essential human integrity is qualified. To the central principle the CJEU have grafted on extraordinary reasoning: that crime and criminality can be predicted in advance; that criminals inhabit a geographic region; that retaining data for billing is mass surveillance. Lots of people who commit the worst crimes do not have a record.

The ideas in the article were those of the first author while the second author rigorously analysed and codified the various decisions of the CJEU to support the thrust of our reasoning. This was a genuine collaboration over many hours of intensive work where both authors refined and agreed every word. It may be commented that the academic community has not sufficiently reviewed the work of the CJEU and the expansion of their jurisdiction into national constitutional law in such cases as the *Apple taxation* (*Commission v Ireland*), a startling example, and the contradiction of apparent law by way of judicial manoeuvring should have been called out before.

Personal statement

The task of a lawyer is to engage with his or her own community in explaining the law and in facilitation both understanding and reform. I have done that both in my text-books and in the articles I have written. I have also lectured and presented ideas to meetings of judges internationally and to conferences of practitioners and academics here, in England, in France and in the US.

Deliberate choices were made by me over these last 45 years as to publishing.

Firstly, my role as a senior barrister and as a judge was to involve young graduates by drawing them into scholarship. One, in particular, my late friend PA McDermott, with whom I wrote his first published article, became a great scholar and my collaboration with him is engenders life-long pride. Others, M Bolger, C Herlihy, P Carey, O Cross, L Loughrin, S Kelly, I Rakhmin, and others, were given a start through collaboration with me. That has made an impact and has also enabled me to pursue themes which otherwise pressure of work would have stymied.

My second choice was to publish nationally, with some exceptions. While this may seem to contradict promotion of self, I don't regard this as correct. One's duty is primarily to one's own community. That is furthered by offering ideas based on one's own experience and knowledge. International understanding is thereby furthered where Irish law is clarified or an example of good law-making is enabled. Since I was asked by Denham CJ in 2017 to take over the role of reviving the Irish Judicial Studies Journal, then moribund for over a decade, in collaboration with the University of Limerick, since the courts had no funding available, I have regarded it as my duty to write as much as possible in that journal, rather than seeking to publish elsewhere. Where I have, it has been the DULJ that was chosen. Both the DULJ and the IJSJ are peer-reviewed and the

collaboration with UL, and Professor L Cahillane in particular, has enhanced the impact of Irish legal scholarship.

Thirdly, while I have heard it reported that colleagues in the academic world have been urged to drop the editing of a major text-book in favour of publication in scholarly journals, I might be forgiven for taking a completely opposite view. Scholarship is a vital driver of legal excellence. But scholarship can also legitimately promote good order and excellence of argument in litigation through the, monumental, task of writing a text-book. I have done that and involved younger scholars in the process. This is a deliberate choice and I regard it as contribution to the community. At the same time, where driven by impulses to argue for reform, or to clarify the law fully, as in my collaboration with V O'Connor on contempt of court, or I Rakhmanin on expert evidence, or S Byrne as to rules in sexual violence cases or V O'Connor again, on the recurring theme of treating victims properly in court, or S Kelly on intellectual property, legal articles are an enhancement of scholarship. With Sinéad, I wrote about Geographical Indications for the EUIPO book on intellectual property.

Fourthly, it cannot have escaped notice that my approach has been informed by my 27 years of practice as an advocate in court and my 20 years of work as a trial judge, a tribunal judge and an appeal judge. That is not a mean choice. Working to improve litigation is a noble undertaking and in that there has been a measure of success which impacts Ireland's reputation as a centre for excellence. Pointing out that public enquiries have become an endless nightmare through several wrong turnings, as in my article with P Carey and C Herlihy, is surely a public duty.

Finally, the duty of a scholar is to put stuff out there. It will not always succeed in impacting law reform or the attitude of judges. But, as in the debating document on sexual violence and how the victim is treated in court with S Byrne, what is widely read by the judiciary or what enhances their task in applying the rule of law. What is written is read, here by academics, by students, by the Law Reform Commission and by the dedicated section of the Department of Justice. They do not write and say, your work on such-and-such a legal topic resulted in this change or enhanced understanding, but the tools have been given and the flaws have been exposed and, by-times, acted upon.

I know a separate list of publications should be provided but I feel it right to put these five examples into context; as in the principle of statutory interpretation – *noscitur in sociis*.

List of publications (with books in **bold**)

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Charleton & McDermott *Criminal Law and Evidence*

Part I

Elements of Liability

Chapter 1

Basic Principles[1]

Through its traditions and by its Constitution, the Irish Republic is committed to an ordered society. Central to achieving this aim is the pursuit of justice.[2] The Preamble to the Constitution lays down as the fundamental template for all our laws, the attainment of "true social order" by "seeking to promote the common good" through "Prudence, Justice and Charity". Liberty may only be taken from those within our jurisdiction "in accordance with law."[3] At the same time, the State "guarantees by its laws to respect, and as far as practicable, by its laws to defend and vindicate the personal rights of the citizen."[4] Specifically, the constitutional duty is to protect by law "as best it may from unjust attack" and to provide vindication for unjust attacks on "the life, person, good name, and property rights of every citizen."[5] Therein, the tension is expressed. Our people expect to be protected from attacks on their person and on their property by a functioning police force and look to the criminal justice system to vindicate their entitlement to justice. Those who embark on crime do so in the knowledge that their liberty is only to be circumscribed in accordance with law and that a criminal conviction may only be recorded through the observance of the fundamental standards which Article 38.1 of the Constitution encapsulates as a trial "in due course of law." It is facile to propound that those who commit crime are protected in consequence by multiple rights. Such rights exist only because the status of someone accused of crime is that of a person who is innocent until proven guilty.

Victims and redress

In contrast to the enduring and immovable fundamental rights which are enjoyed by those accused, the criminal justice system both being law-based and humane in its objectives, the victims of crime are less certain in the assertion of rights. Yet, they are those subject to violent transgressions of their person or assaults on their material welfare. In that, they have no immediate recourse to rights. Their rights are taken by the perpetrator and usually in circumstances where recourse to the law of torts, as setting standards for the exercise of care and the recovery of monetary damages where civil wrongs are perpetrated,[6] is futile because any proposed civil defendant has either no funds or has been self-rendered judgment proof. An Garda Síochána exists as our police force to

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1 For further reading on this subject see Brett, Waller and Williams, *Criminal Law: Text and Cases* (12th edn, Butterworths 2013) chs 1 and 2; Charleton, *Offences Against the Person* (Round Hall 1992), chs 1 and 2; Gans, *Modern Criminal Law of Australia*, (Cambridge University Press 2017) ch 2; Howard, *Australian Criminal Law* (5th edn, The Lawbook Company 1991); Manning, Mewett & Sankoff , *Criminal Law* (5th edn, LexisNexis Canada 2015) chs 1-7; Radzinowicz and Turner, *The Modern Approach to Criminal Law* (Macmillan 1948); Russel, *Russell on Crime* (12th edn, Stevens 1964); Clarkson, *Understanding Criminal Law* (4th ed, Sweet & Maxwell 2005); Ryan, 'The Criminal Justice (Drug Trafficking) Act 1996: Decline and Fall of the Right to Silence?' (1997) 7 ICLQ 22; Simester and Sullivan. *Simester and Sullivan's Criminal Law* (7th edn. Hart Publishing 2019) chs 1 and 3; Simons, 'Criminal Liability for Environmental Pollution'(1998) 3 Bar Review 458; Smith and Hogan, *Criminal Law* (15th edn, Oxford University Press 2018) chs 1-2; Stuart and Delisle, *Learning Canadian Criminal Law* (12th edn, Carswell 2013) chs 1-4, 6 and 12; Stuart, *Canadian Criminal Law: A Treatise* (6th edn, Carswell 2011).

2 Charleton and Herlihy, 'Truth to be told: Understanding truth in the age of post-truth politics' [2019] IJSJ 1.

3 Article 40.4.

4 Article 40.3.1°.

5 Article 40.3.2°.

6 *UCC v ESB* [2020] IESC 38 see the judgment of Charleton J Judgment still not given on this.

discourage crime and the greatest discouragement is the fear of being caught. The police exist as a permanent symbol of the rule of law and as the resource for the investigation and prosecution of crime. It is to them that victims of crime initially turn. In court, the voice of the victim had traditionally been silenced since the theory of criminal law tacitly operated in our courts up to the last century was that the perpetrator of an offence committed a wrong against society. Hence, the Director of Public Prosecutions takes cases not in the name of the person offended against but in the name of the people of Ireland. But more recently the emphasis has shifted to victims being entitled to seek vindication,[7] as best the State may do that, and of the justice system being there for the purpose of recourse by those who suffer from crime. In other ways, some crime may be glibly nominated as victimless. Hence, to fail to pay tax is not supposed to harm any individual citizen and to smoke hallucinatory drugs can be argued as merely recreational. The same might be said of self-harm or of the assisted euthanasia of a rational but severely suffering person. In the latter, the community places a value on human life and rationalises that respect begins to dissolve by the undermining of any aspect of this core value. In the former, instances of recreation through substance taking may induce psychosis, wounding, danger to others, as in the famous case of *Lipman*,[8] and so the need for the State through the social contract to care for citizens through heath provision justifies wider prohibitions on conduct that others may see as private. As with tax, without such prohibitions there would be no State.

Therein is the resolution to the tension as between the breach of the "fundamental political duties" of fidelity "to the nation and loyalty to the State" that the individual rights of perpetrators sets up.[9] Without the law of torts or contract, individuals would be tempted into self-remedy. In crime, that danger is worse since fundamental to the human experience has been the impulse for revenge.[10] Without criminal law, blood feuds might last generations. A case from practice is illustrative. In 1985, a family were told by their daughter that she had been raped. Instead of recourse to police, to hospitals and to other supports, the supposed perpetrator was kidnapped and imprisoned in a shipping container where he was set upon by two Alsatian dogs.[11] In making decisions and in framing laws, sight should never be lost of the fundamental danger that without a criminal justice system that is easy to have recourse to, where laws are rational and where courts are sensible in their decisions and search calmly for the truth, the danger always lurks that society will turn on itself. Thomas Hobbes' expression of life without the law can also fit a social breakdown in consequence of the framers and administrators of justice rendering themselves ostensibly unworthy of trust:

> In such condition, there is no place for industry; because the fruit thereof is uncertain: and consequently no culture of the earth; no navigation, nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving, and removing, such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short.[12]

Hence, the State takes onto itself the power to punish and assumes the responsibility of thorough investigation and the appointment of a rational judiciary sworn to serve the people through justice.

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[7] Criminal Justice Act 1993, s 5 as inserted by Criminal Procedure Act 2010, s 4.
Kilcommins, Leahy, Walsh, and Spain, *The Victim in the Irish Criminal Process* (Manchester University Press 2018).

[8] [1970] 1 QB 152.

[9] Article 9.3.

[10] Charleton, *Lies in a Mirror: An Essay on Evil and Deceit*, (Blackhall Publishing 2006) chapter 2.

[11] The first author prosecuted in the case, which was not reported, where the family organising the revenge were the ones prosecuted.

[12] Thomas Hobbes, *Leviathan* (1651) Of the Natural Condition of Mankind as Concerning Their Felicity and Misery, Chpt 13.
Hence, the statue of Justice by John van Nost the Younger, in Dublin Castle from 1753, while carrying a sword as the symbol of enforcement and scales to indicate impartiality is not, as in other portrayals, blindfolded. The truth can be found out.

Imprisonment is a form of violence. It is the only form of retribution to which those within our jurisdiction who are the victims of crime can hope for and the State alone is authorised to do violence to people living in Ireland. Stigmatisation as a criminal, imprisonment for an offence and even the awesome infliction of the experience of a criminal trial are all aspects of depriving a person accused of crime of the rights to freedom and to be let alone. The gardaí, in the pursuit of crime, deserve the support of effective and rational laws and that the citizen, presumed innocent until otherwise so proven, retains such rights as will enable him or her to enjoy autonomy of action in responding to criminal allegations.

Finding facts

The jury in serious criminal cases are the sole body charged with finding facts. Webs of untruth are spun around the central facts of the commission of crime and it is the task of twelve untrained citizens to draw those aside to attempt to view what time and deceit have masked. A wronged citizen cannot avenge himself, the State alone has that power. The process of placing evidence before a jury must retain the dignity of rationality, otherwise it would be right to consider the criminal process to be flawed. Since it would be wrong for rational people to doubt a guilty verdict, the standard of proof requires the elimination of any reasonable doubt. Since a judge is cloaked in the respect with which the law is regarded, the judiciary should be neutral but rational in presenting evidence to a jury. Hence, the foundation of criminal law is the concept that people should be punished by the State when they are to blame for conduct which brings about defined grievous wrongs.

Rationality also demands that before stigmatising a citizen as a criminal, and imposing condign punishment, the accused should be blameworthy in respect of that for which that person stands accused. That blameworthiness is a consensus of the ideas of right-thinking citizens. In previous centuries the moral law, as interpreted by various religions, indicated the behaviour that was proscribed. In the present century a substratum of moral order is still clearly discernible in our law, particularly in those areas where human conduct has not been assisted or altered by technological advance. Thus, it has always been a crime to deliberately kill someone or to sexually assault them. New methods lead to new mischiefs and the law can lag behind in describing as crimes what the people regard as grave social wrongs.

Limitation by the Constitution

If the moral law had remained a vital source of law-giving, old ideas could easily be adapted to outlaw newly invented or discovered wrongs. Since 1937 the judicial law-making power of the common law, once the source of English law through the acceptance by centralised judges of local customary laws, has been exercised sparingly in the development of civil law. In the realm of criminal law, apart from the interpretation of existing offences and the development of defences to new conditions, it has hardly developed at all.[13] This is both because the Constitution provides that the sole and exclusive power of making laws for the State is vested in the Oireachtas,[14] and because the judiciary in Ireland have no tradition of interference in the social construct of our society, as for instance in the United States of America.[15] Furthermore, the fundamental law in this jurisdiction is amended by simple plebiscite; to date there have been 36 of them. In consequence, the judges are surely powerless to intervene by declaring a perceived common mischief to be a criminal offence. Unless conduct is proscribed no person can be charged with it before a criminal

[13] See *The People (DPP) v Casey* [2019] IESC 7.
[14] Article 15.2.
[15] For example, abortion was declared lawful in *Roe v Wade* 410 US 113 (1973) and homosexual marriage authorised in *Obergefell v Hodges* 576 US (2015).

court. Nor can the law move backwards and today declare to be criminal yesterday that which was not criminal yesterday.[16]

Nonetheless in the sphere of the law of evidence, the judges continued to intervene with good reason in order to protect the notion that confessions to crime should be voluntary.

Source of laws

The constructs of the common law governed our society at the time of English rule. There was little in the piecemeal agglomeration of individual decisions that could be regarded as irrational. Rather, by being based on experience, the tendency was always towards fairness and rationality. The punishments which the judges then applied as customary, including hanging, premorbid torture, whipping, transportation to the colonies, or hard labour, have all been replaced with simple imprisonment or a monetary fine.[17] For the sake of rational development of argument, reference is often made in this work to the state of the law in 1922, with the edition of Archbold's Pleading, Evidence & Practice in Criminal Cases, then current, acting as a reference.[18] Apart from early attempts to declare the existing common law in statute, such as in the Offences Against the Person Act 1861, and what is essentially a sentencing statute applying existing definitions of property offences with matching penalties in the Larceny Act 1916, little of the law was then written down. While the prevailing view that it was better to trust to the wisdom of judges, was then abating, in interpreting their prior decisions, then as now, the judiciary declared the law. Other countries had stated their criminal law in the form of an all-embracing code. Sir James Stephen proposed the complete codification of the criminal law but, partly due to the jealousy of others and to inertia, he was unsuccessful in his effort.[19] Griffiths used his *Digest of the Criminal Law* as the basis of the Queensland Code which was enacted on 1 January 1901. It was subsequently copied in Western Australia and in Tasmania where it was improved by incorporating precedent charges into its text. An attempt at codification in this jurisdiction was probably over ambitious. It ultimately foundered.[20]

Codification

More successful efforts reflected a desire to preserve the best features of the common law by writing them into a permanent form. Inevitably, the codes contain self-inconsistencies. Identification of these problems has usually been met by speedy reform in jurisdictions which have codified their criminal law; the will to make law was already manifest. Ireland, in contrast, is left floundering among a mass of statutes and decisions when criminal law and evidence should be clear and readily accessible in a single document. While the way forward in the shape of a single all-embracing criminal code is a large task, it is much simpler to begin adopting central definitions of concepts such as possession, dishonesty, intention, recklessness, strict liability, absolute liability, wilful blindness and criminal negligence and by repeating them in every statute making these concepts key towards building a rational modern criminal code.

Lack of definition

This jurisdiction has left undefined the most fundamental concepts of criminal liability. Nowhere is there to be found a statement by the Oireachtas on either the foundational concepts of criminal liability or on the various mental elements of crime. Even proscribed conduct is often described in language that is difficult to construe. This work has been drawn from a multiplicity of sources in an attempt to construct basic ideas of criminal liability which the practice of criminal law in our courts would seem to indicate applies in Ireland.

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[16] Article 15.5.
[17] See the Criminal Law Act 1997, ss 10, 11 and 12.
[18] Archbold, *Criminal Pleading, Evidence and Practice* (26th edn, Roome and Ross 1922).
[19] Sir James Fitzjames Stevens, *Digest of the Criminal Law* (5th ed, Macmillan 1894).
[20] Expert Group on the Codification of Criminal Law, *Codifying the Criminal Law* (November 2004).

The Australian code models are in themselves a sufficient guide to the direction of obvious reform. The most cohesive and far-reaching structure yet produced, the Model Penal Code of the American Law Institute, is referred to in this work as it contrasts the inevitable confusion of judge-made law with the simplicity, certainty and ease of reference of a written text. Its merits are all too obvious.[21]

Whilst there is a constant harvest of new criminal legislation in the last three decades, an aspect of legislative analysis outside the scope of this work is the tendency to rush through far-reaching legislation in response to a particular event. Thus, the Proceeds of Crime Act 1996 was enacted in apparent response to the murder of Veronica Guerin and the Offences Against the State Act 1998 after the Omagh bombing. The murder of Veronica Guerin shocked the Irish nation into the realisation that organised crime had a grip on the State and was prepared to use any means to perpetuate its parasitic existence. The Omagh bombing was seen as an atrocity that demanded new laws. One could only wonder, in the light of multiple atrocities spanning decades since 1966, why action was only taken in response to that event. In law making, the preserve of the Oireachtas, reflective and painstaking work tends to yield legislation that is less susceptible to challenge.

Choices and wording

In the legislative sphere, choices are made as to who should be a criminal, who should be a victim and what penalty, always expressed as a potential maximum, should be available to the courts. These policy decisions are entirely outside the sphere of judicial competence.[22] It is within the sphere of competence of public representatives to make such choices. One example suffices. At common law, it was not illegal to offer sexual favours for money, provided this was done in private and did not amount to public solicitation, which could be a public nuisance.[23] In the Victorian era it was recognised, however, that women could be exploited and locked into a situation of being a prostitute. Hence, the Criminal Law Amendment Act 1885 created several offences, including procuring a woman under 21 years to enter prostitution or to go abroad and enter a brothel. Using false pretences, abduction, administration of drugs, in that regard were specific offences, no matter what age the victim was. Those men who controlled prostitution were targeted by the Vagrancy Act 1898, which created offences of living "wholly or in part on the earnings of prostitution" and of "persistently" soliciting in a public place for immoral purposes. It will be seen that to remove the words "or in part" from the offence of living off prostitution would make proof of the crime considerably more difficult. Similarly, it is not the offence of soliciting without the accused woman doing so persistently.

By the use of words, legislatures decide who is to be caught within the net of criminal conduct. By making decisions as to what should be subject to a criminal sanction in our society, the nature of that society is changed. The Criminal Law (Sexual Offences) 1995 Act abolished any prohibition on consensual homosexual conduct between persons of at least 17 years; ss 1-5. Soliciting became an offence only in respect of those underage for any form of sexual action; s6. Soliciting for prostitution, meaning a person offering his or her body for payment, became an offence where done "in a street or public place"; s 7. Arguably, by not including the requirement of persistence, the law altered. Loitering became an offence but only where the gardaí reasonably suspected such a purpose and asked the suspect to move on and that person refused; s 8. Three offences were recast, of organising prostitution or compelling someone to take up that trade, s 9, of being a person who "knowingly lives in whole or in part on the earnings of the prostitution of another person and aids and abets that prostitution", s 10 thus requiring more than merely living with a prostitute, and of brothel keeping. There the choices made in s 11 were to criminalise anyone who

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21 See Wechsler, 'Challenge of a Model Penal Code' (1952) 65 Harvard LR 1057.

22 *AD v Ireland* [1994] 1 IR 369; *Corway v Independent Newspapers Ltd* [1999] 4 IR 484; *TD v Minister for Education* [2001] 4 IR 259; *Mavior v Zerko Limited* [2013] IESC 15; *IRM v Minister for Justice and Equality* [2018] IESC 10.

23 Archbold, *Criminal Pleading, Evidence and Practice* (26th edn, Roome and Ross 1922) 1024, 1036 etc.

(a) keeps or manages or acts or assists in the management of a brothel,

(b) being the tenant, lessee, occupier or person in charge of a premises, knowingly permits such premises or any part thereof to be used as a brothel or for the purposes of habitual prostitution, or

(c) being the lessor or landlord of any premises or the agent of such lessor or landlord, lets such premises or any part thereof with the knowledge that such premises or some part thereof are or is to be used as a brothel, or is wilfully a party to the continued use of such premises or any part thereof as a brothel.

No matter how fiction may treat the occupation, to be a prostitute is not a happy avocation. The Criminal Law (Sexual Offences) Act 2017 moved away from the concept that prostitution could be tolerated provided prostitutes were not exploited and displays of prostitution did not disturb public streets into the outright banning of prostitution. As between possible choices of penalising those who worked at prostitution, which had been the traditional legal policy of both the common law and of Victorian statutes, and criminalising the purchase of sexual acts, the Oireachtas chose the latter. Hence, by s25 a new s7A was introduced into the 1995 Act in this form

(1) A person who pays, gives, offers or promises to pay or give a person (including a prostitute) money or any other form of remuneration or consideration for the purpose of engaging in sexual activity with a prostitute shall be guilty of an offence …

What, it might be asked is "sexual activity". The choice made in terms of definition was to attempt to encapsulate a varied human activity in legislative words:

(2) In this section 'sexual activity' means any activity where a reasonable person would consider that—

(a) whatever its circumstances or the purpose of any person in relation to it, the activity is because of its nature sexual, or

(b) because of its nature the activity may be sexual and because of its circumstances or the purposes of any person in relation to it (or both) the activity is sexual.

While this is only an example, it will be noticed that choices are made by legislatures in relation to such difficult areas as mercy killing, abortion, marriage and sexual relations. Furthermore, the choice has been made that every infringement of the taxation code is also a criminal offence and that enforcement of European Union directives and regulations in transposed form should be by the creation of summary offences.

Treasons, Felonies and Misdemeanours

At common law a crime was classified either as a treason, a felony or a misdemeanour. The original distinction between a felony and a misdemeanour was that between a major and a minor crime, with the former historically attracting different and more serious penalties. Over time, this distinction "though always broadly discernable, became blurred".[24] The practical importance of the distinction became the collateral consequences which turned upon it:

(i) the general power of arrest depended upon whether the crime committed was a felony or a misdemeanour;

(ii) the distinction drawn between principals and accessories to a crime only applied to felonies and not to misdemeanours;

[24] Smith and Hogan, *Criminal Law* (15th edn, OUP 2018) 27.

(iii) misprision of a felony (concealing a felony) was a distinct offence as was compounding a felony (ie agreeing for reward not to prosecute a felony). These offences did not arise out of misdemeanours.

The Criminal Law Act 1997 abolished the felony/misdemeanour division and provided that on all matters where such a distinction had previously been made, the law and practice would now be the law and practice applicable at the commencement of the Act to a misdemeanour. In order to avoid confusion, the Act codified the law in those areas where the felony/misdemeanour distinction had still been relevant, that is arrest without warrant, s 4, aiding and abetting principal offenders, s 7, and concealing offences, s 8. The Act also abolished the penalties of penal servitude and hard labour; s 11. In the Third Schedule to the Act a large number of now obsolete Acts and parts of Acts were abolished. Section 3 provides as follows:

> (1) All distinctions between felony and misdemeanour are hereby abolished.
>
> (2) Subject to the provisions of this Act, on all matters on which a distinction has previously been made between a felony and a misdemeanour, including mode of trial, the law and practice in relation to all offences (including piracy) shall be the law and practice applicable at the commencement of this Act in relation to misdemeanour.

Section 7 deals with parties to offences and is considered separately. Section 8 deals with concealing an offence and is also dealt with separately.

Basic Elements[25]

"An act does not make a man guilty of a crime, unless his mind be also guilty": *Haughton v Smith*.[26] For example, a person lighting a cigarette in Cork city centre is not guilty of murder or manslaughter if striking the match detonates a huge pocket of natural gas, recently leaked from a cracked pipeline, and results in the deaths of a number of passers-by. It could be otherwise if the actor had chosen to disregard warning signs against such conduct. Early Irish law had the same idea: thus, a mad person was not guilty in throwing a missile, drunken rage did not excuse, necessity could justify stealing a piece of food, negligence established criminal liability or reduce its consequences because of mistake and, *díablad fíach ferg*, anger doubled penalties.[27] Every society makes choices and culpability is central to what is a crime and what is not.

Culpability

Consistently, we make an assessment of the blameworthiness of a person in causing harm by morally assessing their conduct in the circumstances. The gravity of the consequences can alter our view as to the wrong done. A simple error causing little harm is normally regarded as trivial, but the same error is abhorred if it results in grave harm. An example is dangerous driving as an offence and dangerous driving causing death or serious injury as a more serious offence. Arguably, a person's conduct should only be judged according to his state of mind. People act, or omit to act, either according to decisions as to what they wish to do or by focusing their mind on the task in hand. So, is it really only the gravity of mental culpability which should determine our attitude to a crime or its consequent punishment? In reality that approach is not the one which people take. If, in the example given, the cigarette smoker were to cause no more than the explosion of a small pocket of gas which merely startled passers-by, no one would think of prosecuting him. That conduct is coloured differently in the eyes of ordinary people by the fact that it caused death. In

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[25] Finbarr McAuley, 'Mens rea: a legal-philosophical view' (1982) 15(2) Irish Jurist 84-104; Mark Dsouza, 'Criminal culpability after the Act' (2015) 26(3) King's law journal 440-462, Mark Murphy, 'The Problem of Unconstitutionality and Retroactivity in Criminal Law in Ireland' (2007) 42 Irish Jurist 63-118; Thomas O'Malley, 'Punishment and moral luck: The role of the victim in sentencing decisions' (1993) 3(1) ICLJ 40-60.

[26] [1975] AC 476, 491.

[27] Kelly, *A Guide to Early Irish Law* (Dublin Institute for Advanced Studies 1988) 152-155.

assessing what conduct is to be made criminal we look both at the wrong done inside the person (the mental element) and the person's conduct or its consequences (the external element).

In assessing punishment we look not only at the wrong done but the consequences of the wrong. By definition, the consequence of manslaughter is the death of the victim. Sentence may be as variable as these range from life imprisonment to conditional discharge.[28] The consequence of the wrong remains, however, the unlawful killing of another person. Sentence is assessed according to the gravity of the wrongdoing which brought that death about both in terms of mental wrong and external consequences. The gravity of the conduct causing death may vary from a simple punch intended to hurt to an act of criminal negligence that is utterly inexcusable.[29]

In some circumstances apparently blameworthy conduct can become less culpable, or be extinguished entirely, if another element is taken into account. In our example of the gas explosion, the apparent culpability of ignoring warning signs seems less blameworthy if the actor lit the cigarette, not for himself, but for a gas worker who emerged, unlit cigarette in mouth, from one of the excavations and asked for a light. An enquiry as to whether the accused had a defence tends to complete the picture as to whether he is criminally liable. Some factors merely lessen or mitigate the punishment due to a crime, others are recognised as being so fundamental to the wrong as to extinguish it or transform it into a lesser crime. We will discuss this in due course in the final section of this work on defences.

To take another example; a man is found with a bloodied hand standing over the body of another who is recently deceased due to a fracture of the skull caused by a boulder which lies on the ground close by. To cause the death of another human being is the crime of homicide which, depending on the mental element which accompanies that external element, is either murder or manslaughter. Killing another person, save by the unavoidable use of reasonable force in self defence, is the conduct therefore proscribed. There are several alternative sets of facts which may explain the man's actions. The accused merely came on the scene and is an innocent bystander who is not responsible because he had, to use the time-honoured but quite accurate phrase which denotes complicity, "no hand act or part" in the killing. Thus, he is not blameworthy because he had nothing to do with the external element of the crime. The accused was a steeplejack working on a church spire overhead when, due to an inexplicable fault, an apparently new and sound rope recently purchased from a reputable supplier snapped, causing a pile of rubble to kill the victim; the accused is not responsible because he did not cause the death of the victim with a coincident mental element of acting in a criminally negligent manner. Suppose the accused deliberately struck the deceased on the head but he had done that in the course of defending himself against a murderous attack with a flick-knife which was on the point of success; he is not responsible because he made lawful use of force in circumstances and in a degree which was reasonable. Suppose the accused used a rock to defend himself against a friend who, due to jealousy over a girl, offered him a fight, an offer which he took up; this is certainly manslaughter and may be murder (Suppose the accused decided to rob the deceased, a task made easier if the skull of the victim was bashed-in; this intentional infliction of serious harm makes the unlawful killing murder.

Criminal responsibility

Criminal responsibility thus depends on:

(a) a law making the specified act or omission criminal at the date when it is performed;

(b) an act or omission by the accused covered by the definition of the offence;

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[28] For an analysis of the range of sentencing based on culpability see *The People (DPP) v Mahon* [2019] IESC 24 and *The People (DPP) v FE* [2019] IESC 85.

[29] *The People (DPP) v Cullagh* ITLR 31 May 1999.

(c) a state of mind accompanying the act which is of sufficient gravity within the definition of the offence, and

(d) the absence of a defence.

Proscribed Conduct

The rule is that there must be a law outlawing the particular activity or conduct alleged against the accused is laid down by Articles 15 and 50 of the Constitution. Article 15.2.1°provides that "The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State." References subsequently in the text of the Constitution to other subordinate legislative authorities are in the context of the potential reunification of Ireland. Subordinate legislation, which does not include indictable crime, may be made by order of Government ministers or local authorities, provided it is within the limits proscribed by the parent legislation.[30] Retrospective penalisation is forbidden by Article 15.5.1° in clear language: "The Oireachtas shall not declare acts to be infringements of the law which were not so at the date of their commission." In *McKee v Culligan*[31] the Supreme Court held that the Article constitutes

> an expressed and unambiguous prohibition against the enactment of retrospective laws declaring acts to be an infringement of the law, whether of the civil or the criminal law. It does not contain any general prohibition on retrospection of legislation, nor can it be by any means interpreted as a general prohibition of that description.[32]

Article 50 carries over the laws in force immediately prior to the date of the coming into operation of the Constitution. This includes the common law. Sometimes principles that are now obscure can found the prohibition. In *Shaw v DPP*[33] the facts were that the accused published a book called "The Ladies' Directory", advertising the names and addresses of prostitutes and indicating special services they might provide together, in some cases, with an accompanying photograph. He was charged with, among other offences, a conspiracy to corrupt public morals and was convicted. It was not necessary for the prosecution to charge him with this offence as his activities also came within the definitions of living on the earnings of prostitution contrary to s 30 of the Sexual Offences Act 1956 and publishing an obscene article contrary to s 2 of the Obscene Publications Act 1959. The House of Lords, however, took it as an opportunity to declare that the protection of certain public interests could require judges to retain a legislative function. Viscount Simonds stated:

> There is in that Court a residual power, where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare. Such occasions will be rare, for Parliament has not been slow to legislate when attention has been sufficiently aroused. But gaps remain and will always remain since no one can foresee every way in which the wickedness of man may disrupt the order of society.[34]

The judgment in *Shaw* perhaps influenced the Supreme Court judgment in *AG (SPUC) v Open Door Counselling Ltd*,[35] but the plain reality is that judges in Ireland are prohibited from legislating.

An example of how a defence predating independence can be subject to fresh analysis that entirely changes its direction is seen in *The People (DPP) v MacEoin*.[36] The judgment on the law of provocation is considered in chapter 18. What is remarkable about the MacEoin decision is that the Court of Criminal Appeal reversed the law inherited at independence and simply substituted a

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[30] *Bederev v Ireland* [2016] IESC 34.
[31] [1992] 1 IR 223.
[32] ibid 272.
[33] [1962] AC 220; [1961] 2 All ER 446; [1961] 2 WLR 897.
[34] See *Knuller v DPP* [1973] AC 435; *DPP v Bhagwan* [1972] AC 60; *DPP v Withers* [1975] AC 842; *R v Kamara* [1974] AC 104.
[35] [1988] IR 593; [1987] ILRM 477; reproduced at para [4.101].
[36] [1978] IR 27.

rule of its own which was not applied in any other common law jurisdiction. Such a change was, it is submitted, for the Oireachtas to make. The case, as we shall see in the section on provocation as a defence, has been both followed, refined and severely criticised.

Non-retroactivity and codification

Does the statutory abolition of a common law offence operate retrospectively or only prospectively? The problem was triggered by the case of *The People (DPP) v Kavanagh*.[37] The Special Criminal Court considered the effect of s 28 of the Non-Fatal Offences Against the Person Act 1997 which created the new statutory offence of false imprisonment (s 5) and abolished the common law offence of false imprisonment (s 28). The defendant had been charged with false imprisonment contrary to common law arising out of events which had occurred prior to the commencement date of the 1997 Act. The Special Criminal Court held that it could not consider the counts of false imprisonment in the indictment of the accused as the offence had been abolished by the 1997 Act. This conclusion was not altered by s 11 of the Criminal Law Act 1976, which provides that:

> (1) the offences of kidnapping and false imprisonment and an offence under section 10 of the Criminal Law (Jurisdiction) Act, 1976 shall be a felony.
>
> (2) a person guilty of kidnapping or guilty of false imprisonment shall be liable on conviction on indictment to imprisonment for life.

Section 21 of the Interpretation Act 1937 creates a presumption that where a statute is repealed pending proceedings are not affected. Thus, if s 11 of the 1976 Act had created new statutory offences of kidnapping and false imprisonment, the original common law crimes would survive the passing of the 1997. However, the Special Criminal Court held that the 1976 Act had not created any new statutory offences but had merely categorised the common law offences of kidnapping and false imprisonment as being felonies and provided a maximum penalty for the said offences. The judgment of the Special Criminal Court ended with the admonition that it was both "surprising and most unfortunate that those having responsibility for the drafting and enactment of the 1997 Act should have made an obvious error of such a serious nature." The Oireachtas responded with the Interpretation (Amendment) Act 1997. However, this legislation could not affect proceedings which had been brought before its commencement date and there were also questions raised about its constitutionality. Thus, the issue was still "live" when it came before the High Court in *Quinlivan v Governor of Portlaoise Prison*.[38]

In that case, the applicant had been charged with false imprisonment contrary to common law and s 11 of the Criminal Law Act 1976. The charges arose out of events which had occurred before the commencement date of the 1997 Act. McGuinness J agreed with the Special Criminal Court that the 1976 Act did not create a new offence of false imprisonment or kidnapping, but merely altered the penalty for the existing offences at common law. Thus s 21 of the Interpretation Act 1937, which creates a presumption that where a statute is repealed pending proceedings are not affected, was inapplicable. She further held that the inclusion of a specific saver in the 1997 Act to the effect that pending prosecutions were not to be affected would have been a "preferable legislative practice", but the absence of such a saver was not conclusive of the issue, as principles of statutory interpretation and constitutional consideration had to be taken into account. A consideration of these latter factors led McGuinness J to the conclusion that the Special Criminal Court had erred in the Kavanagh case:

> I have already surveyed the general trend of the canons of construction and of the common law rule of interpretation as set out in *McLoughlin's*[39] case. It seems to me that the

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[37] *DPP v Kavanagh* [1997] 10 JIC 2901. See generally White, 'The Present Prosecution of Abolished Offences' (1998) 8 ICLJ 196.
[38] [1998] 2 IR 113
[39] *Re McLoughlin's Application* [1963] IR 465.

> interpretation of Section 28 of the 1997 Act must be considered not only in the light of these rules but in addition, and simultaneously, in the light of the constitutional requirement of non-interference with the judicial process. This requirement is most clearly set out by the Supreme Court in *Buckley's*[40] case and in *Hamilton v Hamilton* [1982] ILRM 466. These judgments are, of course, binding on this Court.
>
> Where two constructions or interpretations of the relevant statutory provision are open, the Courts must adopt that which is not in conflict with the Constitution. As was the case in the Family Home Protection Act 1976, the 1997 Non-Fatal Offences Against the Person Act does not contain any provision dealing with pending cases, but neither does it state specifically that the abolition of the common law offence of false imprisonment is to have the effect of bringing to an abrupt end all prosecutions for that offence now before the Courts.
>
> If Section 28 and the other relevant provisions of the Non-Fatal Offences Against the Person Act, 1997 are read in this light then I must hold that the intention of the Oireachtas was to act prospectively, and not to interfere with prosecutions under common law and Section 11 of the Criminal Law Act, 1976 of which the Courts were already seised.[41]

The reasoning in Quinlivan was affirmed in the High Court by O'Higgins J in *Mullins v Hartnett*.[42] He reached his decision by using the principles of statutory interpretation and so deemed it unnecessary to consider the constitutional aspect to the case. In response to the possibility of unintentional retroactive abolition again being argued, notwithstanding the foregoing principles, the Oireachtas swiftly passed the Interpretation (Amendment) Act 1997. This provides at s 1(1) that where legislation "abolishes, abrogates or otherwise repeals an offence which is an offence at common law", then absent a contrary intention apparent in the legislation, this does not "affect the previous operation of the law in relation to the offence", or "affect any penalty, forfeiture or punishment incurred in respect of any such offence" or "prejudice or affect any proceedings pending at the time of such abolition, abrogation or repeal in respect of any such offence or any other offence." For clarity s 1(2) provides for the continuation of the law in respect of any offence in force at the time of commission.[43]

Statutory construction

Statutory construction is outside the scope of this volume. In England, the cannon of construction that criminal statutes are to be strictly construed has been revised so that such legislation is subject to the general rules. In this jurisdiction, the rule of strict construction prevails. Essentially this means that rules ameliorating absurd results are not applicable: nothing is to be read into criminal legislation which is not there.[44] Rather, the ordinary cannons of construction apply whereby words are given their plain meaning but such words are read in the context of the other relevant provisions of the legislation for the purpose of putting into force the intention of the Oireachtas.[45]

Conduct of the Accused[46]

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[40] *Buckley v Attorney General* [1950] IR 67.

[41] [1998] 2 IR 113, 146.

[42] [1998] 2 ILRM 304.

[43] For further forays into this saga, see *Grealis and Corbett v DPP* [2001] IESC 50; *Cummins v Judge Patrick McCartan* [2005] IESC 67.

[44] See the judgment of Henchy J in *Inspector of Taxes v. Kiernan* [1981] IR 117, 121.

[45] See *Savage Supermarket v An Bórd Pleanála* [2011] IEHC 488; *Sweetman v Shell* [2016] IESC 58; David Dodd, *Statutory Interpretation in Ireland* (Tottel Publishing 2008) 134-137.

[46] Christopher Taggart, 'Retributivism, agency, and the voluntary act requirement' (2016) 36(3) Pace Law Review 645-735; Finbarr McAuley, 'The action component of actus reus' (1988) 23(2) Irish Jurist 218-239; Ian Farrell and Justice Margeau, 'Taking voluntariness seriously' (2013) 54(4) Boston College Law Review 1545-1612.

From the moral law, the criminal law inherited the concept of blame; for a person to be in the wrong, that individual must have acted culpably both as to bringing about the external element of the offence, the act proscribed or actus reus, and been mentally blameworthy, the mental state proscribed or mens rea. While external acts can range from falsifying a tax return to the Revenue to burning down a building, crimes have a recurring mental element that centres around advertence to the act, the accused knowing, intending, being wilfully blind or reckless or negligent to a criminal degree; the latter being the only one that does not require actual mental advertence to the blameworthy nature of the act.

General principle

Thus, there must be a proscribed physical act before a crime can be committed. An example will illustrate this point. Suppose A buys a Ford Fiesta. Some time later he is short of money and decides to enter into a hire purchase agreement under which he will sell his car to a finance company and then hire it back from the company until he has paid it off. Subsequently A sees a Mercedes he likes belonging to B. B wants a smaller car and so A offers to exchange his Fiesta for B's Mercedes. A reassures B that he is the owner of the Fiesta and that there is no money owing on it. A knows this is a tissue of lies, but is desperate to get his hands on B's Mercedes. On the basis of A's representations the exchange takes place. Eventually the truth about the Fiesta emerges and A is charged with obtaining B's Mercedes by false pretences. It turns out, however, that there is an error in the documentation and registration of the hire purchase agreement A entered into with the finance company. The result of this error is that the agreement was void and so in fact A still owns his Fiesta and it is free of any incumbrances. Effectively, all A has is a personal loan from the finance company. In order to be guilty of the offence of obtaining by false pretences there must be a physical element, ie a false representation. While A certainly had a guilty mind at the time of the car exchange with B, there was no external act; as it turned out, A was telling B the truth about the status of the car even though he thought he was telling a pack of lies. Thus A cannot be convicted of obtaining by false pretences.[47] We discuss later the even more vexed question of whether A can be convicted of attempting to obtain by false pretences.

Result crimes and conduct crimes

Crimes are sometimes divided into result crimes and conduct crimes. Most crimes are result crimes as it must be proved that the conduct of the accused had a particular result. For example in a charge of murder the prosecution must prove that the accused's conduct caused the death of the deceased. However, conduct crimes do not require the prosecution to prove that any particular result was caused. An example of a conduct crime is perjury. Perjury is committed as soon as the accused, being a witness in any civil or criminal case, makes on oath a false statement which he does not believe to be true. It is irrelevant whether he or she actually manages to fool the court or the jury. Inchoate crimes consist of concepts which penalise acts preliminary to the commission of the crime which the parties desire to commit. Inchoate crimes are themselves crimes and may be linked in an indictment to the substantive offence. So, to attempt a crime is a crime; to ask someone to commit a crime is a crime; and to agree to commit a crime is a crime. This is considered in the section on inchoate offences.

Voluntary conduct

The accused must act, or omit to act, or stand, by reason of his voluntary conduct, in relation to a situation or event which the definition of the crime declares to be unlawful. Generally speaking, mere coincidence is insufficient. It is fundamental to the construction of criminal liability that the accused is placed in a situation where he or she is criminally liable by reason of their own voluntary act. Modern jurisprudence has developed this concept into the defence of automatism. Where the accused acts as a mere body, disengaged from, and not subject to, the control of the mind that

[47] *Dellar* (1952) 36 Cr App R 184.

person is not criminally responsible. The concept of voluntariness is fundamental to criminal liability. A person cannot be responsible for an act, an omission, or a situation which that person has not contributed to by some voluntary action or omission. Two exceptions can be pointed to but both have been heavily criticised.

First, in *Larsonneur*,[48] the accused was convicted under the Aliens Order 1920 on a charge that she "being an alien to whom leave to land in the United Kingdom had been refused was found in the United Kingdom". She had been expelled from Ireland to that jurisdiction in the custody of the British police. The defence of estoppel might now apply and is considered later in this work. A different view was taken in *Finau v Department of Labour*[49] where it was held not to be an offence to fail to leave New Zealand where this was impossible due to a pregnancy. As criminal law is always in the process of developing, a generally applicable defence of impossibility has developed. Further, as the Constitution implies the standards of fundamental justice in the administration of law, the New Zealand decision is strongly to be preferred. However, even the New Zealand courts interpret a defence of impossibility strictly. Thus, in *Tifaga v Department of Labour*,[50] lack of funds to pay for a ticket home to Western Samoa was held to be no defence to a charge based on a failure to leave New Zealand after an entry permit had been revoked. In the New Zealand Court of Appeal, Woodhouse J held that while on a temporary permit the accused had a responsibility of maintaining the means of leaving if asked to do so.

Secondly, departing from the rule requiring a willed act by the accused, the law will ignore, or will treat differently by substituting a lesser offence, the absence of voluntary conduct if it has its origin in a state brought on by the voluntary consumption of alcohol or other drugs. Therefore, in *Lipman*[51] the accused was convicted of manslaughter, notwithstanding that he killed the victim under the influence of drugs and believing he was strangling snakes in the underworld. This decision has been heavily criticised. The judgment could easily have been brought within an established principle by a finding that the accused had been guilty of criminal negligence by taking a mind-altering drug with limitless possibilities as to the effect on his conduct in physical proximity to another person.

Reflex actions

The nature of the interaction between the external element and the mental element of a crime has been described in the following terms by McLachlin J, speaking in the Supreme Court of Canada:

> The term *mens rea*, [mental element] properly understood, does not encompass all of the mental elements of a crime. The *actus reus* [external element] has its own mental element; the act must be the voluntary act of the accused for the *actus reus* [external element] to exist. *Mens rea* [mental element], on the other hand, refers to the guilty mind, the wrongful intention, of the accused. Its function in criminal law is to prevent the conviction of the morally innocent – those who do not understand or intend the consequences of their acts. Typically, *mens rea* is concerned with the consequences of the prohibited *actus reus* [external element].[52]

Suppose a man arms himself with a shotgun and holds up a service station. During the course of the robbery, the garage attendant is shot dead. The accused claims that he did not voluntarily pull the trigger, but only did so as a reflex response to what he perceived as danger when the attendant made a sudden movement.[53] Such a claim of involuntariness will fail because the act of pulling the trigger cannot be isolated from the loading and cocking of the weapon, the failure to apply the

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48 (1933) 24 Cr App Rep 74.
49 [1984] 2 NZLR 396.
50 [1980] 2 NZLR 235.
51 [1970] 1 QB 152.
52 *R v Theroux* 1993 CanLII 134 (SCC); [1993] 2 SCR 5, [3].
53 See *The People (DPP) v Mahon* [2019] IESC 24.

safety catch, the pointing of the gun and the accused's placing his finger on the trigger. In *Ryan*[54] the High Court of Australia held that in such circumstances, phrases like "reflex action" and "automatic reaction" can, if used imprecisely and unscientifically, be mere excuses. They have no real application to a fully conscious man who has put himself in a situation in which he has his finger on the trigger of a loaded rifle levelled at another man. If he then presses the trigger in response to a sudden threat, his doing so is a consequence that is a probable and foreseeable result of a conscious apprehension of a danger, and in that sense is a voluntary act. Similarly, in *The People (DPP) v Mahon*,[55] the accused produced a knife in the course of a heated argument and claimed that the victim had walked into it, the blade penetrating his stomach through to leaving a grove on his spine. The context of the actions determines the culpability.

The decision in *Ryan* was followed by the New Zealand Court of Appeal in *Wickliffe*.[56] An accused claimed that he had pulled the trigger after being pushed against the wall when struggling with a jeweller he was trying to rob. Both actions are voluntary, so there is the basis for criminal liability. The killing is at least brought about by an assault or by the accused's criminal negligence. The killing can only be murder if the action was intended to result in death or serious injury.[57]

Basic models for liability[58]

It is possible to roughly categorise the typical situations in which criminal liability is constructed. In this text these receive separate treatment but are now sketched in order to provide a theoretical introduction:

(1) Possession based offences

The accused bears a relationship of physical control to an object which is either close at hand or in a place to which he can resort when that person has need of it or is with a person subject to his or her direction. Possession based offences are fundamental to the prohibition on the use of dangerous articles. This model is resorted to because the proof of this kind of relationship is far easier than the proof of an ulterior intent to use the article in a dangerous way, for instance to use a knife to stab, or the proof that it was so used, or the proof that the accused had such an article in order to attempt a crime with it. Sometimes the model is simple possession, for instance possession of a drug contrary to s 3 of the Misuse of Drugs Act 1977, but sometimes an aggravating factor of intention in relation to the object is added on, for instance possession of a drug intending to supply it to another contrary to s 15 of the 1977 Act. Sometimes the modes may be possession of a firearm as a basic offence with possession in circumstances indicating an unspecified unlawful purpose, with a final and most serious offence of intent to commit an indictable crime; Firearms Acts 1964 and as later expanded and amended. Possession based offences are fundamental to the control of drugs, firearms, explosives and weapons of violence. Those offences take up a separate section of this work.

(2) Assault based offences

The accused may be required to have struck at, or moved towards striking at, some other person. Those are assault based offences. The majority of offences against the person are based on the concept that it is wrong to strike another person, or to put them in fear of being immediately struck, or to deprive them of their liberty. Murder and manslaughter had their origin in this concept

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54 (1967) 121 CLR 205.
55 [2019] IESC 24.
56 [1987] 1 NZLR 55.
57 Criminal Justice Act 1964, s 4.
58 Emma Roche-Cagney, 'Comparative overview of the law regarding rescue' (2014) 32(19) and (20) ILT 278 and 299 (Parts I & II); Gerard Coffey, 'An evaluation of "possession" in the construction of criminal liability' (2016) 26(4) ICLJ 108-117; Glanville Williams, 'Criminal omissions: the conventional view' (1991) 107 LQR 86; Ivan Bacik, 'Striking a blow for reform?' (1997) 7(1) ICLR 48-58; Paul McCuthcheon, 'Omissions and Criminal Liability' (1993) 28(1) Irish Jurist 56-57;

but are now analysed in terms of the result of the accused's conduct being death to the victim caused by a voluntary act of the accused, which, in the case of murder was intentional or which, in the case of manslaughter, was criminally negligent, was criminal and dangerous or resulted from an assault. It is also a wrong to deprive someone of their liberty without justification (such as a sentence of imprisonment) but in early law this was usually accompanied by an assault. These offences have now been recast by the Non-Fatal Offences Against the Person Act 1997, discussed in Chapter 12.

(3) Liability for omissions

Exceptionally, where the accused bears a relationship giving rise to a duty to protect the welfare of another, he or she may be liable for failing to act. Traditionally, such a relationship was based on a duty arising from a contract (such as employment) or on blood or family ties. In *Gibbins and Procter*[59] a man and a woman he was living with withheld food from a child as a result of which the child died. They were convicted of murder. By living with the man and receiving money from him for food the woman had assumed a duty towards the child. A niece living with her aunt who fails to give the aunt any food or to procure any medical attendance for her when the aunt becomes ill may be found guilty of manslaughter if such neglect accelerated the aunt's death.[60] The modern tendency is towards identifying a duty to act by reference to all the circumstances affecting the relationship between the victim and the accused. This is further discussed in the context of manslaughter. In *Miller*[61] the accused went to an unoccupied house to sleep for the night. He lay down on a mattress and later woke up to find it smouldering from a cigarette he had dropped before going to sleep. Instead of trying to put the fire out, he simply moved to another room and promptly fell asleep again. The house was badly damaged and the accused was charged with arson. It was held by the House of Lords that the accused's omission to put the fire out or call for help constituted arson on the facts of the case. Once the accused became aware that the mattress was on fire he had a legal responsibility to act to prevent the risk of the house being damaged by fire. In terms of the impulses that lead to the construction of liability, it cannot be ignored that the action of the accused had set the fire in the first place.

In general, however, the criminal law does not enforce unselfish behaviour. Good samaritans are praiseworthy essentially because they intervene in circumstances where others are entitled to and do walk by a person needing assistance. Hence, absent ties of responsibility, such as being a teacher in charge of an expedition or a parent or someone exercising the responsibility of a parent, it may not be an offence to watch someone drown even though the means of saving them are readily to hand at no consequence to oneself. In some countries such conduct may amount to a criminal offence. The Canadian Law Reform Commission has proposed that as a general rule "Everyone commits a crime who, perceiving another person in immediate danger of death or serious harm, does not take reasonable steps to assist him."[62] This has had not traction in this jurisdiction.[63] Even without such a statutory reform, a close connection to the person in trouble can be a basis for liability. For instance, hiring a prostitute for a wild party and then not coming to her aid when she collapses of addiction and consumption related issues may found liability in manslaughter.[64]

Some offences proscribe a failure to act when requested by authority. Examples include failure to co-operate with gardaí exercising their statutory functions. Another example would be failing to clear an obstruction in a public place, such as a sit-down protest, when required by the gardaí to do so; s 8 of the Criminal Justice (Public Order) Act 1994. The Criminal Justice Act 1984 includes offences of failing to surrender to bail, s 13. Similarly, it is an offence to fail to produce a driving

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59 (1918) 13 Cr App Rep 134.
60 *R v Instan* [1893] 1 QB 450.
61 [1983] 2 AC 161.
62 Report 31 (1987), s 10(2).
63 *UCC v ESB* [2020] IESC 38. And see Allen Linden, Toward Tort Liability for Bad Samaritans (2016) 53 Alta L Rev 837, 842.
64 On this point see *R v Russell* [1933] VLR 59; *R v Clarke and Wilton* [1959] VR 645; *R v Nixon* (1990) 57 CCC (3d) 97.

licence on demand by the gardaí and to fail to provide samples in the context of routing checkpoints or arrests for drunk driving; Road Traffic Act 2010 ss 10 and 59.

In the circumstances of an arrest under s 30 of the Offences Against the State Act 1939, a person in custody commits a criminal offence for which the penalty is six months' imprisonment, if he fails, on request by a garda, to give an account of his movements or actions; s 52. The constitutionality of s 52 was upheld by both the High Court and the Supreme Court in *Heaney v Ireland*.[65] Some inconsistency with the later decision in *Re National Irish Bank and the Companies Acts*[66] may be noticed. In that latter case, the Supreme Court affirmed that the "general right to silence" derives "from the right to freedom of expression guaranteed to citizens by Article 40.6" of the Constitution; and see *Saunders v United Kingdom* [1996] 23 ECHR 313. Hence, a compulsion under ss 10 and 18 of the Companies Act 1990 to cooperate with court-appointed company inspectors and for such answers to be admissible in a subsequent prosecution violated the constitutional guarantee. If, notwithstanding the nature of the compulsion exercised, a statement was nonetheless voluntary, it was admissible. Similar reporting requirements are to be found in the Official Secrets Act 1963, s 11(2) and in the Taxes Consolidation Act, s 1079. Those, in particular the latter, more precisely describe when the reporting requirement arises. Section 11 of the Official Secrets Act 1963 requires a person who becomes aware that there has been or is about to be an act contrary to the safety or preservation of the State to forthwith disclose to a member of the gardaí or defence forces any information in relation thereto which it is in his power to give. Section 2 of the Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012 makes if an offence for a person who knows or believes that murder, manslaughter or specified sexual offences have been committed but fails without reasonable excuse to report information that might be of material assistance to the authorities. Section 3 casts identical obligations in relation to sexual offences against vulnerable persons. Section 2 contains a proviso that such duty "is without prejudice to any right or privilege that may arise in any criminal proceedings by virtue of any rule of law or other enactment entitling a person to refuse to disclose information." Similarly, where a person in possession of firearms or ammunition, fails when asked and "without reasonable excuse" to give information as the origin of the weapons, an offence under s 15 of the Criminal Justice Act 1984 is committed. A similar obligation to disclose information exists in the context of financial crime under section 19 of the Criminal Justice Act 2011. Section 9 of the Offences Against the State Act 1998 places an obligation on persons aware of the commission of serious offences, or the prospect of the commission of same, to come forward and share this information with the gardaí. In *Sweeney v Ireland*,[67] the Supreme Court construed this provision as requiring that a person provide information about crimes in which that person was not complicit. That construction of "without reasonable excuse" presumably applies to cognate provisions. This provision is almost identical in wording to section 9 of the 1998 Act and does not provide for any defence:. Section 19 of the Criminal Justice (Theft and Fraud Offences) Act 2001 provides that, when asked by gardaí, a person in possession of stolen property may be asked for an account of the origin of the property and refusal is an offence.

Section 18 of the Criminal Justice Act 1984 enables a court or jury to draw inferences where a person, on being asked, does not account for forensic signs on their person or clothing. Section 19 of the 1984 Act enables inferences to be drawn from a person's presence at what may be described as the scene of a crime, while section 19A enables inferences to be drawn from failure to mention a fact while being interviewed that is subsequently relied on in a criminal trial. In *Sweeney v Ireland*, the following comment was made by Charleton J as to the proper manner of analysis of such sections:

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65 [1994] 3 IR 593 (HC); [1996] 1 IR 580 (SC).
66 [1999] 1 ILRM 321.
67 [2019] IESC 39.

> A proper construction of these provisions requires that an inference may only be drawn, firstly, if it is proper to do so, and, secondly, it is clear that silence of itself in the context of such mark or the possession of such an implement as may give rise to such inference is insufficient for conviction; *Rock v Ireland* [1997] 3 IR 484. What these provisions as to inference thus have in common is that they are only evidence and are insufficient of themselves to provide sufficient proof for a conviction.[68]

Clearly, legislative provisions enabling what might already be regarded as common sense deductions to be drawn from particular circumstances differ from provisions which require the accused to report child abuse or serious crime committed or planned by others. According to the *Sweeney* decision, whether provided for or not in the legislation, a person is excused from self-incrimination and is only obliged by such provisions to report the actions and plans of others to which that person is not complicit.

(4) Depriving another of their property

It is inherent in the human personality, and in an ordered society, that people will be allowed to own goods. Article 43.1.1º of the Constitution provide that the State "acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods." Hence, the State may not abolish "private ownership or the general right to transfer, bequeath, and inherit property."[69] Such rights are, however, to "be regulated by the principles of social justice."[70] Furthermore, according to Article 43.2.2º "as the occasion requires", the State may "delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good." Hence, inheritance tax, income tax and other taxes are applied. An entire code under the Taxes Consolidation Act 1997 provides for evasion of tax and for failing to keep proper records as offences.[71] Moral individuals would consider that failing to genuinely estimate and pay tax is a category of wrong "the same as stealing."[72] The State vindicates the right to private property by providing for a range of offences related to property, including theft, obtaining by deceit and forgery. Outside of lawful taxation and compulsory purchase with adequate compensation, it is an offence for any party, including the State, to deprive a person of their property. If it were otherwise commerce could not function and violence would flow from disputes based on the use of force to seize goods. This is one of the key areas of criminal law and a large portion of this work is devoted to it, see Chapter 13.

(5) Crimes of ulterior intent

Apart from a voluntary action, the definition of the offence sometimes requires a further mental element to result in a particular consequence. For example, in murder the accused must intend to kill or to cause serious injury by his actions: Criminal Justice Act 1964, s 4. Thus the accused's mind was directed towards stabbing the victim: a voluntary action since it was an intentional action, but with the intention also that the wound would kill or cause serious injury to the victim. The most grievous assault was, up to 1997, committed when the accused intends by his actions to maim, disfigure or disable, or to do some other grievous bodily harm to the victim; s 18 of the Offences Against the Person Act 1861. Assault offences have now been recast in the Criminal Justice (Theft and Fraud Offences) Act 2001. The proper construction of the external and internal elements of a crime depends upon the terms of the statutory definition.

(6) Inchoate offences

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68 [2019] IESC 39, [25].
69 Article 43.1.2º.
70 Article 43.2.1º.
71 Taxes Consolidation Act 1997, s 1078.
72 Gran Torino (Eastwood, 2008).

Inchoate offences do not require that the victim was assaulted, robbed or that property was burnt down or blown up. These offences are attached to the planning of crime, incitement to commit crime and attempts to commit crime. The definition of inchoate offences involves a consideration of whether the conduct of the accused amounted to an attempt, a conspiracy, or incitement as well as the substantive offence to which these are related. Hence, to agree to murder someone is a criminal conspiracy for those in accord on the plan even though the victim knows nothing of the plan. To approach a person and seek to hire that individual to kill a person is the crime of incitement even though no murder ever happens. To burst into a bank with weapons but to be foiled by a security alarm and have to flee is still the crime of attempt even though no money was ever stolen. This is discussed in chapter 8. I THINK IT IS ANYWAY

(7) Aiders and abettors

Persons who do not themselves perpetrate an offence, in the sense of pulling the trigger or going into the bank and threatening the teller with a gun in pursuit of theft but supply the gun or encourage the commission of the offence, are considered separately under the rules relating to aiding and abetting an offence and the rules imposing liability for a common enterprise to commit an offence. The rules have been simplified and restated by the Criminal Law Act 1997.

Elements of Offences

The constituent elements of an offence are to be construed from an examination of the wording of the statutory or common law definitions. Serious criminal offences fit within the foregoing principles that a crime is punishable not simply because of the action, for instance the death of a person at the hand of the accused, but also because that accused intended to kill that person. For the kind of everyday transgressions that carry a fine, or perhaps some other punishment, such as parking on a double yellow line or littering or burning leaves in a prohibited zone, the criminal law is not designed so as to burden the State with proof of a mental element. Such less serious offences are based on the idea that thoughtless or careless conduct causing potential harm to society should be punished. Thus, there is a category of offences based on the idea that once something happens and the accused is legally responsible for this, that person should be punished no matter what he or she did or failed to do. Serious offences, however, require a mental element.[73]

The Mental Element

Criminal law, originating as it did from the moral law, retains the principle that liability depends on the coincidence of a mental element appropriate to the offence together with the commission of the external elements of that offence. Different crimes call for different mental elements. It should be noted that the greater includes the lesser. The person who intends also commits crimes of recklessness; he who is reckless is also criminally negligent. Instead of the vast array of definitions which are necessary to cover all the possible permutations of socially harmful behaviour that necessarily make up the criminal calendar, the mental element of a crime is capable of being classified into the following categories:

(1) *Intention and knowing* (often expressed in the statutory form, particularly in relation to property offences, as requiring that the accused should act knowingly). In terms of moral opprobrium, this is the highest level. A person accidentally setting fire to a kitchen is in a different moral category to one who does so deliberately. The accused acts with the purpose of committing the external element or being aware that the result will be the same. The accused then acts with intention. When the accused does more than suspect or believe something, for example, that a Euro note is forged, but actually knows that, he or she acts with knowledge.

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[73] *People v Murray* [1997] IR 360.

(2) *Recklessness and believing*. When the accused is or becomes aware that there is a substantial risk that an element of the offence is present, for example, that a woman is not consenting to sexual intercourse, but proceeds with intercourse or penetration in those highly culpable circumstances, the accused is reckless. Sometimes a statutory formula will found guilt on knowing or believing some state of affairs. Believing is advertent consideration of that state of affairs, but without certainty.

(3) *Criminal negligence*. This applies only to manslaughter and involves that kind of really bad negligence that is beyond that which establishes civil liability, for example failing to give soldiers at artillery ranges proper ear-muffs, but instead shows a disregard for the life and safety of others, for instance ordering or allowing artillery pieces that have cracked barrels to be used and which explode killing the soldiers, whether or not the accused actually adverts to that risk of explosion and death. If the risk did occur to the accused, he or she would be reckless; since it is a more serious mental element it is of course sufficient to found a conviction for manslaughter.

(4) *Negligence*. This is a failure to exercise reasonable care in all the circumstances of the case. Of itself it does not found offences but may be part of the next category.

(5) *Strict liability subject to a defence of reasonable mistake*. The external element of the offence is present but the accused acted without reasonable care to prevent, or not to cause, its occurrence.

(6) *Absolute liability*. The external element of the offence occurs due to the accused or in circumstances which make the accused liable.

Only the first two categories could truly be said to require mental states. These are the categories most often required by the definition of serious crimes. Criminal negligence is limited to the commission of manslaughter but logically should be extended to situations where, apart from death, the accused causes serious physical harm to the victim. Crimes of negligence are essentially regulatory in nature. The final two classifications are concerned with the less serious crimes which are truly regulatory in nature; that classification itself is suggested by Canadian authorities but which have found only limited favour in this jurisdiction.

Legal versus Moral Guilt

The mental element of a crime is concerned with legal, not with moral, guilt. Some examples will illustrate the point. Suppose A is charged with conspiring with B to export drugs from Thailand to Ireland. B is an undercover drug enforcement officer and at A's trial he gives evidence that he made the agreement with A and intended, with the authority of his supervisors, to carry out the scheme. His plan was to take the drugs into Ireland to entrap other drug dealers. A pleads that B cannot be a conspirator because he lacks the necessary mental element (if A is successful in this claim he will be acquitted, as it takes at least two people to make a conspiracy). The courts will hold that B does have the necessary intention to commit the agreed crime. Neither B's good motives, nor the superior orders under which he was acting, would necessarily be a defence if he were to be charged with the crime.[74]

Now suppose that C, a man with pederast inclinations, sexually assaults a young boy. He claims that he would not have given way to his inclinations and committed the offence but for drugs secretly administered to him by D. D secretly administered the drugs to C and to the boy so that he could obtain some compromising photographs of C for the purposes of blackmail. The drug did not render C insane nor did it render him an automaton. Its sole effect was to reduce his ability to resist his perverted inclinations. As C had intended to assault the boy, he will be properly

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[74] *Yip Chiu-Cheung* [1994] 2 All ER 924. There could be a defence of estoppel where the accused acted under official direction; *The People (DPP) v Casey* [2019] IESC 7.

convicted of the assault even though the intent arose out of circumstances for which C says he bears no moral blame.[75] D will be complicit in the crime and liable for encouraging or aiding the commission of the offence. C will be liable even though his resistance to temptation is weakened: once a person has even the slightest control over his conduct he should exercise it to prevent himself committing a crime.

Concurrence of the Mental and External Elements

The mental element and the external element must both coincide in order that a crime be committed. It is insufficient, for example, to commit theft that the accused mistakenly takes a fur coat belonging to another person, believing it to be hers, but on arriving home and discovering her mistake, decides to keep it. Theft requires that the accused intend to permanently deprive the owner of her goods. It would be otherwise if the definition of the offence were cast in terms of dishonestly handling another person's property: see the Larceny Act 1990. For offences which are defined in terms of a single act or omission the mental element must coincide at the point when the external element is committed. In many offences, the external element is defined as a continuing state of affairs; in those circumstances it is enough that the mental element appropriate to the offence should be present while those circumstances continue.[76] For example it is an offence to possess heroin. That offence is not committed where a packet of heroin is slipped secretly into a person's pocket. If that person later finds it, and keeps it, the offence of possession is committed. So also, the offence of handling stolen property is committed when the lady with the fur coat discovers her mistake and decides to profit from it by keeping it herself.

Examples

The following examples will illustrate the requirement of concurrence. Suppose a group of men conspire to murder another man in circumstances that will make it appear that the victim died by accident. They strike their victim over the head and, assuming he is dead, throw him off a high cliff. Medical evidence later reveals that the victim had not in fact been dead when thrown over the cliff, but had died from the fall. At their trial, the accused claim that they cannot be convicted of murder, arguing that when they threw the victim over the cliff they believed he was already dead and thus lacked the requisite mental element for murder at the time when the external element of the crime was carried out. They may have had an intention to kill the victim or cause him serious harm when they struck him over the head, but as that blow had failed to kill him, no offence of murder was committed. Such a defence will fail as the courts will view the actions of the gang, from the time they formed the intention to kill the victim to the time they threw him over the cliff, as one series of acts. In other words, all the events should be construed as one single transaction and cannot be divided up in the way that the conspirators contend.[77]

Now imagine a different set of facts. This time a single accused strikes his victim over the head with a piece of fence paling and drags the unconscious man into a telephone box. The victim dies by drowning in his own blood. This is because at some stage in the attack he received an injury to his respiratory system. As he was unconscious, he was unable to avoid inhaling his own blood. The assailant may claim that if the victim received the injury to his nose while he was being dragged into the phone box, the crime of murder has not been committed, arguing at trial that at that stage he did not possess the requisite mental element. The courts will take judicial notice of the fact that death may result from a number of different causes. If an act is a substantial and operative cause of death and is accompanied by the requisite mental element the ingredients of murder are all present. Here the assault with the paling is a substantial cause of death in that the victim would

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75 *Kingston* [1994] 3 WLR 519.
76 *Fagan v Metropolitan Police Commissioner* [1969] 1 QB 439.
77 *Thabo Meli* [1954] 1 All ER 373. See also *Church* [1966] 1 QB 59; *Le Brun* [1991] 4 All ER 673.

not have drowned in his own blood had he been conscious. As the assailant had the requisite mental element at the time of the beating he can properly be convicted of murder.[78]

Coincidence at the time of the offence

As to when coincidence of mental and external elements must occur depends on the definition of the offence. Continuing offences mean that where a person becomes aware of the wrong at any stage while that individual is bringing about the external element of the offence, he or she will be guilty. In Ireland it is an offence to be unlawfully at large from a sentence of imprisonment or remand.[79] At common law it was an offence to escape from lawful custody. Escape is an event. It may take planning and to bring about a jail break may require implements or the use of fraud or violence. While it takes time, it is still a choice made by the prisoner; an event complying with the "cardinal rule" that "the intent and the act must both concur to constitute the crime".[80] It would not be an offence, however, to be inadvertently at large. An example would be where prisoners were brought on an educational boating expedition to see monastic remains on Inis an Ghaill Crabhthigh in Lough Corrib but got lost in the maze of pathways and through a counting error on the boat, two were left behind. Through automatism, in *Scott*, something similar occurred.[81] The accused claimed to have wandered out of jail after a fellow inmate struck him on the head with a piece of timber. In the case, the reasonable doubt which the prosecution could not disprove was that he recovered a consciousness of his situation only when far away from the prison. Then he decided to travel to Sydney. Under the relevant Victoria law it was not an offence to be unlawfully at large. The Supreme Court of Victoria affirmed that there must be a coincidence of the mental element with the external element at the time when the external element occurred. As in the case of the person who mistakenly brings home the wrong article, and decides to exploit that fact, the later occurrence of a guilty or greedy mind cannot be transferred to the earlier point in time at which it should have concurred.

Gillard J, in his analysis, concentrated less on the voluntary nature of the act than on the failure of that act of leaving the jail, to be accompanied at the time of leaving by an intention to break custody:

> It is one of the fundamental principles of our criminal law that a person is not criminally responsible for an act which is done independently of the exercise of his will: see *R v Tolson* (1889), 23 QBD 168; [1886-90] All ER Rep 26; *Hardgrave v R* (1906), 4 CUR 232, at p 237; 13 ALR 206, at p 207. The legal problem raised by the alleged defence is a nice one. If his story were true, at the time the applicant was missing from the working party, his mind did not go with the act. The difficulty that arises from such a statement, however, is to give a proper and accurate meaning to the word 'act'. It has been accepted by eminent jurists both in the British Commonwealth and the United States, that those acts which carry legal liability must be willed movements or voluntary omissions: see *Salmond's Jurisprudence,* 7th ed, pp 381-2. 'In legal understanding an *act is* an exertion of the will manifested externally. It implies a choice. A convenient distinction sets off acts 'voluntary muscular motions' from events, those occurrences which take place independently of human will': *Roscoe Pound, Jurisprudence,* vol 4, pp 410 *et seq.* It has, accordingly been said that 'no involuntary action, whatever effects it may produce, amounts to a crime by the law of England'. See *Stephen's History of the Criminal Law,* vol 2, p 100; *Stephen's Commentaries,* 21st ed, vol 4, p 14; of *Holmes, The Common Law,* p 54. According to the opinion of the jurists, the exercise of the will is essential to the *actus reus* of an offence, quite apart from the existence of the *mens rea:* see article by *JWC Turner* in *Modern Approach to Criminal Law,* pp 200 *et seq; cf Glanville Williams, Criminal Law*, pp 10-21.

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78 *McKenna* [1980] 2 NZLR 31. See also *S v Masilela* 1968 (2) SA 558 (AD).

79 Criminal Justice Act 1960, s 6.

80 *Reynhoudt* (1962), 107 CLR 381, 386; [1962] ALR 483, 484; *Hardgrave v R* (1906) 4 CLR 232, 237; 13 ALR 206, 207.

81 [1967] VR 276.

> Whatever differences they may entertain as to the precise nature of an 'act', the jurists would probably describe the movement of the applicant (if his story be true) from the prison working area to the Hume Highway (since it was done involuntarily) as an *event* but not an *act* of the applicant: *Roscoe Pound, Jurisprudence,* vol 4, pp 410 *et seq.* See also *Paton's Jurisprudence* pp 273-6; *cf Kilbride v Lake* [1962] NZLR 590, at p 593. But even if it can be considered as an *actus reus,* it is well established that there must be a *mens rea* to which the *actus reus* must be attributed. There must be a causal relationship between the two ... Despite the rule established in *R v Riley* (1853), Dears 149; 169 ER 674; [1843-60] All ER Rep 675, in relation to larceny, the better opinion now appears to be that 'the intent and the act must both concur to constitute a crime': *per* Lord Kenyon, CJ, in *Fowler v Padget* (1798), 7 TR 509, at p 514; 101 ER 1103, at p 1106; see *Hale PC,* vol 1, pp 229, 560; *Stephen's History of the Criminal Law of England,* vol 2, pp 97, 112; *Glanville Williams, Criminal Law, p* 494; *Russell on Crime,* 12th ed, p 54; 3 *Current Legal Problems* (1950), at p 150; (1950), 66 LQR at p 202; *cf R v Flowers* (1886), 16 QBD 643, at p 646; *R v Harrison-Owen,* [1951] 2 All ER 726; [1951] WN 483; *Korp v Egg and Egg Pulp Marketing Board* [1964] VR 563, at p 566 ...

Another concept designed to result in substantial justice is that which seeks to transfer the mental element from the crime which the accused seeks to commit to a different crime actually committed by him or her.

Transferred Malice

Suppose A, with the requisite mental element for a particular crime, does an act which causes the external element of the same crime but not in a manner so as to bring about the result A desired. For example, suppose A intends to murder B because B is his wife's lover. One dark night he fires a shot across the street at a man whom he believes to be B by reason of that man leaving the company of his wife. In fact the man he has killed is C, a solicitor to whom she had gone for advice on her problems. In one sense this is an unintended result since A intended to kill B. However, he has caused the external element of murder and did so with the requisite intention for murder. Therefore, we say that A may be convicted of murder.[82] The same principle applies if A does actually shoot at B but misses and kills C who is standing just behind B.[83] This principle operates only when the external element and the mental element of the same crime coincide. Thus, if A shoots at B's dog with the intention of killing it, but misses and fatally wounds B who is standing next to the dog, A cannot be guilty of murder as he does not have the mental element of that crime. His criminal negligence in the use of a firearm, however, will found a manslaughter charge.[84]

In *Attorney General's Reference* (No 3 of 1994),[85] Lord Mustill refused to extend the principle of transferred malice and concluded that the principle "Like many of its kind … is useful enough to yield rough justice, in particular cases, and it can sensibly be retained notwithstanding its lack of any sound intellectual basis."

Intention[86]

Often in a criminal trial there will be no contest as to the mental element of an offence. The issue will be as to whether the right person is before the court; in other words, was it the person in the dock who robbed the bank? The course of everyday events indicates that the common sense

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82 See *Wrigley* [1957] Crim LR 57; *Hussain* [1969] 2 QB 567; *Ellis* (1976) 24 CCC (2d) 276.

83 *Mitchell* [1983] QB 741.

84 *The People (DPP) v Mahon* [2019] IESC 24.

85 [1997] 3 All ER 936.

86 Antje Pedain, 'Intention and the Terrorist Example' [2003] Crim LR 579-93; Dana Kay Nelkin and Samuel Rickless, 'The relevance of intention to criminal wrongdoing' (2016) 10 Crim Law and Philos 745-762; Itzhak Kugler, 'Conditional Oblique Intention' [2004] Crim LR 284-90; Ivana Bacik, 'If it Ain't Broke? A Critical View of the LRC Paper' (2002) ICLJ 6; John Stannard, 'Murder, intention and the inference of intention' (1999) 34 Irish Jurist 202; Ronan Keane, 'Homicide: the Mental Element' (2002) 1 Judicial Studies Institute Journal 66.

approach of inferring the mental element of an offence from all of the surrounding circumstances is correct. If a person disguises himself and holds up a bank teller, managing to escape with €100,000, few people would seriously entertain an argument that he had no intention to deprive the bank permanently of its cash. Intention is not only a component of murder but also of burglary, theft and many other statutory offences. Usually, the concept causes no issue.

In murder trials there is often a real contest, and this is sometimes the only issue, as to whether the accused intended to kill or to cause serious injury to the victim. This is the mental state required by s 4 of the Criminal Justice Act 1964. The course of human affairs is such that people, unless they are trained to pursue killing to earn money or in pursuit of a political ideal, rarely kill unless they are driven to the extremes of passion. Intention is a simple word which, when it is used in the definition of a criminal offence, requires that a person be proved to have acted with the purpose of causing the harm or circumstance outlawed. In other words, that the accused meant to do what he or she did.

In the ordinary state of affairs, the concept of intention and the circumstances from which it may be inferred should cause no difficulty. Intention and desire can be the same or not. A person stuck on a sinking boat may have no desire that a companion should die but in throwing that other overboard will intend, but not desire, that the person drowns. Mental contortions may mean that the person might say that the intention was self-preservation, but an intention to kill may be inferred. The difficulty on the case law has arisen where juries are instructed that foresight of consequences, or even certainty of consequences, constitute intention. That is not so, but the function of the jury is to find facts and not to have facts artificially constructed through legal reasoning. A person may intend a result but fail. The person still intends. Suppose, having watched 'A Perfect Murder'[87] a person believes that finely ground glass put in a soufflé will kill an elderly relative, that course is taken. The glass has no effect but the person still intended to kill. Were strychnine used, resulting in death, the intention is the same but the methodology coupled with the result more naturally leads to the conclusion that this was an intentional killing.

The application of the simple concept of intention to events can lead to sometimes unconvincing reasoning. In *Hyam*,[88] the accused lady had a relationship with a man who then moved in with another woman. She poured petrol through the letterbox of that house and ignited it. She knew that there were people asleep there. Two children died in the fire. The jury, at her subsequent murder trial, were directed that the necessary intention for murder was present if she foresaw death or grievous bodily harm as a highly probable result of her actions and that it was not necessary to prove that she wanted or aimed at that happening. The House of Lords agreed. In *Moloney*,[89] the victim was killed by his apparently affectionate stepson in the course of a mad contest, with loaded shotguns, as to which of them was quicker on the draw. Following a taunt to pull the trigger, he did so and discharged the shotgun directly at the victim's head. The House of Lords disapproved a direction to the jury that the accused intended serious bodily harm if he foresaw that serious bodily harm would probably happen. Lord Bridge indicated that foresight of a consequence as being probable or likely was not to be taken as the equivalent of an intention but that juries might infer intent from such a state of mind. The meaning of intention was a matter for a jury to decide. Such an approach would be potentially disastrous as it would leave a vital component of many offences undefined. Lord Bridge went on to say that in cases where the accused had a purpose other than causing the prohibited harm, but where the result was an inevitable or likely consequence, the jury should be directed to consider whether the relevant forbidden result was a natural consequence of the accused's action and whether he foresaw it as such. If he did foresee it, it would be proper to infer that he had intended such a forbidden consequence. Lord Bridge was referring to "oblique intention" where, for example, a person wishes merely to destroy an

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87 Episode of the TV series Alfred Hitchcock Presents, 1956.
88 *Hyam v DPP* [1975] AC 55.
89 [1985] AC 905.

airplane in order to collect insurance money but knows that the one hundred passengers and crew will not survive the bomb he intends to explode. The better analysis would surely be that where the accused foresaw death, the action in question may properly found an inference that death was intended.

In *Hancock and Shankland*[90] two miners, during a major strike pushed a concrete block off a bridge on top of a taxi identified as taking a miner to his work. It killed the taxi driver. The miners claimed they intended to push the block from the bridge onto a different lane of the motorway to the one in which the taxi was travelling; that they intended to frighten the working miner but not to hurt anyone. A direction in accordance with *Moloney* was given and the subsequent conviction was overturned by the House of Lords. That direction was wrong because it failed to refer to the probability of the consequence occurring, which was of vital importance. The greater the probability of a consequence the more likely it was foreseen and consequently intended. Foresight was not to be taken as equivalent to intention and even the highest degree of probability was only a factor to be considered by the jury in the light of all the evidence in order to decide if the accused acted with intent. This is correct since the function of the jury is to find whether the accused has had proven against him or her the elements of the offence. Certainly, as in s 2(2) of the Criminal Law (Rape) Act 1981, the presence or absence of grounds for belief or for any other state of mind is a matter of inference based on the circumstances. This is a general proposition both of good sense and of common law. Reality, and not the alternative universe of law world, is the basis for adjudication of facts through shrewdness and sense. Inference from facts and legal principle are not to be conflated, however. In *Nedrick*,[91] the Court of Appeal indicated that an accused would need to foresee a consequence as a virtual certainty, barring some unseen intervention, if the inference of intent was to be made. Where an accused realised that a consequence was for all practical purposes inevitable, then the inference that he intended such a result might be irresistible. Smith and Hogan[92] summarise the decisions thus:

> (1) A result is intended when it is the actor's purpose to cause it;
>
> (2) A court or jury may also find that a result is intended, though it is not the actor's purpose to cause it , when:
>
> (a) the result is a virtually certain consequence of the act, and
>
> (b) the actor knows that it is a virtually certain consequence.[93]

Intention is a simple concept. It either exists or not. In *The People (DPP) v Reddan*[94] the Court of Criminal Appeal faced an argument that intention might exist but might be somehow flawed. The court held that there is no such thing as a defence of flawed intent:

> In essence [counsel for the accused] was submitting that in answer to the charge of murder his client could rely on a defence of flawed intent; that he should have been allowed to call medical evidence in support of that defence, and that it should have been left to the jury by the trial judge. [Counsel] did not seek to rely on any authority in support of this defence. And the Court is satisfied that it is not supported by any authority. When a person is charged with an unlawful killing and the actual killing is not denied only two defences are possible: provocation, which would have the effect of reducing the offence to manslaughter, and insanity, which would result in a finding that no crime had been committed at all (see *The People (DPP) v O'Mahony* [1985] IR 517). [Counsel] does not seek to rely on either of those

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90 [1986] AC 455.

91 [1986] 3 All ER 1. And see *Woollin* [1998] 3 WLR 382, noted at (1998) 148 NLJ 1636.

92 *Criminal Law* (15h ed, 2018) 91. See also Simester and Sullivan. *Simester and Sullivan's Criminal Law* (7th edn. Hart Publishing 2019), 149.

93 For an interesting discussion of these cases see Norrie, 'Oblique Intention and Legal Politics' [1989] Crim LR 793; *MD* [2004] ECWA Crim 1391.

94 [1995] 3 IR 560.

> defences but submits that there are degrees of intent, and that if the jury found that the intent of his client was flawed, she should be found guilty of manslaughter only and not murder. The Court is satisfied that no such defence exists in law.[95]

A guide to intention

Astonishing cases where a person intends to cover up evidence of a fraud by blowing up a suitcase on a flight, foreseeing that the plane will crash but hoping for the best, or where a person is stuck tight in a narrow cave and companions must dismember the living body to escape, are generally in the realm of fiction. What is central is that intention is to be regarded as equivalent to purpose and that while desire of the result usually accompanies purpose, it is not essential. While foreseeing death as a consequence of an action is a sound basis for inferring that death was intended, as a concept from the law of negligence, foresight is not legally equivalent to intention. Lack of desire is not equivalent to lack of intention and lack of competent means to bring about a desired result may mean that intention is less easily to be inferred, but intention may nonetheless be present. Ordinary sense would suggest that the more certain is death seen to be a consequence of the actions of the accused, the more readily it may be inferred that such was the intention. In *Clifford v DPP*,[96] the issue was whether actions on the street by the accused were intended by him to cause a breach of the peace. One of the arguments advanced was that since only trained gardaí were present, they were hardly likely to react to the provocations of the accused by breaching the peace. The statutory formula made the intention in itself the central element of the offence. Charleton J explained the concept of intention thus:

> A person may intend to blow up a plane in flight and so kill the passengers. That is direct intention. A person may claim to intend only to blow up a suitcase in a plane in flight but hope, that through some miracle, all the passengers in the plane will survive. It might usefully be noted, on the relevant case law, that the closer the impugned conduct comes to inevitably causing the consequence charged, as for instance in that example intending the death of the plane passengers, the more readily a court may feel able to infer that intention, in the example given of causing death, against the accused. The more obscure the consequence, the less readily can the inference of an intention in that regard be made. In no instance, whether of direct intention or oblique intention, is the inference that the accused intended either an act or its consequences automatically to be inferred from particular behaviour. In each instance, it is a matter of judgment for the court.[97]

The court urged that rather than enable the theoretical intrusion of concepts unrelated to the issues at trial, analysis of the mental element of a crime should be placed in the context of "the building blocks of the case" at trial.[98] The interaction between the facts at trial and the inferences from those facts was a matter not of law but of good sense:

> The fact that it may be very difficult for a particular accused to achieve the wrong which is the subject matter of the charge does not mean that he did not have the intent to bring it about. To return to the explosion on the plane example, it might be very difficult, for instance, to mix a viable bomb from a number of small vials of liquid, within the current guidelines for what a passenger can carry in their hand luggage, that have been brought onto a plane by a number of persons; but that does not mean that an accused may not have acted with the purpose of combining these liquids together, or with other substances, to make an explosive. His making a bomb on a plane may lead to an inference that he intended to explode it and kill himself and the passengers. That deduction may be made, depending on the facts proven, by the court of fact on all the elements proved by the

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[95] ibid 569.
[96] [2008] IEHC 322.
[97] ibid [10].
[98] ibid [13].

> prosecution but it does not have to be made. There may be evidence suggesting an alternative of a hijacking or a violent protest about some political matter. This may be likely or unlikely, but in considering all of the evidence, the court of trial is looking at what is necessarily to be inferred as to the purpose of the accused from the accused's conduct and is also looking at what possible alternatives may reasonably arise to operate as a doubt in the accused's favour. If he is consciously doing whatever he can to bring about the criminal wrong in question, that means it is his purpose. That constitutes an intent to commit the offence. The fact that the consequence is very difficult, or is very easy, to bring about, on the facts proved in an individual case by the prosecution, is a matter upon which an argument may be made to the court of trial as to whether the accused had that intent, or did not have that intent. All of this is a matter for the construction of the relevant evidence. Again, based on the example given, the fact that the accused did everything logically necessary to cause an explosion on board an aircraft may, but not must, lead to an inference that this was his purpose. The fact that the scale of that explosion was highly likely to destroy the plane may, but not must, lead to an inference that that was his purpose. That fact that people die when a plane explodes in mid air may, but not must, lead to an inference that he intended to kill. At the other end of the scale, the fact that it was not likely that the accused could, with the materials he and his accomplices had in their hands, cause an explosion may, but not must, be a matter from which an inference may be drawn against his ever having had such an intent or of intending any consequence to such an explosion.[99]

Just, however, as desire may be relevant to inferring intention, but may not be equivalent, what drives people to commit a crime is not the same as their intention. Motive may be a powerful element in the proof of intention.

Motive

Motive is properly introduced into evidence to assist the prosecution in proving the crime. Absence of motive can assist the accused in defence. If a person has a reason, such as financial embarrassment, to embezzle, then an inference may arise from that fact. Where a person has insured a relative's life before travel, then death by poisoning may point to the insurer as the perpetrator. Evidence of motive alone could not be enough to soundly convict without other evidence. Evidence of lack of motive, on the other hand, may suffice to raise a reasonable doubt as to guilt. Motive is never part of the mental element of a crime. It is the underlying impetus which may lead to the commission of the crime. For example, someone may wish to fake their death in order that their family may collect life insurance money. So they leave their clothes on a beach and assume a new identity, hoping the insurance company will believe that they have been drowned in a swimming accident. In *Chandler v DPP*,[100] the accused were charged with conspiracy to enter a military base for a purpose prejudicial to the safety or interests of the state. They claimed that their actions had been for the purpose of drawing the public's attention to the danger of nuclear weapons. In their opinion reducing the risk of a nuclear holocaust was not something which could be described as being prejudicial to the safety and interests of their country. A majority of the House of Lords held that the offence had been proven and that motive was irrelevant. What was important in deciding liability for a crime was whether it was that person's purpose to bring about the external element of the offence.

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99 ibid [12].
100 [1964] AC 763.

The fact that someone has a motive, or lacks a motive, to commit an offence is capable of being evidence.[101] In *Lewis*,[102] the accused was charged together with Tatley with the murder of Tatley's daughter and son-in-law. The physical act of murder was committed by Lewis. He posted to the victims a bomb in the form of a kettle rigged with dynamite. This exploded on being plugged in. The issue on appeal to the Supreme Court of Canada was whether the trial judge should have admitted evidence that Tatley was angry that his daughter had married without his consent and whether the jury should have been instructed that Lewis had no motive for the bombing. Dickson J stated the relevant principles as being:

(1) As evidence, motive is always relevant and hence evidence of motive is admissible.

(2) Motive is no part of the crime and is legally irrelevant to criminal responsibility. It is not an essential element of the prosecution's case as a matter of law.

(3) Proved absence of motive is always an important fact in favour of the accused and ordinarily worthy of note in a charge to the jury.

(4) Conversely, proved presence of motive may be an important factual ingredient in the Crown's case, notably on the issue of identity and intention, when the evidence is purely circumstantial.

(5) Motive is therefore always a question of fact and evidence and the necessity of referring to motive in the charge to the jury falls within the general duty of the trial judge 'to not only outline the theories of the prosecution and defence, but to give the juries matter of evidence essential in arriving at a just conclusion'.

(6) Each case will turn on its own unique set of circumstances. The issue of motive is always a matter of degree.[103]

Dickson J explained the centrality of both motive to kill and the asserted absence of any animus against the deceased by the other accused:

> The necessity of charging a jury on motive may be looked upon as a continuum at the one end of which are cases where the evidence as to identity of the murderer is purely circumstantial and proof of motive on the part of the crown so essential that reference must be made to motive in charging the jury. The Crown's case against Tatley was such a situation. It was essential to establish motive and the trial judge properly referred to motive in charging the jury in relation to Tatley. At the other end of the continuum, and requiring a charge on motive, is the case where there is proved absence of motive and this may become of great significance as a matter in favour of the accused. Between these two end points in the continuum there are cases where the necessity to charge on motive depends upon the course of the trial and the nature and probative value of the evidence adduced. In these cases, a substantial discretion must be left to the trial judge. In *Imrich* (1974) 21 CCC(2d) 99 6 OR 496, 39 CRNS 77, for example, the evidence of exclusive opportunity was such that motive receded into the background.[104]

A similar approach in accepting motive as evidence was adopted in 1929 by the Court of Criminal Appeal in *Attorney General v Joyce and Walsh*.[105] The main point of the appeal was that evidence had been improperly admitted purporting to prove the commission of a separate crime, consisting of a previous attempt to poison the deceased, Daniel Walsh. One Mary Kelly had given evidence that the accused, Joyce, used to take his meals with Daniel Walsh in the house of the deceased and that on one occasion the deceased was heard to complain about his food. On one other day when the deceased was drinking his tea "and got some taste on it", the deceased complained of the taste in

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101 Kent Roache, *Criminal Law* (7th edn, Irwin Law 2018) 208-211.
102 (1979) 47 CCC (2d) 24; [1979] 2 SCR 821.
103 ibid 821.
104 ibid 837.
105 [1929] IR 526.

the tea. The accused, his wife, Mrs Walsh, who was present, proclaimed that there was no taste on the tea, but that any taste was due to a difference in the milk. The evidence was that Joyce had, in the presence of Mrs Walsh, put guano in the milk which had then been put specifically into Daniel Walsh's, the deceased's, tea. An objection was taken to the admissibility of this evidence and to further incidents of apparent attempted guano poisoning by the two accused. The report indicates that evidence of attempts to commit prior poisonings by an accused person may be relevant in establishing motive which, in turn, may show an animus by the accused persons towards the deceased which can assist in showing, by way of motive, the perpetrator of the ultimate crime. Having examined the authorities, Sullivan P stated:

> This Court is of opinion that the fact that the prisoner Joyce, to the knowledge of the prisoner Annie Walsh, put guano into the milk which was used by the deceased in his tea was admissible in evidence against the prisoners. It formed part of one entire transaction which was under investigation by the jury; it presented one aspect of the relations existing between the prisoners and the deceased, just as the intrigue between the prisoners and the attempts to conceal it illustrated another. The fact that it was stated to have occurred 'a long time before the deceased met his death' would affect the weight to be attached to it by the jury, but is not sufficient to necessitate its exclusion from their consideration.[106]

This principle has been consistently applied. In *The People (DPP) v Nevin*,[107] the accused ran a public house and bar food business on the N11 in Wicklow. Her husband was killed late at night by a single shot to the heart while checking accounts in a back office. The premises were apparently ransacked and the accused was lightly tied up on her bed. All of the staff working in the kitchens and bar had been told not to return and sleep on the premises, as was their custom, after a dance in the nearby town. Evidence was admitted at trial by Carroll J that the accused had attempted to suborn three individuals to kill her husband and to do so in circumstances where it would be made to appear as if what was involved was a robbery. The Court of Criminal Appeal analysed the evidence as relevant to motive in proving that the accused had arranged for the death of her husband in the manner in which it was ultimately carried out. Geoghegan J followed the reasoning in *Joyce and Walsh*:

> In Attorney General v. Martin, Joyce and Walsh [1929] I.R. 526 this Court (Sullivan P.) considering the admissibility of evidence of an attempt to poison a deceased person some years earlier as evidence of ill will and hostility by the accused persons towards the deceased much later, adopted with approval the following passage from the judgment of Kennedy J in R v Bond [1906] K.B.389
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> "Within this same limitation I think, come the cases of trials for murder with felonious intent, in which evidence is admissible to show prior assaults by the prisoner upon the murdered or injured person and menaces uttered to him by the prisoner, or to show conversely irritating behaviour by the deceased to the prisoner, as in R. v. Hagan. The relations of the murdered or injured man to his assailant, so far as they may reasonably be treated as explanatory of the conduct of the accused as charged in the indictment are properly admitted to proof as integral parts of the history of the alleged crime for which the accused is on his trial.[108]

At trial, and on the appeal, the principle was argued by the prosecution that prior acts and declarations could be used as evidence of motive. The court upheld that argument:

> [T]he State relied upon the foregoing passage and argued further that the evidence supporting the solicitation charges was admissible also as evidence of motive to show that

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106 ibid 541.
107 [2003] 3 IR 321.
108 ibid 343.

it was more probable that the applicant committed the murder citing the following passage from the judgment of Lord Atkinson R v. Ball [1911] AC 47 HL:

> "Surely in an ordinary prosecution for murder you can prove previous acts or words of the accused to show that he entered ill feeling or enmity towards the deceased, and this is evidence not merely of the malicious mind within which he killed the deceased, but of the fact that he killed him. You can give in evidence the enmity of the accused towards the deceased to prove that the accused took the deceased's life. Evidence of motive necessarily goes to prove the fact of the homicide by the accused, as well as his "malice aforethought" in as much that it is more probable that men are killed by those who have some motive for killing them then by those who have not."

It is inescapable that the presence or absence of motive for the commission of a crime is a relevant and indeed may be an important consideration to be taken into account during the deliberations of jurors.

The court is satisfied that evidence of attempts by the applicant to persuade witnesses to kill her husband, together with evidence as to her suggestions as to how his murder should be perpetrated comprised evidence of extreme hostility and ill will on the part of the applicant towards her husband and was accordingly admissible in her trial on the charge of murder.

Furthermore evidence of complaints by the applicant to persons whom she was soliciting to murder her husband that she was the recipient of brutal treatment at his hands together with evidence of an express statement allegedly made by her during the course of solicitation that after his murder she would benefit from his estate clearly comprised evidence of motive and was similarly admissible in the trial of the applicant for murder.[109]

This principle has been subsequently followed.[110]

Knowledge[111]

While it is not correct to say that knowledge is the equivalent of intention, as the mental element of crime, knowledge implies a highly culpable state of mind which is equivalent, in gravity to intention. Offences which require knowledge include that of knowingly permitting a place to be used for the purpose of dealing in drugs, contrary to s 19 of the Misuse of Drugs Act 1977. It is only where the offence is so grave that it requires an ultimate state of mind equivalent to intention, or where, as in the case of permissive offences under the Misuse of Drugs Acts 1977 and 1984, the Oireachtas outlaws what is otherwise the innocent activity of being aware of the commission of a crime, that knowledge is chosen as the mental element. As is the case with the vast bulk of criminal offences which depend upon either intention or recklessness as a mental element, where the Oireachtas chooses knowledge as the mental element it is virtually invariably coupled with an alternative mental state of recklessness or of belief. An example of this is provided by s 1078 of the Taxes Consolidation Act 1997. Sometimes the Oireachtas responds by re-defining knowledge outside the terms of the fundamental common law definition of that offence by, in effect, defining knowledge as having reason to suspect the existence of the fact or situation which is outlawed. Another example of this is provided by s 29(1) of the Misuse of Drugs Act 1977. This is discussed separately in this text as an example of a reversed burden of proof.

Knowledge, in criminal law, is that state of mind which is beyond believing in some state of affairs, or taking a risk that a state of affairs is as it may be thought to be. Knowledge is a state of mind which is not just rash or casual or incautious, but a state of mind whereby the accused has embraced as fact that state of affairs of which the prosecution accuse him. This suggested

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[109] ibid 344.
[110] *DPP v EC* [2016] IECA 150.
[111] Paul McCutcheon, 'Knowledge and the actus reus of possession offences' (1997) 32(1) Irish Jurist 119-144.

definition is taken from the discussion of the Supreme Court in *Hanlon v Fleming*.[112] A warrant had been issued in England for the arrest of the accused and his extradition from Ireland was sought. He had been charged in England with dishonestly receiving stolen goods, namely, nine electric detonators and four ounces of plastic gelatine, knowing or believing that these were stolen goods. This offence was defined by s 22(1) of the Theft Act 1968 of the United Kingdom. Correspondence between the offence for which the accused is requested and an offence in Ireland, must be proved if the accused is to be extradited. Thus it was necessary to decide whether s 33(1) of the Larceny Act 1916, then in force, contained corresponding elements. In general, where an offence in Ireland contains three elements, A, B and C, the offence on which extradition is sought must contain at least those three elements. If, in addition, the definition of the crime contains a further element which makes the offence more onerous of proof on the prosecution, it does not affect the rights of the accused and extradition will be granted. If, however, the offence sought has only two elements, A and B, then extradition will not be granted because conviction of that offence in the requesting country will be easier than in Ireland. In that situation correspondence is absent. Section 33(1) of the Larceny Act 1916 provided that every person who receives any property knowing that it had been stolen or obtained unlawfully would be guilty of an offence. In the context of determining whether there was correspondence, the Supreme Court discussed the meaning of knowledge in criminal law. Henchy J affirmed that where a statute requires that the accused know of the defined wrong, this requires a particular mental state:

> Actual knowledge of the fact that they were stolen is of the essence of the offence. This is not the same as direct knowledge, such as an accused would have if he saw a looter smash a shop window and abstract goods which were displayed inside. Of course, the actual knowledge may be proved circumstantially. In giving the judgment of the Court of Criminal Appeal in *The People (Attorney General) v Berber* [1944] IR 405 Black J said at pp 411-412 of the report:
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> > The question of guilty knowledge is well dealt with *in Wills on Circumstantial Evidence*, 7th ed, p 103 in the following passage: "It is not necessary that the receiver of stolen property should have obtained a guilty knowledge by direct information; it is sufficient if the circumstances under which it was received were such as must have satisfied any reasonable mind that it must have been dishonestly obtained." The word "must" deserves emphasis in both places where it occurs in this passage.
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> The judgment went on to say:
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> > The fact that a person has been so imprudent that he did not know that the property was stolen, when, if he had not been so imprudent, he would have known it, is a negation of guilty knowledge. It would be absurd to regard it as a proof of the very thing it negatives. To set up ordinary prudence as the test of guilty knowledge is to make imprudence a necessary badge of fraud, whereas a reasonable mind may often be satisfied that property was received under circumstances indicating a transaction that was casual or incautious, indiscreet or venturesome, or even rash, without being criminal.[113]

Belief and knowledge were not the same concepts. Knowledge demanded a higher degree of certainty than belief:

> While knowledge and belief frequently coincide or overlap (for example, I both know and believe that this is the Supreme Court), there are many matters which one may believe to be correct without being able to say that one knows them to be correct. For example, I may believe that there is life in outer space. that evolution is the origin of species, that a particular

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112 [1981] IR 489.
113 ibid 496.

> person did a particular act, but I may have to admit that I do not know, or do not know with any substantial degree of certainty, that such beliefs are well founded. Without entering into the intricate logical, metaphysical and philosophical problems involved in a comparison of knowledge with belief, and keeping the matter on the plane of ordinary usage (which is, presumably, how it would be dealt with by both judge and jury), I would point to the commonly used expression 'I believe it to be so, but I do not really know'.[114]

Henchy J emphasised that the difference between knowledge and belief encapsulated a moral judgment within the legislation and required a mind guilty to that standard, quoting this passage from Glanville Williams in his *Textbook of Criminal Law* at p 87:

> The word "knowing" in a statute is very strong. To know that a fact exists is not the same as taking a chance whether it exists or not. The courts ought not to extend a *mens rea* word by forced construction. If, when Parliament says "knowing" or "knowingly", it does not mean actual knowledge, it should be left to say as much by amending the statute.[115]

It could be said that knowing something amounts to "correctly believing"; you know something and you are correct.[116] But knowledge is a subjective state: just because something is so does not mean that the accused knows it to be so. As with intention, the more obvious the circumstances giving rise to the state of affairs required by the definition of the crime, the more readily an inference of knowledge may, but not must, be drawn. The more obvious the fact, the more readily an inference may be made that the accused knew that fact. Knowledge is not the same as "having a pretty good idea".[117] Consequently, statutory formulae in the definition of crime more usually require knowledge or belief. In that regard, suspicion may not be equated with belief unless, the fact occurring to the accused, a deliberate decision is made to set aside the need for obvious enquiries in favour of wilful blindness.[118] In such circumstances, the jury is entitled, but not bound, to infer that such deliberate shutting out of the apparent truth may establish belief. As a matter of ordinary reasoning, circumstances where people do not enquire as to the exceptionally low price of goods because the wrong answer may be likely to be forthcoming are regard as the kind of culpable state of mind that may be considered as belief.[119]

Permitting

In *The Incorporated Law Society of Ireland v Carroll*[120] Murphy J held that the word "permit" in a criminal statute imports a requirement of knowledge. Knowledge could be either actual knowledge of the event in question or a deliberate shutting of one's eyes to the obvious. An example of that would be where records were kept as to the hours which a driver worked, and which showed that the driver had worked more hours than were permitted by law. A refraining from looking at such records would amount to the requisite knowledge. See also *Duncan v Gleeson*[121] quoted below.

Wilfully

While the concept of acting wilfully is rarely found in modern statutes, it implies a subjective knowledge of the external wrong and a decision to either bring it about, or where it is a question of a requirement of care, to favour neglect. In *Sheppard* ,[122] the charge was of wilfull neglect of a child leading to the death of that child. Lord Keith correctly, in the light of later English decisions,

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114 ibid 497.
115 ibid 498.
116 *McCullum* (1973) 57 Cr App R 645
117 *R v Woods* [1969] 1 QB 447.
118 *Griffiths* (1974) 60 Cr App R 14.
119 Smith & Hogan, *Criminal Law* (8th ed, OUP 1996) 114-115. *DPP v Byrne* [1998] 2 IR 417
120 [1995] 1 JIC 2402, 1995 WJSC-HC 879; [1995] 3 IR 145 . See also *Grays Haulage Co Ltd v Arnold* [1966] 1 WLR 534.
121 [1969] IR 116.
122 [1981] AC 394.

defined the "primary meaning" of the word as "deliberate". Thus it is acting wilfully if a carer "knows that his child needs medical care and deliberately, that is by conscious decision, refrains from calling a doctor".[123] In *The Incorporated Law Society of Ireland v Carroll*,[124] Murphy J emphasised that use of wilful as a statutory formula depends for definition on the surround words and statutory context:

> Counsel … has drawn attention to the word 'wilfully' which governs the three activities prohibited by section 59 of the [Solicitors Act], 1954. Undoubtedly that word imports a degree of knowledge or intent. The use of such a word is of particular importance in conjunction with another word which, unlike the word 'permit' is neutral as to the intent or otherwise on the part of the party causing the action to occur. This appears from the decision in *Maguire v Shannon Regional Fisheries* [1994] 2 ILRM 253 where Lynch J held that the word 'cause' in section 171(1) of the Fisheries (Consolidation) Act 1959 included acts which happened negligently or inadvertently and that the word 'intentionally' or 'knowingly' was not implied by the use of that word. In the Solicitors Act 1954 the inclusion of the word 'wilfully' would have a particular significance in relation to paragraphs (a) and (c) of subsection (1) of section 59 as it would establish that an intention to perpetrate the wrongdoing or knowledge of it was required to establish the offence. However, in relation to the wrongdoing identified in paragraph (b) of that subsection, the word used is 'permit' and, following the decision of Lord Parker CJ [in *Grays Haulage Company Ltd v Arnold* [1969] IR 116], it seems to me that the word of itself imports a requirement of knowledge. The use of the word 'wilfully' in conjunction with 'permit' may underscore that requirement or obviate any doubts which might otherwise arise, but, in my view, would not significantly change the need for knowledge or the nature of the knowledge required as indeed identified by Lord Parker in the case which I have cited.[125]

Recklessness[126]

Recklessness is a less culpable mental state than intent. Where a person intended the external element of a crime, recklessness, criminal negligence and negligence will also be incorporated in that state as they are lesser in terms of blameworthiness. Simply, what is graver in terms of culpability includes states of mind that are less grave. The system does not work in the opposite direction; negligence or criminal negligence do not amount to recklessness. Recklessness does not suffice for crimes of intent. Each is separately defined and distinct. In general, intent and recklessness are alternative mental elements for most offences. Examples are rape and assault. Where a statute specifies intent then the purpose of the accused in bringing about the external element of the crime must be proven; an example is murder. Where a statute specifies that an act is done maliciously, this requires proof that the accused either intended to do the particular kind of harm that in fact was done or was reckless as to whether such a kind of harm would occur or not (the accused foreseeing that the particular kind of harm might be done but going on to take the risk of it) and this word is not limited to, nor does it require, any ill-will towards the victim.[127] Recklessness can be simply defined as the conscious running of an unjustifiable risk.

Inadvertence

The House of Lords in *Caldwell*[128] and in *Lawrence*[129] had temporarily reversed the traditional analysis of recklessness and replaced it with a test based on mere negligence. According to Lord

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123 Subsequently upheld in *A-G's Reference (No 3 of 2003)* [2005] QB 73.
124 [1995] 1 JIC 2402, 1995 WJSC-HC 879; [1995] 3 IR 145.
125 ibid 160.
126 Amarthalingam, 'Caldwell Recklessness is Dead' (2004) 67 Modern Law Review 491; Ryan & Ryan, 'Recklessness, Subjectivity and the Criminal Law' (2004) 22 ILT 90.
127 *Cunningham* [1957] 2 QB 396.
128 [1982] AC 341. See *Elliot v C (a minor)* [1983] 2 All ER 1005.
129 [1982] AC 516.

Diplock, in those cases, recklessness involves the accused doing an act which creates an obvious and serious risk and giving no thought to the possibility of there being any risk or recognising that there was some risk involved, but nonetheless going on to do the act. Apparently excluded from this definition is the person who considers whether there is a risk but then discounts it. The House of Lords appeared to see no difference between a person who foresees a risk that may be occasioned by his conduct and one who does not foresee such a risk. Indeed comments by the individual judges indicate that they regarded them as equivalent moral states. Proceeding with an act in circumstances where an ordinary person would have foreseen that it was creating a risk of a consequence which is outlawed is equivalent to the civil standard for negligence; failing to exercise the standard of care appropriate to a reasonable person in the circumstances in question. In civil law, damages are awarded where harm is caused by a failure to exercise reasonable care. Crime is much more serious. Conviction involves stigma and punishment. The imposition of a test of negligence for criminal liability removes the foundation of blameworthiness necessary to justify punishment for a culpable mental state. Obviously, it is far less wrong to genuinely fail to foresee a risk than to continue with conduct being aware of that risk. These decisions undermined the moral foundation of the criminal law and substitute standard ideas of the acceptable behaviour of notional ordinary people in the place of individual blame.[130] Eventually, and after much academic criticism,[131] in *G*,[132]the House of Lords was faced with a conviction of some pre-teen children who, away from home without permission, lit some newspapers on a concrete floor and near a bin. After they departed, fire spread to nearby buildings causing serious damage. The earlier decisions were reversed, Lord Bingham basing his analysis on the moral culpability inherent in the concept of recklessness:

> … a salutary principle that conviction of serious crime should depend on proof not simply that the defendant caused (by act or omission) an injurious result to another but that his state of mind when so acting was culpable. This, after all, is the meaning of the familiar *rule actus non facit reum nisi mens sit rea*. The most obviously culpable state of mind is no doubt an intention to cause the injurious result, but knowing disregard of an appreciated and unacceptable risk of causing an injurious result or a deliberate closing of the mind to such risk would be readily accepted as culpable also. It is clearly blameworthy to take an obvious and significant risk of causing injury to another. But it is not clearly blameworthy to do something involving a risk of injury to another if (for reasons other than self-induced intoxication: *R v Majewski* [1977] AC 443) one genuinely does not perceive the risk. Such a person may fairly be accused of stupidity or lack of imagination, but neither of those failings should expose him to conviction of serious crime or the risk of punishment.[133]

Irish approach

The definition of recklessness always required that accused must have foreseen the risk of the consequences of his conduct bringing about the external element of the offence but have proceeded with his conduct nonetheless: *The People (DPP) v Murray*.[134] The Supreme Court in Murray did not indicate whether the foreseen risk must be serious. The Model Penal Code definition indicates such a test. It is submitted either that the foreseen risk must be serious, or that the culpability in failing to exclude that risk must present. The definition of criminal negligence discussed later in Chapter 10 on homicide, deliberately incorporates a definitional element of a high degree of risk. As criminal negligence is a lesser standard than recklessness that element of high risk must also apply. A contractor involved in the construction of a bridge who downgrades the quality of the steel structuring knowing of the danger to the stability of the bridge, is taking a

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130 For an interesting discussion see Patient, 'Caldwell *after* Moloney – Another look at Caldwell Recklessness' (1987) SI JCL 82.
131 Williams, 'Recklessness Redefined' (1981) 40 CLJ 452.
132 [2004] 1 AC 1034.
133 ibid [32].
134 [1977] IR 360.

serious risk. A person who has a faint suspicion that the woman with whom he is having sexual intercourse is not consenting to the act, can remove that suspicion by the simple expedient of an enquiry; to fail to do so involves a high degree of moral culpability and is so equivalent to taking a serious risk. A risk can also be justifiable, or unjustifiable, depending on the circumstances. Situations in which that would be a real issue in a criminal trial will be rare. For example, a contractor about to embark on the construction of a major tunnel project through a mountain will be aware that there are serious risks involved to the safety of those engaged. It is not recklessness for the engineer to proceed provided every reasonable precaution is taken to ensure that those dangers are kept to the absolute minimum. Proceeding with the task is justifiable and taking all reasonable precautions indicates a lack of moral culpability should an accident occur. Similarly, a surgeon about to embark on an operation to save a patient's life may know that the procedure involves, in itself, a serious risk to the patient's survival. Failing to take that risk may mean that the patient will die in the normal course of events whereas if the proposed treatment is successful the patient's life may be beneficently extended for a long period. The risk is therefore justifiable, even though it is serious, and again moral culpability is absent.

Following the identification by Henchy J in Murray of the suitability of the definition of recklessness as drawn up by the American Law Institute in the Model Penal Code, the definition has been reproduced in many reports and discussion papers of the Law Reform Commission. It has also been expressly used in the Central Criminal Court where, as rarely but happens, recklessness has been a live issue in relation to rape. This definitional analysis also conforms with the reasoning of Griffin J in Murray and conforms to the requirement of Walsh J that recklessness is a kind of negligence where there is foresight of consequences.

In *Clifford v DPP*,[135] the High Court placed the elements of recklessness within a framework of high culpability, through ignoring a danger apparent to the accused, and specifically adopted the definition contained in s 2.02(2)(c) of the Model Penal Code:

> Recklessness consists of an accused subjectively taking a serious risk, involving high moral culpability, that his conduct will bring about the wrong defined by the charge. Here, the wrong defined by the charge in terms of recklessness is as to whether a breach of the peace may be occasioned, that is brought about, by his conduct. Recklessness involves a subjective element in Irish law, and so it is different from criminal negligence which is the mental element of one aspect of criminal negligence manslaughter. For an accused to be reckless, it must occur to the mind of accused that his conduct will bring about the consequence impugned but, nonetheless, he proceeds to act. Moral culpability is necessary in this context because all life is a risk. To decide to build a major tunnel through a mountain involves a risk of accidental death to the workers. Where all proper precautions are taken, there is no moral culpability should someone die in an accident. Failing to avoid a serious risk of which you are aware can involve a high degree of moral fault. An example incorporating the necessary elements in recklessness of the subjective taking of a serious risk in culpable circumstances is this. A man is driving a car at speed along a country road and sees a stop sign at a crossroads. He knows that a car may cross the road in front of him but, notwithstanding that risk, he powers ahead without stopping, causing death or injury. He may in these circumstances be charged with manslaughter as his mental state is even more serious than the mental element of criminal negligence required for that offence. That man is reckless as to the death or injury caused. Section 2.02(2)(c) of the Model Penal Code is generally accepted as being the definition of recklessness in Irish law:-

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135 [2008] IEHC 322 [14] Charleton J.

> "A person acts recklessly with respect to a material element of an offence when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves culpability of high degree."[136]

The accused may be reckless as to the consequence of an action, adverting that by jumping into a swimming pool without choosing a spot to land, the result may be to injure others. The accused does not intend to assault anyone, much less to cause injury, but the failure to take an ordinary precaution is what is culpable. The recurrence of situations where the necessity to put the burden of proving that the accused acted with the purpose of causing the harm would be impossible means that recklessness is a common alternative mental state for serious crimes. In intention the accused acts so as to bring about the harm; assault intending to cause harm. In knowledge the accused is correct in being aware of a culpable situation brought within the control of the accused; possessing forged currency. In recklessness, advertence to a risk that is serious, or a consequence that is serious while the risk may be lower, and the absence of moral justification for proceeding constitutes the culpable mental state; penetration or continuing with sexual intercourse even though the woman may not be consenting. These situations encapsulate both consequences, that harm will be caused or property damaged, and circumstances, that consent is absent. Advertently taking an unjustified risk is highly morally culpable and is therefore a key element of the definition of many crimes. While not adverting to a clear risk may be sensibly regarded as equivalent in culpability to choosing to proceed with a foreseen risk, advertence is the key element of culpability and is only removed where voluntary intoxication by the accused requires the accused to be assessed as to the action or circumstance as if in a sober state.[137]

Subjectivism versus objectivism

The judgments of the Supreme Court in *The People (DPP) v Murray*[138] are an analysis of the elements in the offence of capital murder. However, notwithstanding the later abolition of the death penalty for that offence, the judgments remain a source of the basic principle of criminal law in this jurisdiction. Prior to 1964 everyone convicted of murder had to be sentenced to death. The Criminal Justice Act, of that year, removed the death penalty for murder except in the specified cases set out in that section. Subsequently the death penalty has been abolished entirely by s 1 of the Criminal Justice Act 1990 and those categories of murder replaced by a minimum sentence that a person sentenced to life imprisonment must serve. A person found guilty of murder in 1963 would have been automatically sentenced to death. A person committing murder after the coming into force of the 1964 Act could only be sentenced to death if his victim fell within the categories to which that Act applied the death penalty. In constructing the elements of an offence the judges, particularly Walsh J, Henchy J, and Griffin J, focused on these four factors:

(1) Depending on the status of the victim the penalties immeasurably increased from life imprisonment to actual death.

(2) The form of the charge appropriate to capital murder, as opposed to ordinary murder, required a statement that the victim fell within the category which attracted the more severe penalty.

(3) Criminal law had always assumed that a legislature requires a mental element in respect of the commission of each of the external factors of serious crime. In most ordinary crimes

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136 ibid [14].
137 *R v Brady* [2006] EWCA Crim 2413.
138 [1977] IR 360.

there is a single external element. An example is assault and a single mental element, of intention or recklessness, would suffice. For capital murder there were two external elements; the killing of a person and that person's status as a diplomat or Garda, etc. Consequently, a mental element was required in relation to both. As s 4 of the Act defined the mental element for murder as an intention to kill or cause serious injury, no dispute arose as to the mental state of the accused when killing the victim. Left at large however, was the question of the status of the victim. Simply requiring that there be an external element unaccompanied by any knowledge or suspicion on the part of the accused that the victim was a garda would cause the most severe sanction to be imposed simply on the basis of a chance occurrence. Fundamental requirements of blameworthiness indicated that before being culpable the accused should also have had awareness of the status (or occupation) of his victim. In deciding that the intention of the Oireachtas could not have been that the accused should know the victim was a garda, and in indicating recklessness as the appropriate mental standard for this additional element, the Supreme Court firmly established the subjective state of mind of an individual accused as being fundamental to blame. The court indicated recklessness as a sufficient mental element for crime in the absence of an indication to the contrary in the text of legislation.

(4) The Supreme Court had no law-making function but merely declared the elements of the offence from an analysis of the law as it stood in it historical context and gleaned the intention of the Oireachtas from the words they had used to create the offence, and from its context.

The Murray case

In *The People (DPP) v Noel and Marie Murray* the accused, who were husband and wife, escaped in a motor car after an armed bank robbery in which each of them had taken an active part. The driver of a private car, who was passing the bank at the time of the escape, pursued the robbers' car in his car until eventually the robbers' car stopped and the accused ran away from it. The pursuer stopped his car and ran after and overtook the husband. When the pursuer was about to seize the husband (who was then unarmed) the wife shot and killed the pursuer. The pursuer was a policeman and a member of the Garda Síochána who was not in uniform and who was not on duty at the start of the chase. The accused were charged jointly in the Special Criminal Court on an indictment containing 11 counts, of which the first charged them with the commission of capital murder. They were convicted on the first count and sentenced to death by execution; they were also convicted on five other counts and sentenced to terms of penal servitude. The accused appealed to the Court of Criminal Appeal and from there to the Supreme Court. In the Supreme Court, Walsh J concluded:

> In the present case the appellants are undoubtedly guilty of murder but, in my view, the absence of the knowledge of the status of their victim means that the offence of capital murder has not been established. Whether the fact that the victim was a member of the Garda Síochána is to be described as an accompanying circumstance or a surrounding circumstance, it is part of the *actus reus* and for the reasons I have already given it cannot be said to be intentional unless the evidence at the trial did establish that the person who fired the shot (the appellant Marie Murray) knew that her victim was a member of the Garda Síochána. Indeed, the court of trial did not find that she did have that knowledge and, in my view, that fact alone is fatal to any submission that she can be said, under any circumstances, to have had the necessary knowledge.[139]

Henchy J clearly endorsed a subjective test for recklessness. He stated:

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[139] ibid 389.

> In my judgment, it is not proper to construe either s 38 of the Offences Against the Person Act 1861, or s 1 of the Criminal Justice Act 1964, in such a way as to make those sections hardly ever applicable to assaults on or murder of policemen in plain clothes. In the case of such an assault or murder, the required *mens rea* as to the victim's occupation and activity is a matter of intention or, in the alternative, recklessness. Just as a person who does not intend an assault may be held guilty of an assault if he has been reckless as to whether his physical activity would have that effect (*R v Venna* [1975] 3 WLR 737), so a person may be found guilty of the capital murder of a Garda if it is shown (a) that he murdered the Garda and (b) that he was reckless as to whether his victim was a Garda acting in the course of his duty.
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> The test of recklessness in this context is well stated in the Model Penal Code – s 2.02(2)(c) – drawn up by the American Law Institute [quoted as above] … What is in issue on this aspect of the case is recklessness not as to the consequences of an act but as to a concomitant circumstance of an act. In dealing with whether simple ignorance will displace recklessness in that context, Professor Glanville Williams (*Criminal Law: The General Part*; 2nd ed, p 152) has written:
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> > 'A person who does not know for certain whether or not a fact exists may think that its existence is probable, or only possible; or he may have given no thought to the question of probability or possibility. The last will be particularly likely if he does not know the criminal law and so does not realise the relevance of the fact to his legal responsibility. The proposition to be maintained is that in each of these situations there is recklessness for legal purposes. Simple ignorance is not enough to displace recklessness. It is only where the actor's mind is filled with mistaken knowledge that the act is not reckless (though it may be negligent) as to that circumstance.'
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> For the reasons I have given earlier in this judgment, I do not accept that *mens rea* as to the concomitant circumstance that the victim of the murder was a Garda acting in the course of duty is proved if the mere unconsidered possibility of his being so existed. In the present case, however, if it were held that the appellant Marie Murray must have adverted to the possibility that the man who was trying to apprehend her husband was a Garda, and that, regardless of that risk, she shot him, *mens rea* for capital murder would have been proved because she would have consciously disregarded a substantial and unjustifiable risk.[140]

Griffin J also used a subjective test in his judgment:

> In my opinion, therefore, on the correct construction of the Act of 1964 the specific intent required by s 4 does not extend to the aggravated ingredients of s 1, sub-s l(b)(i), and knowledge that the person killed was a member of the Garda Síochána is not an ingredient of the offence of capital murder under that subsection. Therefore, there would be the necessary *mens rea* if there was recklessness as to this fact on the part of the person doing the killing. However, there must be *advertence* on the part of the accused – recklessness involves foresight of the possibility and the taking of a risk. It is of interest to note that in *R v Reynhoud* (1962) 107 CLR 381 Kitto J although discussing intention and not recklessness, appears to have taken the view that the recklessness under discussion in this judgment would amount to intention; at p 389 of the report he said:
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> > 'It does not mean that the Crown had to prove that the respondent *knew* that the person he was assaulting was a policeman in the due execution of his duty. Consistently with the decision [*under appeal*] the necessary intention might have existed though the respondent hoped, or even believed, that the person was not a policeman or was not at the time in the due execution of his duty, provided only that his intention extended to doing to that person what in fact he did to him even if the fact should be

[140] ibid 403-404.

> that he was a policeman in the execution of his duty. Advertence to the possibility of his being such a policeman is, I think, required, but not knowledge.'
>
> In my opinion, therefore, the necessary *mens rea* as to the murder is the intent required by s 4 of the Act; the necessary *mens rea* as to the concomitant circumstances is recklessness ...[141]

Kenny J also came down in favour of a subjective approach which would acquit the accused of capital murder, because recklessness had not been proved, but convict them on the basis that the killing was intentional:

> There was no evidence that Marie Murray knew that the Guard was a member of the Garda Síochána or that she knew anything from which she could infer that he was. In these circumstances she could not be held to have been recklessly indifferent as to whether he was. To prove that a person was recklessly indifferent, it must be established that there were facts which indicated to the person concerned the possibility that the forbidden consequences might occur. I do not think that the possibility that the deceased was a Guard occurred to Marie Murray. There was nothing to indicate to her that he was not a member of the public.[142]

Parke J followed the approach of Griffin J:

> If, as I believe to be the case, the true test of guilt is the intention of the accused, the prosecution must prove that intention in the sense that it has been for many centuries comprehended if the expression *mens rea. Mens rea* may manifest itself in different ways and to different degrees in connection with the *actus reus* with which it must be associated. 'Sometimes it is negligence, sometimes malice, sometimes guilty knowledge ...' – *per* Cave J in *Chisholm v Doulton* (1889) 22 QBD 736, 741. It also seems clear on the authorities that it can be recklessness in the sense that it motivates conduct with a total disregard to the legal or other consequences which may follow: see *In re Borrowes* [1900] 2 IR 593; *R v McLeod* (1954) 111 Can CC 106. Therefore, I share the view expressed by Mr Justice Henchy, Mr Justice Griffin, and Mr Justice Kenny that recklessness can constitute the necessary element of *mens rea.*[143]

Subjectivism affirmed generally

Modern common law systems tend to reject a criminal law which imposes blame on the basis of what a reasonable man would have known, intended or suspected in the situation under analysis. In England, the high point of this objective doctrine came with *DPP v Smith*.[144] The House of Lords' decision imposed liability on the basis that it was irrelevant what an actual accused contemplated; the real test being stated to be what the ordinary reasonable man or woman would, in all the circumstances of the case, have contemplated as the natural and probable result of their action. The correct approach is an evidential one: that the ordinary person would have had a particular advertence in the circumstances proved against the accused means that it may be possible to infer that state of mind to the particular accused at trial. That is not to substitute the elements of a crime into non-advertent negligence. In Murray the Supreme Court rejected any such notion. That is not to say that in pleading a defence, the accused may be excused for not doing what a reasonable person would do, or not limiting the use of force to what is reasonable in the circumstances or not seeking help from the authorities while under duress or not seeking available alternatives to the commission of a crime while claiming necessity.

Objective elements remain in criminal liability apart from the defences. The most obvious is where offences are regulatory in nature and require for conviction proof only of inadvertent negligence

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[141] ibid 415.
[142] ibid 421-422.
[143] ibid 426.
[144] [1961] AC 290.

or mere causation of the external elements. This is discussed later in this chapter. True criminal offences, carrying the stigma of crime and a more than regulatory penalty, require a definition that is set in the concept of advertent fault; *Re The Employment Equality Bill, 1996*.[145] Noteworthy is the defence of the lawful use of force; the proportion of force used must be related to that threatened or reasonably anticipated on the accused's view of the circumstances. Duress and necessity, as defences, also retain some objective elements. We discuss this in the context of defences and of offences, as they occur in the text, which appear to require the accused to act with objective rationality.

Malice

Malice is a concept of mainly historical currency in Irish law. Nonetheless, older statutes use the concept as a definitional element and it is therefore appropriate to strive for a standard definition. As an ancient concept it denoted a guilty state of mind. In the context of murder the idea of malice aforethought has been replaced by the statutory definition of intent.[146] Malice has nothing to do with an animus or ill will towards the victim. Instead it is a shorthand way of denoting by legislation that crime requires a mental element for the offence. This is cast in terms of either (1) an actual intention to do the particular kind of harm that was in fact done, or (2) recklessness as to whether such harm should or should not occur.

Criminal Negligence[147]

The concept of criminal negligence is considered in the context of manslaughter in chapter 10. Essentially, where the mental element of a crime is cast in terms of criminal negligence, the prosecution is relieved of the burden of proving that an individual accused was aware that his conduct might result in the harm constituting the external element of the offence. The general effect of the decisions on criminal negligence has been that the degree of carelessness required to fulfil the definition is such that, in effect, no ordinary person would ever be unaware of the danger which they are creating. Criminal negligence applies only in the case of manslaughter, save where statute creates negligence based offences and then the degree of negligence depends on the wording. As was mentioned in the introduction to this chapter, an act of criminal negligence will go unnoticed and unpunished unless death results to another. Where arguably lesser forms of damage are caused to others, such as serious or permanent injury, an accused will be guilty of a crime only on the application of the higher standard of recklessness which, as we have seen, requires an advertent fault. A reform of the law making culpable those who cause serious harm to others, through criminal negligence, is overdue. There is no good reason why a person who carelessly drops a brick on someone's head is guilty of manslaughter if he dies, but is guilty of nothing if the victim lives on with brain damage. Notwithstanding the obvious culpability of the accused's actions he can only be found guilty of an assault if the prosecution can prove an intent to attack the victim or recklessness as to the consequences of his action. In *The People (DPP) v Cullagh*,[148] the Court of Criminal Appeal upheld a conviction for manslaughter arising out of an accident on a funfair ride. The trial judge had instructed the jury that the person who owned and operated the ride must have been grossly negligent.

Negligence[149]

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145 [1997] 2 IR 321.

146 Criminal Justice Act 1964, s 4.

147 Andrew Ingram, 'The good, the bad and the klutzy: criminal negligence and moral concern' (2015) 34(1) Criminal Justice Ethics 87-115; David Prendergast, 'Gross negligence manslaughter in Irish law' (2014) 37(1) DULJ 267; Mary-Elizabeth Tumelty, 'Doctors, Death and the Irish Criminal Law: Examining the Case for Reform' (2017) 27(4) ICLJ 136-144.

148 Court of Criminal Appeal, *ex tempore*, 15 March 1999. The case is more fully discussed at para **[7.125]**.

149 Brady, 'Recklessness, negligence, indifference and awareness' (1980) 43 MLR 381; David Prendergast, 'Culpability in carless driving and the so-called "third category" of criminal offence' (2018) 36(4) ILT 63-67; Gemma Turton and Sally Kyd, 'Causing controversy: interpreting the requirements of causation in criminal law and tort law' (2019) 70(4) NILQ 425-444.

Negligence consists of a failure by an accused person to exercise that degree of care, in the conduct of such matters as affect other people, which would be exercised by a reasonable or ordinary person performing the task in question. Some statutes create simple offences of negligence. These are mostly summary offences which are dealt with in a trial before a judge, without a jury in the District Court.

Before the Road Traffic Act 1961, situations where death was caused in road traffic accidents could only be dealt with by charging manslaughter. Where serious injury was caused there was no offence designed to deter and punish even those offenders who had behaved in a criminally culpable fashion apart from the outmoded s 35 of the Offences Against the Person Act 1861. This made it an offence "by wanton or furious driving or racing, or other wilful misconduct, or by wilful neglect" to "cause any bodily harm to any person". Two new offences were created by ss 53 and 52 of the Road Traffic Act 1961 and later amended, inter alia by s 51 of the Road Traffic Act 1968 and the Road Traffic (No 2) Act 2011. These were the offences of dangerous driving and careless driving. Section 52 indicates that careless driving is an offence and s 53 indicates that dangerous driving is an offence. There is clearly therefore a qualitative difference in the character of the negligence which will suffice for a conviction for careless driving, but not for one of dangerous driving. In addition, s 51A provides that "a person shall not drive a vehicle in a public place without reasonable consideration for other persons using the place."

The mode of prosecution of an offence under s 53 will depend on the result of the dangerous driving. If death or serious bodily harm is caused to another, then trial is by way of indictment, with a jury. Otherwise, it is a summary trial. Because no advertent mental element is required in relation to the driving of the accused person there is, equally, no requirement of an advertent mental element in relation to the consequence of death or serious injury. The driver does not have to think: I am driving dangerously and I may kill or injure someone. This offence has been criticised as unfair to an accused person on the grounds that it adds punishment for dangerous driving not because of any additional gravity in the defendant's negligence but because of the result of that negligence. Consequences may be out of proportion to fault. In answer to that criticism the following passage from Stephen's History of Criminal Law[150] sets out the philosophy of distinguishing punishment by results:

> If two people are guilty of the very same act of negligence and if one of them causes thereby a railway accident involving death or mutilation of many persons whereas the other does no injury to anyone, it seems to me that it would be rather pedantic than rational to say that each had committed the same offence, but the one had the bad luck to cause a horrible misfortune and to attract public attention to it and the other the good fortune to do no harm. Both certainly deserve punishment but it gratifies public feeling to chose out for punishment the one who, actually, has caused great harm, and the effect in the way of preventing a repetition of the offence is much the same as if both were punished.[151]

Smith and Hogan justify the use of negligence in criminal law in the following terms:

> The negligent handling of certain articles – notablyvehicles – can have such drastic consequences that society is almost bound to adopt any measures that seem to have a reasonable prospect of inducing greater care; and it seems reasonable to suppose that the threat of punishment does have an effect on the care used in their handling of such instruments.[152]

In *Wholesale Travel Group*[153] the Supreme Court of Canada held that it is not an infringement of the Charter of Rights and Freedoms to create an offence for which the mental element component is

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150 Vol 3 (1883).
151 ibid I311.
152 Smith and Hogan, *Criminal Law* (15th ed, OUP 2018) 141.
153 [1991] 3 SCR 154.

negligence, so that a due diligence defence is available. The Supreme Court expanded upon this reasoning in De Sousa.[154] Sopinka J, speaking on behalf of the Court, affirmed fault could be the basis of liability: "The criminal law is based on proof of personal fault and this concept is jealously guarded when a court is asked to interpret criminal provisions, especially those with serious penal consequences." He held that fault tested on a subjective standard was not constitutionally required for all offences, but was only mandatory for offences which, due to the stigma and penalty attached to them, require it.

Hence, s 53 of the Road Traffic Act 1961 as amended provides:

> (1) A person shall not drive a vehicle in a public place in a manner (including speed) which having regard to all the circumstances of the case (including the condition of the vehicle, the nature, condition and use of the place and the amount of traffic which then actually is or might reasonably be expected then to be in it) is or is likely to be dangerous to the public.

Where the contravention "causes death or serious bodily harm to another person" the offence carries a penalty of imprisonment of up to 10 years or a fine of up to €20,000. If such consequences are not charged, summary prosecution can result in up to 6 months imprisonment and a fine. Careless driving under s 52 is a lesser included offence for which the court or jury may return a verdict. Under the legislation "it is not a defence to show that the speed at which the accused person was driving was not in excess of a speed limit applying in relation to the vehicle or the road, whichever is the lower".[155] The following standard direction on the meaning of dangerous driving was given by O'Brien J: "… driving in a manner which a reasonably prudent motorist, having regard to all the circumstances, would clearly recognise as involving a direct and serious risk of harm to the public."[156] Neylon J used to explain to juries that "dangerous driving" was an ordinary expression which was best approached by, firstly, deciding what facts had been proved by the prosecution and then considering whether, if the jury had been witnesses to such driving, they would have regarded it as dangerous.

The essence of negligence is a failure to act as a reasonable person would and it is not surprising that in clarifying the elements of the offence of dangerous driving that the courts have required that the accused person should be at fault as to what was done or not done.

Without reasonable excuse

The phrase without reasonable excuse is used in multiple statutes and in delegated legislation. It is used for instance in Section 9 of the Offences Against the State (Amendment) Act 1998. This provides for liability where a person has information about a serious crime but "fails without reasonable excuse to disclose that information as soon as it is practicable to a member of the Garda Síochána." Most often the burden of proving an absence of such an excuse is on the prosecution. That would be the pattern in s 8 and s 9 of the Criminal Justice (Public Order) Act 1994. The offence under 9 of the Act is committed where a person "without lawful authority or reasonable excuse, wilfully prevents or interrupts the free passage of a vehicle in a public place". In *Director of Public Procecutions v Kelly & Others*,[157] people objecting to water taxes sat down in front of and behind a lorry carrying equipment to install meters. On being asked to leave, they refused. On a case stated, the District Court raised the issue of how the prosecution was to prove that the protesters had no reasonable excuse. Birmingham P in the Court of Appeal pithily stated that this was a matter of inference; an answer implicit in the Supreme Court's analysis of the Offences Against the State Act offence.[158] In refusing leave to appeal, the Supreme Court poured cold water on the

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154 [1992] 2 SCR 944.

155 Section 53(3).

156 Reported (1963) 97 ILT 219 and referring back to and varying slightly the definition given earlier and reported at (1962) 96 ILT 123. Referred to as *The People (AG) v Quinlan* in Pierse, *Road Traffic Law* (2nd ed, 1995) 255.

157 [2019] IECA 378.

158 *Sweeney v Ireland* [2019] IESC 39.

idea put up by the accused that all possibilities were open. Rather, the matter should be judged on the basis of shrewdness and common sense. This pithy analysis was offered:

> None of these points is anything other than a re-argument of settled law that evidence does not have to explicitly cover issues which are capable of being inferred from the evidence actually given. To take an example, robbery occurs where a person steals from another person and either puts that person in fear or seeks to put that person in fear of violence. If evidence is given that an apparently loaded gun was pointed in someone's face, it may be inferred that the person doing so sought to terrify that individual. Similarly, if it be the case that pedestrians stream off a pavement and stop a car from moving up or down the public street, absent some indication that there may be lawful authority vested in those pedestrians or that there may be some reasonable excuse, such as a desire to prevent the motorist from proceeding into a sinkhole that suddenly opened up in the roadway ahead, the presence or absence of an element of the offence may be inferred from the evidence given, or the judge hearing the case may decline to make that inference on the basis that the evidence does not properly support it.[159]

Fault

Fault in driving is found from a consideration of all the circumstances in which the driving occurred. Since a true criminal offence is created, then not merely causation, but also fault is required from the perpetrator. It is clear that the offence of dangerous driving is a true criminal offence and that to find the accused guilty merely on the basis of causation would offend fundamental constitutional principles. Fault is a central component of negligence. Causation is another element. However, the circumstances under which a person can be driving dangerously and not be at fault would be extraordinarily limited. An example might be where a person is "tail gated" from a high speed zone into a low speed zone within a village and because the following car is only an inch or two from his back bumper, finds it impossible to observe the speed limit. The observation of the speed limit, however, is a crime which is entirely based upon the necessary regulation of society and does not carry a fault element. In that context, however, the facts outlined may indicate the potential to plead a general defence of necessity. A rare example of where fault was absent in what was, on the face of it, dangerous driving is to be found in *Gozney*.[160] There the accused was found driving her car in the wrong direction up a dual carriageway against oncoming traffic. She sought to adduce evidence that this circumstance had been caused by a deceptive road layout which might reasonably have caused a competent and careful driver to be put in the same situation. In other words, she claimed that the objectively dangerous situation had not been caused by her own decision, but by the negligent placing of the road signs. The Court of Appeal in England ruled that the fault element in dangerous driving required a consideration of the circumstances which led the driver into being in a situation where she could be adjudged as driving dangerously. That consideration required that there be fault on the part of the driver in addition to the objective circumstances. This fault element essentially consists of inattention which is a species of negligence, as explained by Megaw LJ:

> In order to justify a conviction there must be, not only a situation which, viewed objectively, was dangerous, but there must also have been some 'fault' on the part of the driver, causing that situation. Fault certainly does not necessarily involve deliberate misconduct or recklessness or intention to drive in a manner inconsistent with the proper standard of driving. Nor does fault necessarily involve moral blame. Thus there is fault if an inexperienced or a naturally poor driver, while straining every nerve to do the right thing, falls below the standard of a competent and careful driver. Fault involves failure; a falling below the care or skill of a competent and experienced driver, in relation to the manner of driving and to the relevant circumstances of the case. A fault in that sense, even though it

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159 [2019] IESCDET 220, [9].

160 [1971] 2 QB 674; [1971] 3 All ER 320; [1971] 3 WLR 343; 55 Cr App R 502.

> might be slight, even though it be a momentary lapse, even though normally no danger would have arisen from it, is sufficient. The fault need not be the sole cause of the dangerous situation. It is enough if it is, looked at sensibly, a cause. Such fault will often be sufficiently proved as an inference from the very facts of the situation. But if the driver seeks to avoid that inference by proving some special fact, relevant to the question of fault in this sense, he may not be precluded from seeking so to do.[161]

Strict and absolute responsibility[162]

Some offences are shorn of the fault principle. An able-bodied person parking a car on a space reserved for registered wheelchair users may not look at the road marking but unawareness is no defence. While the analysis in *The People (DPP) v Murray*, quoted above, suggest an imperative of a mental element accompanying every external element of the crime, that construction would nullify regulatory offences which have as their object the safety and cohesion of society. Examples would include not only road traffic offences such as speeding, but also food safety regulations and obligations to comply with the planning code. Such offences, minor in character, but carrying the risk of prison nonetheless, are not ones where the prosecution must prove that the accused was at fault. Some would argue that the moral cost of the device of strict liability is too high and that the infliction of the stigma of criminal conviction should only occur where the accused truly deserves such opprobrium, present only where there is an advertent mental element.[163]

In England, offences of strict liability are perhaps softened by the availability of appropriate criminal defences.[164] Nonetheless, such offences are not capable of being defended through proof of lack of fault or the exercise of reasonable care. Other countries regard the proof of care by an accused as negativing an offence. Where that defence is not open, regulatory offences are called offences of absolute liability. Thus, in England it is possible to analyse crimes of strict liability as removing any mental element from the definition of an offence. The prosecution simply have to prove the responsibility of the accused in relation to the physical circumstances which constitute the offence. Smith and Hogan suggest, however, that offences of strict liability do not always constitute offences of absolute liability. They argue that there is nothing in the general law indicating that general defences of infancy, insanity, duress, automatism or necessity should not be applied.[165] Further they indicate that the case of *Prince*,[166] should not exclude some other mistake apart from age. This case is usually taken as an authority for the proposition that where an offence is alleged involving sexual misconduct with a girl below the age of consent that knowledge as to her age, or a reasonable mistake in placing her above that limit is not a defence. Other mistakes can be involved. For example, Smith and Hogan would agree in cases of abduction, a mistake that the girl was a boy, or in cases of unlawful sexual intercourse, that the accused was married to the victim, should cancel criminal liability.[167] In *Hill v Baxter*[168] it was held that automatism could be a good defence to an offence of absolute liability. This is because when a person acts as an automaton his or her conduct is not voluntary. A defence of automatism therefore denies the external element of an offence. The opposite conclusion was reached by the High Court in New Zealand in *MOT v Strong.*[169]

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161 ibid 508.

162 Ashworth, 'Should Strict Criminal Liability be Removed from all Imprisonable offences?' (2010) 45 Irish Jurist 1; Cian Ó Concubhair & David Prendergast, 'CC v Ireland' in Enright, McCandless & O'Donoghue (eds), *Northern/Irish Feminist Judgments* (OUP) 2017 at 557-578; David Doyle, 'Reasonable belief and unlawful carnal knowledge' (2012) 47 Irish Jurist 49; David Prendergast 'Constitutionality of Strict Liability in Criminal Law' (2011) 33 DULJ 285; David Prendergast, 'Strict Liability and the Presumption of Mens Rea after CC' (2011) 46(1) Irish Jurist 211; Marc Coen, 'Whither Strict Liability?' (2007) 25 ILT 77.

163 Simester and Sullivan. *Simester and Sullivan's Criminal Law* (7th edn. Hart Publishing 2019), 213.

164 Simester and Sullivan. *Simester and Sullivan's Criminal Law* (7th edn. Hart Publishing 2019), [6.2].

165 Smith and Hogan, *Criminal Law* (15th edn, OUP 2018), 146-147.

166 (1875) LR 2 CCR 154.

167 Smith and Hogan, *Criminal Law* (15th edn, OUP 2018), 334.

168 [1958] 1 QB 277.

169 [1987] 2 NZLR 295. This followed the earlier 1958 case of *Cottle.*

History

Offences of strict liability are essentially the product of legislation. As the complexity of society increased in the Victorian era, it became convenient for statutes not to use then current concepts such as knowing, wilful or malicious in describing actions. Instead, it became convenient to impose liability for fines and imprisonment on a summary basis through the imposition of a statutory command that matters affecting the public should be as the legislation required with no mental element. An example is *M'Adam v Dublin United Tramways Company Ltd*.[170] There, the defendants were charged with overloading a tram contrary to s 50 of the Dublin Carriage Act 1853. Each of the trams had a conductor as well as a driver. He was, in essence, the representative of the company charged with ensuring compliance with their regulations, and with the law. The company introduced evidence of letters written by them to their conductors which urged them to comply with the legislation forbidding overloading. On a case stated from the District Court to the High Court in 1929 four questions were asked:

1. Was the evidence that the tram company had asked their conductors to comply with the law admissible? This was answered "No" save in mitigation of penalty.
2. Was the prohibition on overcrowding absolute so as to take the offence outside the rule that a principal is not criminally responsible for the acts of his servants? To this the High Court answered: "Yes".
3. Was the District Justice correct in refusing to convict Dublin United Tramways Company Ltd of the offence of overcrowding? The High Court answered: "No".
4. Was the District Justice entitled to convict the conductor of the tram without, at the same time, convicting the defendant company, to which the High Court answered: "No".

Sullivan P construed s 50 according to its language, which was of its nature a simple command:

> No passenger shall be permitted to travel on the platform, or on any part of such stage carriage, except in or on the place or places set apart and specified in the licence for conveying passengers, and no stage carriage shall contain at any one time any greater number of inside or outside passengers than the number of same respectively specified in the licence.[171]

The High Court simply applied the imperative and eschewed any fault basis because the legislation existed for the regulation of society and the protection of the public:

> I am of opinion that the prohibitions contained in that regulation are absolute. The object of the regulation is to protect the public against the danger that may result from the over-loading of an omnibus, and that object could be achieved only by absolutely prohibiting the carriage in any omnibus of more than a limited number of passengers, and by penalising the owner for any breach of such prohibition, irrespective of his knowledge of such breach.
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> It was argued on behalf of the defendants that, in order to establish the offence charged, it was necessary for the prosecutor to prove that the defendants had *mens rea,* a knowledge of the facts rendering the act unlawful. If, as I hold, the prohibitions imposed by the regulation are absolute, the defendant company would be liable, irrespective of knowledge on their part that such prohibitions have not been observed. They would be answerable for the acts of their servant, the bus conductor, in the course of his employment in permitting the overloading of the omnibus on the occasion in question. The conductor undoubtedly knew that such overloading was wrongful, but, in my opinion, that consideration is immaterial in the present case.[172]

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170 [1929] IR 327.
171 ibid 333.
172 ibid.

Sullivan P reasoned that the acts in question were not "in any real sense criminal, but in the public interest they are prohibited under a penalty." That theme continued to predominate. In *Duncan v Gleeson*,[173] the accused was charged with the offence of permitting intoxicating liquor to be consumed on licensed premises during prohibited hours, contrary to s 2 of the Intoxicating Liquor Act 1927, and of permitting persons to be on licensed premises after closing time. The District Judge found that the facts of the charge had been proven. The judge did not find as a fact that the defendant either permitted intoxicating liquor to be consumed or permitted persons to be on the premises during prohibited hours. The High Court, on a case stated, based its judgment on the meaning of the word "to permit". Although some statutes may concentrate on social regulation, the wording which they employ is the primary guide to their meaning. It can thus be the case that even in a set of criminal offences designed to regulate the public control of a particular activity, in this instance drinking in public houses, that the wording used may either require that the accused have some mental element or, that he be shown to have been at fault in some particular way:

> In regard to the offence of permitting persons to be on licensed premises during prohibited hours, this was first made an offence by s 29 of the Intoxicating Liquor Act 1962, and it must be assumed that the legislature, in using the word 'permit' in that section, was aware of the construction put on that word in *Attorney General v Carroll* [1932] LR 1 and in *Attorney General v Egan* and that it was not intended to create an absolute liability on the publican. The main argument advanced on behalf of the complainant before me was that s 7 of the Act of 1962, which provided for the 'ten minute' concession, had the effect of imposing on the publican an absolute liability after the expiry of that period of ten minutes. I cannot see anything in s 7 of the Act of 1962 to warrant such a construction. If the legislature had intended such a result, it could easily have said so by providing that on the expiry of the ten minutes there would be an offence by the publican if drink was consumed on the premises, or if persons were on the premises. Instead of doing so, s 7 and s 29 of the Act of 1962 continue to use the word 'permit'.
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> In my opinion, the onus remains on the prosecution to prove that the defendant permitted drink to be consumed, or persons to be on, the premises after the permitted hours and the ten minutes allowed by s 7 of the Act of 1962; and that if the court is satisfied that the defendant took all reasonable steps to clear the premises, on the expiry of the permitted hours and during the ten minute extension, the charges should be dismissed. I think that the statement of the law by Judge McGivern in *McHale v Cole* (1965) 100 ILTR 83 was correct and I agree with his remarks as to the duty of publicans. I express no view in the present case whether, on the facts proved, the defendant did, or did not, take reasonable steps to clear the premises. This is a matter for decision by the District Justice. The question asked in the Case stated will be answered in the negative.[174]

Even though the purpose of the legislation may be regulatory and the necessity for the proper ordering of society the legislative purpose, the wording used is the final guide to construing the nature of the liability involved. Thus, in *Sweet v Parsley*,[175] a teacher was prosecuted for "being concerned in the management of premises used for the purpose of smoking cannabis". Those doing the smoking were students to whom she had let the premises and she had no idea what was going on there. The House of Lords decided that the prohibition was not truly regulatory but that the presumption that a criminal offence carried moral blame, hence a mental element, meant that the prosecution had to prove knowledge on her part.

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173 [1969] IR 116.
174 ibid 120-121.
175 [1970] AC 132.

Construction

While offences of simple negligence are easily identifiable from the terms of the statute, the identification of offences of strict liability has been the subject of debate. Essentially it is presumed that for each external element of an offence there is a corresponding mental element.[176] To find that an offence is one of strict liability it is necessary to consider both the wording of the statute creating the offence and the subject matter with which it deals.[177] The subject matter should deal with an issue of necessary social regulation and the manner in which the offence is designed to work should be such that putting the defendant under strict liability is required for the proper the enforcement of the law. There must be something that the accused can do, directly or indirectly, by supervision or inspection, by improvement of business methods or by exhorting those whom he or she may be expected to influence or control, which will promote the observance of the law. In the absence of such ability to influence or control, the law would be imposing liability on a blameless person.[178] The traditional criminal offences are excluded from strict liability. Instead the legislation must deal with the matter of economic or social regulation.[179] Brennan J of the High Court of Australia has quoted with approval in *He Kaw Teh*,[180] the five propositions enunciated by Lord Scarman in *Gammon Ltd v A-G of Hong Kong*[181] with a reservation as to the fourth, that it "seems too categorical an approach to what is, after all, a question of statutory interpretation". These five propositions are:

(1) There is a presumption of law that *mens rea* is required before a person can be held guilty of a criminal offence;

(2) The presumption is particularly strong where the offence is "truly criminal" in character;

(3) The presumption applies to statutory offences, and can be displaced only if this is clearly, or by necessary implication, the effect of the statue;

(4) The only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern, and public safety is such an issue;

(5) Even where a statute is concerned with such an issue, the presumption of *mens rea* stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.[182]

The meaning of "truly criminal" was considered by the Hong Kong Court of Appeal in *HKSAR v Paul Y-ITC Construction Ltd.*[183] The defendant was convicted of two offences of causing mechanical equipment to be used, and construction work to be carried out, without a construction noise permit. The Court of Appeal held that the offences were not "truly criminal" in nature but rather sprung from the fact that such conduct was prohibited. The relevant legislation dealt with public well-being and was closely related to concerns of public health. People had a choice whether or not to participate in the activities covered by the legislation and such activities could be controlled by improvements in business methods. In these circumstances there was no doubt that the legislation intended that knowledge of the particular breaches was not necessary.

176 *The People (DPP) v Murray* [1977] IR 360.
177 *Toppin v Marcus* [1908] 2 IR 483.
178 *Lim Chin Aik* [1963] AC 160 at 174.
179 *Brown v Green* (1951) 84 CLR 285 at 294.
180 (1985) 157 CLR 523, 566.
181 [1985] 1 AC 1.
182 ibid 14.
183 [1998] 2 HKLRD 35.

This has led to particularly divergent constructions of statutes which prohibit sexual relations with those who are below a particular age. In *CC v Ireland*,[184] the principle derived from *Prince*[185] was challenged by a person accused of sexual relations with an under-age girl. Only Denham J was prepared to overturn the authority that any belief or knowledge of the accused that the girl the accused was proposing to engage with sexually was under 17, or 15 depending on the offence, was irrelevant. She based her reasoning on the principle of constitutional construction: that legislation should be construed in a manner consistent with the Constitution provided this does not overturn the intention of the legislature.[186] The Supreme Court, however, were content to continue the imposition of liability for such offences, carrying penalties at the most serious level, based on action without a mental element.[187] This led to reform of the law which restructured the offences, as discussed in this work in chapter 11.

Variations in approach

In England, the solution to the problem of the necessity to impose liability without a mental element has been the construction of statute so as to require a mental element. Thus in *B (A Minor) v DPP*,[188]legislation in relation to sexual activity with a girl under 14 was to be construed as requiring a mental element since the "necessary implication of the statute" did not rule it out and only where strict liability was necessary was the presumed mental element to be shorn away. In *G*,[189] however, a different conclusion was reached and mistake as to age was held irrelevant on the construction of that legislation. Hence, the imposition of strict liability remains a matter of interpretation.

In Australia and New Zealand the courts have adopted a solution to the problems posed by strict liability. This is on the basis that if the accused proves a complete lack of fault, or where relevant due diligence in relation to the subject matter, while the prosecution will be proven as an offence requiring no mental element, the defence will have an answer for which they bear an evidential burden. Clearly, it can be unfair to impose liability for an offence simply on the basis that it occurred. This may be more easily seen where the accused, as a corporation or employer, is held liable for a breach of some social regulation by an employee. The solution arrived at, distinguishes between offences requiring a mental element and those of strict responsibility, by allowing the accused to indicate in the latter that the offence occurred due to a mistake based on reasonable grounds; *Cameron v Holt*,[190] *Ewart*.[191] Offences of strict liability are therefore based on objective negligence with a burden of proof on the accused to prove that the care he has taken was reasonable in the circumstances. On that criterion the Dublin United Tramways Company would have been acquitted. The courts of Canada have led other common law jurisdictions in dividing those "social regulation" offences into crimes of strict liability and absolute liability. The reasoning is attractive to a legal system based on fault and incorporating justice as the ultimate test of fairness of a law: *McGee v AG*.[192] Where due diligence, or doing everything possible to avoid the commission of the circumstances in question, is an answer, the offence is one of strict liability. This affects the prosecution proofs: the prosecution do not have to prove a mental element. Where that answer is not open, then it remains possible to have an offence of absolute liability. The continued existence of such offences is doubtful, or at least rare.[193]

Canadian approach

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184 [2006] IESC 33; [2006] 4 IR 1
185 (1875) LR 2 CCR 154.
186 *McDonald v Bord na gCon* [1965] IR 217, *Keady v Commissioner of an Garda Siochánna* [1992] 217.
187 David Prendergast, 'The Constitutionality of Strict Liability Offences', (2011) 33 DULJ 285.
188 [2000] 2 AC 428.
189 [2009] 1 AC 92.
190 (1980) 142 CLR 342, (1979) 54 ALJ 202.
191 (1905) 25 NZLR 709.
192 [1974] IR 284.
193 *Millar v MOT* [1986] 1 NZLR 660.

The Canadian case of *R v City of Sault Ste Marie*[194] concerned a contract between the City of Sault Ste Marie and the Cherokee Company to dispose of its garbage. The Cherokee Company pursued this task by a land-fill method in which the compacted refuse was covered by sand or gravel. This resulted in a large mound which sloped steeply towards a stream which flowed into a river. Seepage caused pollution and the Cherokee Company was convicted of discharging, causing to be discharged or permitting to be discharged deleterious materials contrary to s 32(1) of the Ontario Water Resources Act RSO [1970] c 332. The issue before the Supreme Court of Canada was whether the city was guilty of a similar charge. Dickson J began by considering the arguments for and against absolute liability:

> Public welfare offences involve a shift of emphasis from the protection of individual interests to the protection of public and social interests: see FB Sayre, 'Public Welfare Offences', 33 Columbia Law Rev 55 (1933); Hall, *General Principles of Criminal Law* (1947), c 13, p 427; RM Perkins, 'Civil Offence', 100 U of Pa L Rev 832 (1952); Jobson, 'Far From Clear', 18 Crim LQ 294 (1975-76). The unfortunate tendency in many past cases has been to see the choice as between two stark alternatives: (i) full *mens rea;* or (ii) absolute liability. In respect of public welfare offences (within which category pollution offences fall) where full *mens rea is* not required, absolute liability has often been imposed. English jurisprudence has consistently maintained this dichotomy: see 'Criminal Law, Evidence and Procedure', 11 Hals, 14th ed, pp 20-2, para 18. There has, however, been an attempt in Australia, in many Canadian Courts, and indeed in England, to seek a middle position, fulfilling the goals of public welfare offences while still not punishing the entirely blameless. There is an increasing and impressive stream of authority which holds that where an offence does not require full *mens rea,* it is nevertheless a good defence for the defendant to prove that he was not negligent.[195]

Dickson J came down against the arguments in favour of absolute liability and proposed the adoption of an intermediate category of offences:

> The correct approach, in my opinion, is to relieve the Crown of the burden of proving *mens rea,* having regard to *Pierce Fisheries* and to the virtual impossibility in most regulatory cases of proving wrongful intention. In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence. This is particularly so when it is alleged, for example, that pollution was caused by the activities of a large and complex corporation. Equally, there is nothing wrong with rejecting absolute liability and admitting the defence of reasonable care.[196]

Thus in Canada, three categories of offence are recognised:

(1) Offences in which *mens rea,* consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.

(2) Offences in which there is no necessity for the prosecution to prove the existence of *mens rea;* the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly

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[194] [1978] 2 SCR 1299.
[195] ibid 1312.
[196] ibid 1325.

be called offences of strict liability. Mr Justice Estey so referred to them in *Hickey's* case.

(3) Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.[197]

Developing the principles in *Gammon Ltd v A-G of Hong Kong*,[198] Dixon J pursued a line of reasoning that accorded with fundamental notions of fairness:

> Offences which are criminal in the true sense fall in the first category. Public welfare offences would, *prima facie,* be in the second category. They are not subject to the presumption of full *mens rea.* An offence of this type would fall in the first category only if such words as 'wilfully', 'with intent', 'knowingly', or 'intentionally' are contained in the statutory provision creating the offence. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the legislature had made it clear that guilt would follow proof merely of the proscribed act. The over-all regulatory pattern adopted by the legislature, the subject-matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category.[199]

The New Zealand courts have enthusiastically welcomed the decision in City of Sault Ste Marie. In *Civil Aviation Department v MacKenzie*[200] the Court of Appeal recognised the availability of a due diligence defence in public welfare regulatory offences unless clearly excluded by the legislature. The onus of proving the defence rests on the defendant on the balance of probabilities once the prosecution has proved that the defendant is responsible for the prohibited act. Richardson J concluded that there were two reasons why the Canadian approach should be adopted;

(1) The courts should be able to promote public health and safety with a strict responsibility doctrine without at the same time snaring the diligent and the careful.

(2) The defendant will usually know far better than the prosecution how the breach of their legislation occurred and what had been done to avoid it. It is therefore not unreasonable to place the burden of proof on the defendant as the emphasis of public welfare offences is on the interests of society rather than the individual.

The correctness of this approach was confirmed in *Miller v Ministry of Transport*.[201] In a dictum, the Hong Kong Court of Appeal has suggested that it would be a defence to a crime of strict liability for the defendant to show on the balance of probabilities that it believed for good and sufficient reasons, though erroneously, that there had been compliance with the relevant legislation.[202]

Constitutional implication

In the *BC Motor Vehicle Reference*[203] this classification was raised to that of a constitutional imperative by the Canadian Supreme Court. The British Columbia Motor Vehicle Act 1979 provided for a minimum period of imprisonment for the offence of driving without a valid driver's licence or with a licence under suspension. Section 94(2) of the Act provided that the offence was one of absolute liability where guilt was established by the proof of driving, whether or not the driver knew of the prohibition or suspension. The Supreme Court held that absolute liability that results in imprisonment is a breach of the right not to be deprived of liberty save in accordance with the principles of fundamental justice as protected by s 7 of the Canadian Charter of Rights and

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197 ibid 1325-1326.
198 [1985] 1 AC 1.
199 ibid 14.
200 [1983] NZLR 78.
201 [1986] 1 NZLR 660.
202 *HKSAR v Paul Y – ITC Construction* [1998] 2 HKLRD 35.
203 (1985) 48 CR (3d) 289.

Freedoms. Similar reasoning is apparent from the Court of Criminal Appeal decision in *The People (DPP) v Smyth and Smyth*.[204] Contrary to what some judges and commentators believe, recognition of a defence of due diligence does not vitiate the effectiveness of strict liability offences. In the Canadian case of London Excavators & Trucking Ltd.[205] the defendant was charged with failing to locate and mark gas, electrical and other services before excavating an area. The defendant was an excavating sub-contractor on a large construction project. The general contractor advised that the area to be excavated by the accused was free of any services. The accused had worked with the general contractor before and considered the general contractor to be knowledgeable and reliable. Nothing was done to confirm the accuracy of the general contractor's information. In the course of excavation a hydro duct was hit causing an explosion. The Ontario Court of Appeal held that the offence was one of strict liability. Once the external act was proved a conviction had to follow unless the accused established that it exercised due diligence to avoid the commission of the offence. The defence of due diligence could take one of two forms:

(i) holding a reasonable belief in a mistaken set of facts, and

(ii) taking all reasonable steps to avoid the offending event.

Even though the accused held the honest subjective belief that the general contractor's supervisors had access to accurate local information and had accurately imparted that information, the defence of mistake of fact was not established because it was not objectively reasonable for the accused's foreman to have accepted and acted upon that information without further inquiry. In particular, it was not objectively reasonable for the accused to continue to rely, without further inquiry, upon the direction of the general contractor once an unexpected concrete obstacle had been encountered in a location the general contractor had pronounced safe to excavate. At that point it was incumbent on the accused, in the interest of the safety of its employees and others who might be exposed to risk of harm, to ensure that the prescribed measures and procedures designed to protect their safety had been carried out in the workplace.

The Irish response

The reasoning in City of Sault Ste Marie has not found favour in this jurisdiction. In *Maguire v Shannon Regional Fisheries Board*[206] the appellant was convicted under s 171(1)(b) of the Fisheries (Consolidation) Act 1959, which provides that any person who "throws, empties, permits or causes to fall into any waters any deleterious matter" shall be guilty of an offence unless such act is done under licence. The appellant was a major pig producer and was the proprietor of a Cavan piggery where a PVC pipe had fractured causing pig feed to flow into a river. The District Judge found as a fact that the appellant had taken all reasonable steps to prevent the accident and to prevent the flow of whey into the river. The judge stated a case to the High Court as to whether the offence was one of strict liability. Using the traditional analysis of strict liability, Lynch J held that s 171 was regulatory in character and did not create an offence that would be regarded as truly criminal and that, in consequence, it was a strict liability offence. The pollution of rivers was a public nuisance and strict liability would encourage greater vigilance on the part of potential polluters. Lynch J concluded that if a mental element had to be proved in these sort of cases "…it would be very difficult ever to establish an offence."[207] He cited *Alphacell v Woodward*[208] for the proposition that in the case of a minor offence of pollution where there is no wrongful intention or negligence on the part of the accused, a comparatively nominal fine could be imposed by way of a sentence mitigated on those factors.

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204 [2011] 1 ILRM 81, [2010] IECCA 34.
205 (1998) 125 CCC (3d) 83.
206 [1994] 3 IR 580.
207 [1994] 3 IR 580, 589.
208 [1972] AC 824.

Following that, *Shannon Regional Fisheries Board v Cavan County Council*[209] raised the issue of the meaning of s 171(1)(b) of the Fisheries Consolidation Act 1959. Due to population increases, a sewage treatment works operated by the defendant council had become totally inadequate for the catchment area which it had been built to serve. The council had sought to have the treatment works upgraded but had been prevented from doing so because the provision of funds therefor was completely within the control of the Department of the Environment. The defendant was charged with a breach of s 171(1)(b) after deleterious matter had entered a river from the sewage treatment works.

In a majority decision, the Supreme Court confirmed the conclusion reached in *Maguire* that s 171(1)(b) creates a strict liability offence. Blayney J (O'Flaherty J concurring) held that on the facts of the case the defendant had a mental element as it had deliberately discharged imperfectly treated sewage into the river and the fact that it claimed that it had no alternative but to do this could not alter that fact. This determined the case. However, in a dictum Blayney J cited the decision in *Alphacell v Woodward*[210] for the proposition that it was "unnecessary and undesirable" to introduce the concept of a mental element into this type of offence. Keane J, dissenting, expressly followed the half-way house solution proposed by the Supreme Court of Canada in *R v City of Sault Ste Marie*.[211] Some may consider that the arguments put forward by Keane J are of interest and should be looked at when the issue next comes up for reconsideration.[212] The case does not finally settle the issue as the Court acted on the basis that a mental element had been proven.

Vicarious Liability[213]

Where vicarious liability for the actions of another rests on the accused, this is properly defined as a species of strict liability. The prosecution do not have to prove the accused's authorisation or encouragement. Ordinarily a person can only be convicted of a criminal offence committed by another if he is a party to the offence. This distinguishes criminal law from the law of tort. Central to the regulation of society in civil law is the requirement that those who work on behalf of others, or otherwise act for them, are themselves personally liable for such torts as negligence and sexual violence and that in addition those under whose control they work are act are also responsible in damages. Criminal law is different. Apart from regulatory offences, some kind of mental element accompanying the prohibited action is required. Vicarious liability in tort has generally resolved itself down to requiring employers, and those in analogous positions, to be responsible where they

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209 [1996] 3 IR 267.

210 [1972] AC 824.

211 (1978) 85 DLR (3d) 161.

212 See *Reilly v Judge Michael Pattwell* [2008] IEHC 446. The applicant ran a bar which he described as a litter "black spot" given its location in relation to other amenities. Having received a warning from the Council, the applicant engaged in a type of litter action plan in order to improve the situation. Having been then prosecuted for litter offences, the applicant felt that his "Litter Management Plan" mean that he had taken reasonable steps to improve the situation. While it was held that, based on the fact that the applicant had not exercised due diligence, there was no need to address the constitutional issue, McCarthy J went on to access the 1. The moral gravity of the offence, 2. The social stigma attached to the offence, 3. The penalty, 4. The ease (or difficulty) with which a duty is discharged or the law obeyed, 5. Whether or not absolute liability would encourage obedience, 6. The ease or difficulty with which the law might be enforced, 7. The social consequences of non-compliance, 8. The desideratum to be achieved when considering the statutes, and found that the relevant litter provisions could not be effectively enforcement without absolute liability, so no defence of taking reasonable steps would be relevant. *Waxy O'Connors Ltd v Riordan* [2016] IESC 30, [2016] 1 IR 215 concerned a pub that was charged with serving alcohol to underaged persons. They claimed that a defence of due diligence should have been allowed. The Supreme Court found that the offence was one of strict liability rather than absolute liability. However, the court did apply Keane CJ's dissent and *City of Sault St Marie*.In *The People (DPP) v Power* [2007] IESC 31 the accused had been prosecuted under the Misuse of Drugs Act 1977, s 15A with a minimum penalty of 10 years; the accused argued that there should be an extra element of mens rea. The Supreme Court dismissed the appeal, holding, inter alia, that, where a criminal offence was created by statute, and the statute was silent as to mens rea, there was a presumption that mens rea was required in relation to the offence as a whole and in relation to each constituent part of the offence; that this presumption could only be displaced by clear words or by necessary implication.

213 Desmond Ryan, 'Close Connection and Akin Employment Perspectives on 50 yeas of Radical Developments in Vicarious Liability' (2016) 56(56) IJ 239-260; Conor Davis, 'Corporate Criminal Liability: Developing a Legislative Model of Attribution' (2017) 20 TCLR 122-147.

engage an individual to do the kind of work within the context of which the action in question takes place. An example is where a teacher within a religious order sexually abuses pupils even though the ethos of the school is committed to decent conduct and strict sexual mores; *Hickey v McGowan*. [214] An employer, on the other hand, cannot generally be convicted of a criminal offence which an employee committed in the course of employment. This is because the employer will lack the requisite mental element. The principle has existed since at least 1730, when it was held in *Huggins*[215] that a prison warden could not be vicariously liable for a murder committed by a deputy gaoler. The warden had neither ordered the murder nor encouraged it nor in any way participated in it. However, there are some limited exceptions to this principle, the parameters of which are subject to debate.

In *Coppen v Moore (No 2)*,[216] the defendant owned six delicatessens. The manager of one of them sold ham with a false label on it to an inspector. The defendant was charged with selling a ham with a false trade description under the Merchandise Marks Act 1887. As this offence was an absolute liability offence it was not necessary to impute any mental state to the defendant. The act of selling the ham was held to be his act on ordinary agency principles. Lord Russell CJ held: that it could not "be doubted that the appellant sold the ham in question, although the transaction was carried out by his servants. In other words, he was the seller, although not the actual salesman." In *Allen v Whitehead*[217] the defendant was the owner of an all-night café which was run by a manager whom he employed. The police had warned the defendant about harbouring prostitutes in his café. Despite warnings from the defendant, the manager continued to permit prostitutes to gather in the café. The defendant was charged with knowingly permitting prostitutes to congregate in a refreshment shop. It was held that the defendant's ignorance of his manager's continuing disobedience was no defence because he had delegated the management of the café. When someone delegates the performance of certain duties which have been imposed by statute, the acts and mental states of the delegate can be imputed to the principal person. If this were not so the statute would be ineffective. In the Ontario case of *Havinda Taverns Ltd*[218] the licence holder of a pub was held not to be liable when a waiter served liquor to a person under 21 years of age as there was no proof that the waiter had been delegated responsibility by the owner or the manager. Although the House of Lords doubted the validity of the delegation principle in *Vane v Yiannopoullos*[219] the doctrine continues to operate in the lower courts. However it has been suggested that it is unlikely to be extended.[220] It appears that what is required for liability in delegation is a complete transfer of responsibility in the context where the legal duty to obey the law remains on the accused.

Vicarious culpability can be created by legislation, though the constitutional requirement of fairness would tend to indicate that it is only in such instances of the necessity to regulate society through the creation of criminal liability for minor offences that such an approach would be permitted. If not expressly forbidden by the text of the legislation, it would seem that for what some call true criminal offences, the courts would use the concept of constitutional construction to imply at least a requirement of negligence. Where conduct is required through legislation by the grant of a licence, such as a planning consent or a waste disposal permit, the obligation remains on the licensee. On one analysis, vicarious liability as a concept is unnecessary. It does not matter that the action of the employee can be proven to be authorised by the licensee, the obligation remains on the authorised person to ensure that the conduct of the affairs covered by the licence accords with its terms. Some authorise see this as a concept of delegation not being an answer, but

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214 *Hickey v McGowan* [2017] IESC 6
215 (1730) 2 Stra 883.
216 [1898] 2 QB 306.
217 [1930] 1 KB 211.
218 (1955) 112 CCC 361 (Ont. Co Ct)
219 [1965] AC 486.
220 Smith and Hogan, *Criminal Law* (15th edn, OUP 2018), 271.

the simpler analysis just suggested may be a better fit.[221] Other situations where the action of an employee is deemed in legislation to be that of the employer are more dubious. In criminal law, possession through another is a legitimate concept; as where in s 1(2) of the Misuse of Drugs Act 1977 "any controlled drug, pipe, utensil or document of which a person has control and which is in the custody of another who is either under the person's control or, though not under the person's control, acts on his behalf, whether as an agent or otherwise, shall be regarded as being in the possession of the person". Liability depends on the actions and state of mind of the accused while the state of mind of the person actually controlling the prohibited item may be innocent. Vicarious criminal liability is a controversial concept. According to Mewett and Manning:

> If anything may be said to impose absolute liability upon anyone it is the application of the doctrine of vicarious liability. The person is liable not only when he himself has no *mens rea* but, even more astonishing, when he has no *actus reus*. It is not he who does any act or has any intent but someone else. It seems an area that must attract Charter scrutiny, as indeed it has.[222]

Limitations

The analysis of vicarious liability that has occurred in Ireland would seem to preserve the licence situation and also authorise liability for the actions of another where the offence is truly of a regulatory character and such a scheme is necessary for legislative effectiveness through the creation of minor offences. This emerges from the decision of the Supreme Court in *Re Article 26 and the Employment Equality Bill 1996*.[223] The impugned portions of the Bill were ss 14 and 15. Section 14 provided that any person who "procures or attempts to procure another person to do anything" constitution discrimination or victimisation would commit an offence. Section 15 was a clear example of vicarious responsibility in criminal law, providing as it did that anything "done by a person in the course of his or her employment shall be treated for the purposes of this Act as done also by that person's employer, whether or not it was done with the employer's knowledge or approval." Furthermore, anything "done by a person as agent for another person, with the authority (whether express or implied and whether precedent or subsequent) of that other person, shall be treated for the purposes of this Act as done also by that other person." In accordance with the analysis of strict and absolute liability emerging from the *City of Sault Saint Marie* decision in Canada, section 15(3) provided a due diligence defence but one which the Supreme Court did not regard as saving the other provisions from unconstitutionality. This stated that t would be "a defence for the employer to prove that the employer took such steps as were reasonably practicable to prevent the employee" from discriminating or from victimising while employed by that employer.

The Supreme Court held that vicarious liability could only be imposed if the following conditions were met:

(1) The provision is essentially regulatory in character, and

(2) The defendant has a particular privilege (such as a licence) or a duty to make sure that public standards as regards health and safety or the environment or the protection of the consumer, and such like, are upheld, and

(3) It might be difficult, invidious or redundant to seek to make the employee liable.[224]

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221 *Allen v Wiitehead* [1930] 1 KB 211, *Mullins v Collins* (1874) LR 9 QB 292.

222 Manning, Mewett & Sankoff , *Criminal Law* (5th edn, LexisNexis Canada 2015) 297. And see Simester and Sullivan. *Simester and Sullivan's Criminal Law* (7th edn. Hart Publishing 2019), 291.

223 [1997] 2 IR 321.

224 ibid 326.

The Bill under scrutiny did not pass this test as it had a penalty of a fine of £15,000 or a prison sentence of two years, or both, and covered offences which far from being regulatory in nature could be expected to attract a substantial measure of opprobrium. The social policy of making the Act more effective could not justify this disproportionate change to the criminal law. Hamilton CJ reasoned:

> It is clear that under s 15 while the person procuring or attempting to procure the deed must have a guilty mind it is not necessary to show that the employer who is to be made vicariously responsible had any knowledge of the procurer's actions. While it was submitted, both in the written submissions and in the oral presentation by counsel for the Attorney General, that sub-s 3 provides an escape route of some description for an accused, this may not always be so.[225]

The Chief Justice referenced the anomalous exceptions whereby at common law an employer might be liable for the actions of employees without authorisation:

> At common law a master was liable for the crimes of his servant in two circumstances only. The proprietor of a newspaper was liable criminally as well as civilly for libels published by his servants in conducting his newspaper even though he had not authorised their publication; but the Libel Act, 1843, permitted him to show that the libel was published without his authority and with no lack of care on his part. (See now s 7 of the Defamation Act, 1961). The other exception at common law was that of public nuisance. This is an act which obstructs, or causes inconvenience or damage to, the public in the exercise of rights common to all the citizens.[226]

The Supreme Court expressed no opinion on the validity of the imposition of liability where regulatory offences carried a necessary nullification of the requirement to prove a mental element. That was not this case:

> While the Court is not now called upon to pronounce on the validity of such provisions, nevertheless, the Court is of the opinion that the conditions by which they may be held to pass muster under our present constitutional system is that they were part of the established legal order at the birth of the State as well as on the coming into operation of the present Constitution; they should essentially be regulatory in character; apply where a person has a particular privilege (such as a licence) or a duty to make sure that public standards as regards health or safety or the environment or the protection of the consumer, and such like, are upheld, and where it might be difficult, invidious or redundant to seek to make the employee liable.
>
> However, what is sought to be done by this provision is that an employer, devoid of any guilty intent, is liable to be found guilty on indictment of an offence carrying a fine of £15,000 or a prison sentence of two years, or both such fine and imprisonment, and to be tainted with guilt for offences which are far from being regulatory in character but are likely to attract a substantial measure of opprobrium. The social policy of making the Act more effective does not, in the opinion of this Court, justify the introduction of so radical a change to our criminal law. The change appears to the Court to be quite disproportionate to the mischief with which the section seeks to deal.[227]

For a discussion of the criminal liability of corporations see Chapter 14. The theory there engaged is quite different since as a matter of law a corporation is an artificial entity, thus lacking the capacity to intend, to foresee or act carelessly. Corporate criminal liability is about the attribution of actions of servants of the corporation and of their state of mind to it.

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225 ibid 370.
226 ibid.
227 ibid 373.

Offences created pursuant to EU Law[228]

The European Communities Act 1972 provides at s 2 that "the treaties governing the European Communities and the existing and future acts adopted by the institutions of those Communities shall be binding on the State and shall be part of the domestic law thereof under the conditions laid down in those treaties." Given that the European legislation is the equivalent of a domestic statute, for these purposes, in consequence a "Minister of State may make regulations for enabling section 2 of this Act to have full effect." These may "contain such incidental, supplementary and consequential provisions as appear to the Minister making the regulations to be necessary for the purposes of the regulations". Section 2(3) forbids the creation of indictable offences under these provisions. Hence the offences tend to be regulatory in character and may be strict liability offences depending on the wording of the delegated legislation. In Ireland it has become common to make breaches of the requirements of European legislation criminal offences.

Case law has established that the constitutionality of domestic legislation designed to give effect to EC legislation may be called into question if such measures are not necessitated by the obligations of membership.[229] In *Meagher v Attorney General*[230] the Supreme Court held that the European Communities (Control of Veterinary Medicinal Products and their Residues) Regulations 1990 was necessitated by membership of the European Union and thus, under Article 29 of the Constitution, was not subject to constitutional challenge. The Regulations had amended the Petty Sessions (Ireland) Act 1856 time limit for prosecution in the District Court of six months by increasing it to two years. Evidence on affidavit went unchallenged that in responding to growth promotion cases the laboratories of the State needed more than six months to analyse samples. A large body of domestic legislation has been passed pursuant to EC obligations. One example of this is European Communities (Unfair Terms In Consumer Contracts) Regulations 1995,[231] which provides that any person "who obstructs or impedes an authorised officer in the exercise of a power under this Regulation, or does not comply with a requirement under this Regulation shall be guilty of an offence." Such offences typically carry a fine or a level of imprisonment consistent with being a minor offence under Article 38 of the Constitution.

Civil Proceedings for Criminal Offences

Civil proceedings may not be brought to enforce a criminal offence unless exceptional circumstances justify that course. In *AG v Paperlink*[232] Costello J identified the following four principles as being applicable where it is sought to seek civil remedies in respect of criminal actions:

> Firstly, I accept as correct the following principle: 'Whenever Parliament has enacted a law and given a particular remedy for the breach of it, such remedy being in an inferior court, nevertheless, the High Court always has a reserved power to enforce the law so enacted by way of injunction or other suitable remedy. The High Court has jurisdiction to ensure obedience to the law whenever it is just and convenient so to do'. *Per* Lord Denning MR in *AG v Chaudry* [1971] 1 WLR 1614 at 1624.
>
> Secondly, the Attorney General as part of his general power to enforce in the public interest public rights has the right ex officio to apply for an injunction to restrain breaches of statute even where the statute prescribes other remedies, including criminal sanctions.

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228 Paul Anthony McDermott, 'Evidence and Procedure update: Criminal offences created pursuant to EU law' (2003) 13(3) ICLJ 20.
229 *Crotty v An Taoiseach* [1987] IR 713 and *Lawlor v Minister for Agriculture* [1990] I IR 356.
230 [1994] 1 IR 329.
231 SI 27/1995.
232 [1984] ILRM 373.

> Thirdly, while the High Court has jurisdiction to grant an injunction in the circumstances just outlined, the jurisdiction should only be exercised in exceptional cases (see *Gouriet v UPM* [1978] AC 435).
>
> Fourthly, in deciding whether to exercise its jurisdiction, the Court would consider the adequacy of the alternative statutory remedy. If satisfied that these alternative remedies are inadequate then the court can properly grant relief by way of injunction. In deciding on the adequacy of the alternative remedies, however, the Court must look at all of the circumstances of the case and the fact that a criminal prosecution has not been brought, does not in itself preclude the Court from granting an injunction

In *Parsons v Kavanagh*[233] it was held that a party was entitled to institute proceedings for relief by way of injunction in respect of a criminal offence committed by another party where the court considered that the penalty did not provide an adequate protection for the constitutional right of the plaintiff to earn an livelihood by lawful means.[234] In *Incorporated Law Society of Ireland v Carroll*[235] the plaintiff brought proceedings for injunctive and declaratory relief against the defendants on the basis that they had held themselves out to be solicitors when, except for one of them, they were not. Murphy J found, on the balance of probabilities, that two of the defendants had held themselves out to be solicitors when they were not, and that another defendant, who was a solicitor, had permitted that state of affairs contrary to s 59(1)(b) of the Solicitors Act 1954. He held, however, that the proceedings were not so exceptional as to allow the civil law to provide a remedy in respect of an act criminalised by statute:

> The plaintiffs anticipated that the civil proceedings would be more expeditious and more efficacious than criminal ones. Presumably, it is generally more difficult to extract, identify and produce the evidence required to prove a case beyond reasonable doubt than it is to produce evidence which would discharge the burden of proof on the balance of probabilities. It follows that speed or its converse, delay, does not amount to an exceptional circumstance. Nor does it seem to me that a criminal prosecution would be less efficacious. If such proceedings were successful and reasonable publicity attached to them, the very fact of the conviction would effect the intention of the legislature and the purpose of the Society. In my view this is not a case of such an exceptional nature as would warrant granting a civil remedy in respect of a criminal wrong.

As regards the solicitor defendant, Murphy J held that while the Constitution vests in the High Court full original jurisdiction and power to determine all matters and questions of law and fact, whether civil or criminal, and while this allowed the court to adjudicate whether or not a breach of s 59 of the Solicitors Act 1954 had occurred, the court was entitled to decline to exercise jurisdiction where there is a more appropriate remedy available.[236] As the appropriate remedy in relation to a breach by a solicitor of this section was either a criminal prosecution or proceedings before the Disciplinary Committee, the court would not entertain them.

Proof of Guilt

It is impossible to separate criminal law from the rules of evidence which set the standard of proof to be achieved, before guilt can be proved, and the means which may be adopted to that end. Chapter 2 is therefore devoted to this subject as are the subsequent chapters 3, 4, 5 and 6 in terms of the technical aspects of proof.

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233 [1990] ILRM 560.
234 See also *Lovett v Grogan* [1995] 1 ILRM 12.
235 [1995] 1 JIC 2402; 1995 WJSC-HC 879.
236 *O'R v O'R* [1985] IR 367.

Jurisdiction[237]

The general principle is that jurisdiction in criminal matters is territorial. This means that jurisdiction is limited to offences committed within the territory of the State regardless of the nationality or domicile of the accused. An offence committed on an Irish ship is committed within the jurisdiction of the State.[238] An act taking place on board an Irish controlled aircraft also takes place within the jurisdiction of the Irish courts.[239]

Extending jurisdiction

Murder and manslaughter constitute one exception to the general principle that criminal jurisdiction is territorial. The Irish courts have jurisdiction over murders and manslaughters committed outside Ireland, provided the accused is an Irish citizen. Section 9 of the Offences Against the Person Act 1861, as amended by the Third Schedule to the Criminal Law Act 1997, provides:

> Where any murder or manslaughter shall be committed on land outside the area of application of the laws of the State, and whether the person killed were a citizen of Ireland or not, every offence committed by any citizen of Ireland, in respect of any such case, whether the same shall amount to the offence of murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in any country or place in the area of application of the laws of the State in which such a person shall be apprehended or be in custody, in the same manner in all respects as if such offence had been actually committed in that country or place; provided that nothing herein contained shall prevent any person from being tried in any place out of England or Ireland, in the same manner as such person might have been tried before the passing of this Act.

Under s 10 (as amended by the Criminal Law Act 1997) jurisdiction is conferred where the accused is attacked in Ireland but dies abroad or is attacked abroad and dies in Ireland.

Exceptional jurisdiction is given also under the Criminal Law (Jurisdiction) Act 1996 and the Explosives Act 1883. The Extradition (European Convention on the Prevention of Terrorism) Act 1987 gives an extremely wide jurisdiction relevant to our discussion. It is an offence contrary to s 5 of the 1987 Act to do or attempt an act in a convention country which if done in Ireland would have constituted an offence involving either (1) an attack against the life, physical integrity or liberty of an internationally protected person, (2) involving kidnapping, the taking of a hostage or serious false imprisonment or (3) involving the use, to the endangerment of persons of an explosive or automatic firearm. The nationality of the offender is not relevant. Where the accused is a national of a convention country it is an offence to do or attempt an act, anywhere in the world, which would have constituted an offence in that person's own jurisdiction and, if he or she had been an Irish citizen, would have been an offence of murder or manslaughter, or an offence under s 2 and 3 of the Explosive Substances Act 1883 involving either (1), (2) or (3) above. Under s 6 this jurisdiction can only be exercised in proceedings taken by or with the consent of the Director of Public Prosecutions. The DPP may not take, or consent to, proceedings except, in the case of the United Kingdom, where a warrant has not been endorsed for execution in the state or extradition proceedings have failed, or, in the case of a convention country, a request for

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[237] Mary Redmond, 'The Criminal (Jurisdiction) Act 1976 and the Constitution' (1978) 13(1) IJ 1-35; Joan Donnelly, 'Unruly Passengers on Board Aircraft: A Review of the Current Liability Regime' (2014) 24(2) ICLJ 34-45; Hansi Fischer-Kerrane, 'Dual criminality in the Corruption Offences Act 2018: A necessary requirement or a hindrance?' (2019) 22 TCLR 123-150; Thomas Mohr, 'the foundations of Irish extra-territorial legislation' (2005) 40(1) IJ 86-110.

[238] *Gulf Oil* [1973] ILRM 163. See generally Air Navigation and Transport Act 1973.

[239] Air Navigation and Transport Act 1973, s 2.

extradition has been finally refused, whether in court, or otherwise. [240] Proceedings may be taken in anticipation of a failure.[241]

Where a person does in Northern Ireland an act which, if done in Ireland, would constitute an offence scheduled under the Criminal Law (Jurisdiction) Act 1996 he is guilty of an offence contrary to s 2 of that Act and is liable to the same penalty as if the crime had been committed in the State.[242] The Act was passed, in essence, as an alternative to extradition. It was somehow considered, at the time, that the Constitution forbade the extradition of political offenders from this jurisdiction, no matter how gross their crime. The definition then put on political offences has not found favour with the courts more recently.[243] The purpose of the legislation was to provide a mechanism whereby persons who commit terrorist-type crimes in Northern Ireland may be tried in this jurisdiction, as an alternative to extradition. Once an offence scheduled under the Act is committed in Northern Ireland it may be tried in Ireland. The offences which are scheduled are the common law offences of murder, manslaughter, arson, kidnapping and false imprisonment. In addition the offences of wounding or causing grievous bodily harm or shooting with intent to maim, and malicious wounding or causing grievous bodily harm contrary to s 18 and 20 of the Offences Against the Person Act, the offences contrary to s 2, 3 and 4 of the Explosive Substances Act 1883, robbery and aggravated burglary contrary to s 23 and 23B of the Larceny Act 1916, offences contrary to s 15 of the Firearms Act 1925, s 26, 27, 27A and 27B of the Firearms Act 1964, and the unlawful seizure of aircraft and vehicles contrary to s 11 of the Air Navigation & Transport Act 1973 and s 10 of the Criminal Law (Jurisdiction) Act 1976 are also scheduled.

Exceptional jurisdiction is also conferred by the Sexual Offences (Jurisdiction) Act 1996, considered in chapter 6, which permits prosecutions to be brought in Ireland against citizens of the State or persons ordinarily resident in the State who commit sexual acts involving children outside of the State. The Act is aimed at so called "child sex tourists". It can be particularly difficult to establish which country has jurisdiction in the case of inchoate offences such as conspiracies and attempts and this problem is discussed separately at paras. The Sexual Offences (Jurisdiction) Act required dual criminality for the exercise of extraterritorial jurisdiction to be possible to prosecute an Irish citizen for a sexual offence against a child outside of the state.[244] As a result of the Criminal Law (Sexual Offences) Act 2017 the state is now able to prosecute Irish citizens committing sexual offences against children abroad without the need for there to be dual criminality.[245]

Choice of jurisdiction cases

It will be rare that any issue of jurisdiction arises. Either liability to be tried in Ireland is established by statute or at common law or it is not. Where an international element comes into play it can be useful to look at the experience in other jurisdictions.

In Canada a broad range of factors are taken into account when establishing criminal jurisdiction. A good example of this is the decision of the Quebec Superior Court in *Ouellette*.[246] The accused was charged with manslaughter. It was alleged that while the accused and the victim were vacationing in the Dominican Republic, the accused struck the victim causing her to fall and sustain a head injury. The victim later died in Canada. The families of both the accused and the victim resided in Canada. The accused sought to prevent his trial in Canada on the grounds that the

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240 Marques v Minister for Justice [2019] IESC 16.

241 Section 6(3)(c).

242 References to doing an act include references to the making of an omission; s 2(1). Liability does not depend on the accused being a national of any particular state. For an analysis of the working of the Act see *The People (DPP) v Campbell* (1983) 2 Frewen 131.

243 See Charleton, 'Extradition to Ireland to the UK' (1989) 53 J Crim L 235.

244 The Sexual Offences (Jurisdiction) Act 1996, s 2(1).

245 The Criminal Law (Sexual Offences) Act 2017, s 42(1).

246 (1998) 126 CCC (3d) 219.

offence took place in the Dominican Republic. Section 6(2) of the Criminal Code provides that no person shall be convicted of an offence in Canada committed outside of Canada. The Quebec Court held that the notion of a "real and substantial link" constitutes a test of varying content which is assessed in relation to the circumstances and, in particular, the importance of the elements of the offence linked to Canada, the relevant facts which arose in Canada and the harmful consequences which were caused, or which could have been caused, in Canada. When weighing these factors, international comity and the universally recognised objective of not letting crime go unpunished must be considered. At least one essential element of the crime, although neither determinative nor even important, must be linked to Canada. While the fact of striking someone constitutes an offence in and of itself, it is the death of the victim which distinguishes manslaughter from the first offence. While this was sufficient to conclude that the offence was not committed outside of Canada there was also the fact that both the accused and the victim as well as their families were Canadian residents. The harmful consequences of the offence occurred in Canada. The Canadian population had a much greater interest in this case than the population of the Dominican Republic. It was also noteworthy that the authorities of that country seemed little or not interested in assuming responsibility for the prosecution of the case. Finally, the accused's interest in being tried in Canada, in his first language, by a judge and jury who shared his social and cultural heritage must also be taken into account. In conclusion, the Canadian courts had jurisdiction to try the accused.

By way of completing this discussion, further consideration is given to the idea of inchoate offences affecting other jurisdictions being committed in Ireland, and attempts and conspiracies to perpetrate offences in Ireland, in Chapter 8.

Limitations

There may be statutory duties under the legislation to warn that a prosecution may be brought or to bring offenders before the District Court within a particular timeframe, but generally there is no statute of limitation for crimes or for tax. Since revenue violations are also crimes, at least this is synchronous. Delay in bringing prosecutions can be serious since there is a duty to prosecute within a reasonable time. Notwithstanding this, violations for rape and other forms of sexual violence have been prosecuted after forty years.[247] Otherwise, scientific advances may make a prosecution possible after decades have passed from the time of a murder.[248] As in Brehon law, liability ceases after death; since every dead person renders his offences dead.[249]

Constructing Criminal Liability[250]

In considering the revision of an old offence, or in creating a new offence, the elements must be examined in terms of what the prosecution needs to prove in terms of the external element of the offence, before considering what should fairly be designated as the mental element. Often, a presumption as to a mental state, or a presumption that a particular fact may be inferred from the existence of another fact, may be of assistance. But, as the analysis in the next chapter shows, inferences are only items of evidence to be weighed in the balance and are not directions to convict. The construction of liability must depend on the principle that an offence should not be cast in terms which make it reasonably possible that an innocent person might be convicted. However, laws which have been found to work incorrectly require revision. If persons who are obviously guilty of conduct which is gravely harmful to the fabric of society continually escape from the offence designed to punish their behaviour, then the law no longer works. Its revision must be

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247 *The People (DPP) v CC* [2019] IESC 94 for instance. This is discussed in the context of sexual offences in chapter 11.
248 *Nash v DPP* [2015] IESC 32.
249 marbaid cach marb a chinta; Kelly, *A Guide to Early Irish Law* (Dublin Institute for Advanced Studies 1988) 157.
250 David Prendergast, 'Constitutional Control of Vague Criminal Law' (2017) 40(2) DULJ 19-44; John Byrne, 'Codification of the criminal law in Ireland' (2005) 15(2) ICLR 15-24.

considered and part of that task may involve the substitution of a less onerous mental element or the creation of a presumption which will assist the prosecution in its task.

Code attempts

In this work, it has already been mentioned that attempts to draft an Irish criminal code have foundered. What causes most difficulty in criminal law is the inconsistency of the multiplicity of statutes passed by the Oireachtas. It should be thought through as to when intention is a necessary mental element of an offence, such as intention to cause harm or intention of someone entering a house to steal. Where both impracticality of proof and the fair imposition of culpability require that recklessness should be the standard, then this constitutes the mental element. Where situations are essentially innocent in themselves, such as sexual intercourse or paying for goods with banknotes, these are dependant on the mental state more than the external action for the imposition of criminal liability. Hence, the ordinary rule applies that the accused is liable for all actions committed by him or her and the only possible defence to the external elements of the offence is automatism. But, awareness of a lack of consent, or of a disability or age barrier, or of forgery is key to the offence. Hence, knowledge of the element constituting the offence is central and recklessness is chosen as an alternative. Quite often possession offences, such as drugs or other contraband, choose a different element. That may be knowledge, or knowledge or belief, or knowledge or belief or suspicion. That last element may be expressed as reason to suspect as establishing criminal responsibility. Does that mean reasonable suspicion or does it mean that the accused is presumed to be reasonable and that if a reasonable person would have suspected the accused is liable? In the latter, apart from strict liability offences, the rule of constitutional construction would seem to need to step in. Why the need for such disparate definitions?

If that were not confusing enough in the area of law designed to protect those under the protection of Ireland from serious harm, elements of offences are still left undefined. What is possession? It can readily be described and so it can easily be put in statutory form. When it comes to intention, this jurisdiction has not seen the mental gymnastics that other countries have applied to simple factual situations. Even still, it remains anomalous that a fundamental concept remains undefined by statute. In this work, best endeavours are applied to present workable descriptions of intention and recklessness and knowledge and reasonable suspicion. These are central. Around them all the elements of criminal law revolve. Were these defined by statute, wordings for old and new criminal offences could easily be melded into what would become in time a coherent criminal code. As we have seen, the reform of the law on interpretation means that offences committed today continue to be a foundation for liability up to trial and conviction. Hence, the piecemeal creation of a code is possible.

Apart from key physical and mental definitions, decisions as to the objective and subjective mental constituents of the defences derive from history and individual decisions. Surely, the time has come to statutorily define the lawful use of force not just for some but for all situations and to provide definitions for duress, necessity, estoppel, insanity, intoxication, diminished responsibility, automatism, entrapment, mistake and infancy?

A modest proposal

Movement towards a criminal code is much easier than redefining in legislative format the entire of the criminal law. Instead it can be done incrementally by:

1. Putting a standard definition of possession in a statutes;
2. Doing the same for recklessness and other concepts;
3. Providing in subsequent legislation that such concepts already defined as fundamental to the criminal law will apply in the instant legislation;

4. Building up legislation in chapters in way with common and correctly understood elements; and
5. Finally, or at some stage, providing a separate statue providing for definitions of the defences.

This work

In this work we end chapters by referring to the Model Penal Code of the American Law Institute. This provides clear and simple definitions of concepts which would tax the recoverable contexts of even the best criminal lawyer. Other codes from Canada and Australia are also referenced. The plan by Sir James FitzJames Stevens to introduce a code to England and Wales foundered before Irish independence. More is the pity. The play was perhaps too ambitious. A code can be achieved by incremental measures. The benefit will be the clarification of the criminal law and the making available within what will ultimately be one volume, the corpus of law that is central to the protection of those living in Ireland.

Code option

The Model Penal Code provides this description in Article 2.02 for the general requirements of criminal culpability:

> (1) *Minimum requirements of culpability* Except as provided in section 2.05, a person is not guilty of an offence unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offence.
>
> (2) *Kinds of culpability defined*
>
> (a) *Purposely*
>
> A person acts purposely with respect to a material element of an offence when:
>
> (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result, and
>
> (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.
>
> (b) *Knowingly*
>
> A person acts knowingly with respect to a material element of an offence when:
>
> (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
>
> (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.
>
> (c) *Recklessly*
>
> A person acts recklessly with respect to a material element of an offence when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.
>
> (d) *Negligently*
>
> A person acts negligently with respect to a material element of an offence when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the

actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

(3) *Culpability required unless otherwise provided.* When the culpability sufficient to establish a material element of an offence is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto.

(4) *Prescribed culpability requirement applies to all material elements.* When the law defining an offence prescribes the kind of culpability that is sufficient for the commission of an offence, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offence, unless a contrary purpose plainly appears.

(5) *Substitutes for negligence, recklessness and knowledge.* When the law provides that negligence suffices to establish an element of an offence, such element also is established if a person acts purposely, knowingly or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.

(6) *Requirement of purpose satisfied if purpose is conditional.* When a particular purpose is an element of an offence, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offence.

(7) *Requirement of knowledge satisfied by knowledge of high probability.* When knowledge of the existence of a particular fact is an element of an offence, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.

(8) *Requirement of wilfulness satisfied by acting knowingly.* A requirement that an offence be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offence, unless a purpose to impose further requirements appears.

(9) *Culpability as to illegality of conduct.* Neither knowledge nor recklessness or negligence as to whether conduct constitutes an offence or as to the existence, meaning or application of the law determining the elements of an offence is an element of such offence, unless the definition of the offence or the Code so provides.

(10) *Culpability as determinant of grade of offence.* When the grade or degree of an offence depends on whether the offence is committed purposely, knowingly, recklessly or negligently, its grade or degree shall be the lowest for which the determinative kind of culpability is established with respect to any material element of the offence.

2.03 Causal relationship between conduct and result; Divergence between result designed or contemplated and actual result or between probable and actual result.

(1) Conduct is the cause of a result when:

(a) it is an antecedent but for which the result in question would not have occurred; and

(b) the relationship between the conduct and result satisfies any additional causal requirements imposed by the Code or by the law defining the offence.

(2) When purposely or knowingly causing a particular result is an element of an offence, the element is not established if the actual result is not within the purpose or the contemplation of the actor unless:

(a) the actual result differs from that designed or contemplated, as the case may be, only in the respect that a different person or different property is injured or affected or that

the injury or harm designed or contemplated would have been more serious or more extensive than that caused; or

(b) the actual result involves the same kind of injury or harm as that designed or contemplated and is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offence.

(3) When recklessly or negligently causing a particular result is an element of an offence, the element is not established if the actual result is not within the risk of which the actor is aware or, in the case of negligence, of which he should be aware unless:

(a) the actual result differs from the probable result only in the respect that a different person or different property is injured or affected or that the probable injury or harm would have been more serious or more extensive than that caused; or

(b) the actual result involves the same kind of injury or harm as the probable result and is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offence.

(4) When causing a particular result is a material element of an offence for which absolute liability is imposed by law, the element is not established unless the actual result is a probable consequence of the actor's conduct.

2.05 When culpability requirements are inapplicable to violations and to offences defined by other statutes; effect of absolute liability in reducing grade of offence to violation.

(1) The requirements of culpability prescribed by sections 2.01 and 2.02 do not apply to:

(a) offences that constitute violations, unless the requirement involved is included in the definition of the offence or the court determines that it application is consistent with effective enforcement of the law defining the offence; or

(b) offences defined by statutes other than the Code, insofar as a legislative purpose to impose absolute liability for such offences or with respect to any material element thereof plainly appears.

(2) Notwithstanding any other provision of existing law and unless a subsequent statute otherwise provides:

(a) when absolute liability is imposed with respect to any material element of an offence defined by a statute other than the Code and a conviction is based upon such liability. the offence constitutes a violation; and

(b) although absolute liability is imposed by law with respect to one or more of the material elements of an offence defined by a statutes other than the Code, the culpable commission of the offence may be charged and proved, in which event negligence with respect to such elements constitutes sufficient culpability and the classification of the offence and the sentence that may be imposed therefor upon conviction are determined by section 1.04 and Article 6 of the Code.

Chapter 2

Fundamental Principles of Evidence

The purpose and role of the rules

The proof of criminal liability is inextricably bound up with the law of evidence.[251] There is no criminal law without the proof of guilt and the means whereby guilt may be proven by the prosecution and defences advanced by the accused is through the law of criminal evidence. Central to any consideration of the trial of an offence is that the prosecution must prove the case which is contended to establish guilt to a standard which removes any possibility that reasonable people, with full knowledge of the facts proven, may regard the accused as not guilty. Since juries of citizens, who are not legally trained, constitute the tribunal for deciding fact in serious criminal cases, what they may hear and what ought to be excluded from their consideration has been a driving force in developing the law of evidence. That, for instance, an accused was previously convicted of an offence unrelated to the charge at trial, is thought to inflame prejudice in minds untrained in the dispassionate and objective examination of facts. Hence, it is usually excluded. Where a person relates something said by another to be a fact, this is again excluded as part of the hearsay rule. The rationale for the basic rules and their exceptions may differ. Through centuries of application of basic principles of fairness as to what a jury ought not to hear and how some principles, such as hearsay, are found to have gone too far and should develop exceptions, even rules based on the most fundamental aspiration that an accused should be afforded a rational assessment of the evidence to back the charge can be excepted. An example is where strikingly probative prior conduct may be admitted despite its tendency to evoke prejudice. Some of those who have committed serious crimes may feel the need to confess, but admissions in police custody are tightly circumscribed by rules to ensure fairness both from a procedural and from a reliability standpoint. Common to the modern approach in criminal law, while the rules of evidence were developed by the common law, statutory intervention has sought to adopt these to modern conditions. Crucial over the decades since 1963 has been the importation into Ireland of the American doctrine of the exclusion of the "fruits of the poisonous tree"; a colourful way of positing that what has been found out through the violation of the constitutional rights of the accused should never, extraordinary excusing circumstances apart, be admitted in evidence. After much criticism of the absolute nature of that rule, the Supreme Court have modified it so that trial judges have discretion.[252] Most of the rules of evidence, however, are just that; rules which either apply or do not, the trial judge having no discretion. The basic premise is that the law is entitled to the evidence of every man and woman who has relevant evidence to offer.

At the Nuremberg Tribunal to decide the war guilt of Nazi leaders, the Anglo-American system of exclusion was rejected. Instead, the tribunal resolved to "admit any evidence which it deems to have probative value." Inheriting, as Ireland did, the English rules of evidence in 1922, there has been just as much neglect of analysis as to the basis and rationale for the existence of these rules as there has been for the creation of a native criminal code. The Nuremberg Tribunal was less troubled by disputes "over procedure and the admissibility of evidence than would be so consumed in a criminal trial in the United States", according to Justice Robert Jackson.[253] Elsewhere in this text, we suggest code options for a future codification of the criminal law. As stated earlier, the place to start that is through the promulgation of basic statutory definitions of

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251 Of particular assistance in a consideration of the rules of evidence in Irish law are: Cole, Irish Cases on Evidence (2nd ed, Dublin 1992), Healy, Irish Laws of Evidence (Thomson Roundhall 2004), Fennell, The Law of Evidence in Ireland (3rd ed, Bloomsbury 2009), Heffernan and Ní Raifeartaigh, Evidence in Criminal Trials (Bloomsbury 2018), McGrath, Evidence (2nd edition, Roundhall 2014).

252 The People (DPP) v JC [2017] 1 IR 417.

253 R H Jackson - Nuremberg in Retrospect 35 ABAJ 813, cited in Glanville Williams, The Proof of Guilt: A Study of the English Criminal Trial (3rd ed, London, 1963).

fundamental concepts such as recklessness, intention, knowledge, possession and dishonesty. Here, our concern is a clear and uncluttered exposition of the law and the laying out of any underlying rationale with a view to considering its modern fitness for purpose.

The Burden and Standard of Proof

The Burden of Proof

Every accused is presumed to be innocent unless and until the jury find him guilty.[254] It is wrong to charge a jury so as to imply there is an onus on an accused to prove innocence.[255] There are limited exceptions to this, but except where expressly otherwise provided, the burden of proof is always on the prosecution at every stage of a criminal trial. That burden is discharged by the prosecution proving beyond reasonable doubt that the accused is guilty of the offence. This involves the proof of his having brought about the external elements of the offence and, at the instant of perpetrating it in the case of a single incident offence, or during the commission of it in the case of a continuing offence, having the relevant mental element of the crime in question. A judge should not tell a jury that if they reject the explanation, if any, given by the accused that they are thus automatically entitled to convict.[256] Always, the prosecution bear the burden of proving guilt and just because a defence case may be unattractive that does not necessarily mean that the prosecution case is sufficiently strong. Furthermore, it is wrong to state or imply that if a defence is likely or probable the accused should be acquitted. Apart from insanity and diminished responsibility and other limited cases where the accused bears some burden of proof, the test is always: has the prosecution disproved the defence beyond all reasonable doubt?[257] Because the burden of proof remains at all times on the prosecution, even if the jury reject the accused's version of events, which in law means that they do not have a reasonable doubt as a result of a consideration of his version of events, they must return and consider the entirety of the prosecution case and ask the question as to whether it proves the guilt of the accused beyond reasonable doubt. The dictum of Lord Sankey in *Woolmington v DPP*[258] has been expressly approved in Ireland:[259]

> Throughout the web of English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt ... if at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal.

Subject to the limited exceptions which follow, there is never an onus upon an accused to raise a doubt in the mind of the jury. When an issue which may establish a defence has been raised by the accused, through the giving of evidence, the reading out of a confession statement made in garda custody, or by putting to a witness on the accused's instructions a proposition which may be tenable, the burden remains with the prosecution to disprove such evidence beyond reasonable doubt.[260] That burden was explained in the context of the justificatory defence of the lawful use of force by Walsh J in *The People (AG) v Quinn* thus:[261]

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254 *Harvey v Ocean Accident and Guarantee Corporation* [1905] 2 IR 1.
255 *The People (DPP) v Rawley* [1997] 2 IR 265.
256 *The People (AG) v Oglesby* [1966] IR 162.
257 *The People (DPP) v Bambrick* [1999] 2 ILRM 71.
258 [1935] AC 462.
259 *The People (AG) v Oglesby* [1966] IR 162; *The People (AG) v Quinn* [1965] IR 366. For further material see Ch 16 on defences.
260 *The People (AG) v Quinn* [1965] IR 366.
261 [1965] IR 366, 382.

> When the evidence in a case, whether it be the evidence offered by the prosecution or by the defence, discloses a possible defence of self-defence the onus remains throughout upon the prosecution to establish that the accused is guilty of the offence charged. The onus is never upon the accused to raise a doubt in the minds of the jury. In such case the burden rests on the prosecution to negative the possible defence of self-defence which has arisen and if, having considered the whole of the evidence, the jury is either convinced of the innocence of the prisoner or left in doubt whether or not he was acting in necessary self-defence they must acquit.

In *The People (DPP) v Gleeson*[262] at issue was the defence of duress. Confusion often arises as between a persuasive burden of proof and the burden of adducing evidence. The persuasive burden of disproving any element of the evidence which rationally could found a defence is on the prosecution. Excepting insanity, diminished responsibility and statutory interventions reversing the burden of proof, the prosecution are required to prove their positive case as to why the accused is guilty, including any defence that may arise. A defence does not simply drop out of the sky. It must be there on the evidence. If it is not, a defence cannot be left to the jury on a speculative basis. Hence, the accused has the burden of adducing some evidence which rationally might found a defence of duress, or lawful use of force or any other. Charleton J explained:[263]

> Since, however, acquittal on a criminal charge is on the basis of the prosecution not meeting the standard of proof beyond a reasonable doubt, a defence may only be left for consideration by a jury if it actually arises on the evidence. Once there is some evidence capable of raising the issue, the persuasive burden of disproving a defence is on the prosecution; see *Taiapa v R* (2009) 240 CLR 95 and Fairall and Barrett, paragraphs 1.73-1.74. A defence should not be left to the jury if there is no reasonable basis to support it, such as where it is either asserted speculatively or without foundation in the evidence. There must be some evidence whereby a defence such as duress may be left to a jury. The mere assertion of a defence does not mean that there is sufficient evidence requiring the jury to consider it.

It is all too easy to assert that a defence arises. But there must a stateable basis for a defence to be left to a jury. Walsh J in the *Quinn* case stated:[264]

> Before the possible defence can be left to the jury as an issue there must be some evidence from which the jury would be entitled to find that issue in favour of the appellant. If the evidence for the prosecution does not disclose this possible defence then the necessary evidence will fall to be given by the defence. In such a case, however, where it falls to the defence to give the necessary evidence it must be made clear to the jury that there is a distinction, fine though it may appear, between adducing the evidence and the burden of proof and that there is no onus whatever upon the accused to establish any degree of doubt in their minds. In directing the jury on the question of the onus of proof it can only be misleading to a jury to refer to "establishing" the defence "in such a way as to raise a doubt." No defence has to be "established" in any case apart from insanity.

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[262] [2018] IESC 53.
[263] ibid [19].
[264] [1965] IR 366, 382-383.

Exceptions

Exceptions to the general rule that the prosecution bears the burden of proof on every issue in a criminal case must be expressly created. At common law, the one exception is the defence of insanity where the burden is on a person who alleges that he was insane at the time of committing the relevant offence to prove to the satisfaction of the jury his lack of criminal responsibility.[265] In *The People (DPP) v Heffernan*[266] the Supreme Court added diminished responsibility to that common law exception. Hence, when insanity or diminished responsibility is the defence in issue, the duty cast on the accused is to clearly prove the negativing of the mental element of the defence due to either insanity or diminished responsibility. That the accused was probably insane or had diminished responsibility must be proved by the accused as a probability. According to O'Malley J, this does not result in an unfair outcome whereby a jury might be left with a reasonable doubt but not amounting to a probability:[267]

> I agree in general with the proposition that any burden cast upon an accused that could result in conviction by a jury, despite a reasonable doubt as to an essential part of the offence, would be an unlawful violation of the presumption of innocence. (I would add to this general proposition a caveat in relation to insanity and mens rea, in that the issues raised in *R. v. Chaulk* [[1990] 3 SCR 1303] do not appear to have been canvassed here.) However I do not consider that this possibility arises in this context. The successful raising of the defence of diminished responsibility does not depend on negation of any element of the prosecution case, nor of proving any essential aspect of it. The long-established elements of murder remain as they were, and are for the prosecution to prove beyond reasonable doubt. Evidence of a mental disorder sufficient to qualify under the Act does not in itself rebut either the common law presumption of sanity and responsibility for actions or the statutory presumption that the accused person intended the natural and probable consequences of his or her actions. It creates a new, mitigatory defence that reduces the consequences of a proven offence. It is therefore incorrect to suggest that the imposition of a burden of proof could require an accused to prove either the actus reus or the mens rea, since these are matters that must be proven by the prosecution beyond reasonable doubt before the question of diminished responsibility can arise. Whether the necessary prosecution proof arises from admissions by the accused or from other evidence is irrelevant. For the same reason, it is not the case that a person could be convicted of murder by a jury that has doubts about his or her guilt.

This seems to involve a pragmatic view. Insanity is virtually never raised as a defence outside of homicide cases and the defence of diminished responsibility has followed this pattern insofar as legislation limits it to murder. Mental illness can be confused with rage or hatred and clarity in a defence which is so much a product of the internal workings of the mind of the accused requires a clear exposition. According to Charleton J in the same case:[268]

> It is fair that someone who claims a mental illness impairing their understanding or conduct in high degree in the context of homicide should have a defence in the form of diminished responsibility. But equally fair is the requirement that, in putting forward such a defence, the accused should truly engage with setting out his or her defence. Justifiably, the burden may be on the accused to bring forward testimony upon which that fact can safely be found.

In addition to the mental illness exception at common law, express statutory provisions have created a presumption that in the event that the prosecution prove a given set of circumstances or

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[265] *AG v Boylan* [1937] IR 449.
[266] [2017] 1 IR 82.
[267] ibid [64]. See further the judgment of O'Malley J in *The People (DPP) v Forsey* [2018] IESC 55 [80-89].
[268] [2017] 1 IR 82 [16].

facts, some aspect of the external or mental element of the offence will thereby be inferred.[269] Examples include the possession of a package containing drugs whereby awareness of the nature of the substance inside the package will be inferred,[270] the presumption that a gift given to a public official is for a corrupt purpose;[271] and the other statutory constructions expressly shifting the burden of proof which are noted throughout this text. Both of these reversed burdens have been subject to constitutional scrutiny. The result is that where an element of the offence is reversed onto the accused to prove the negative of a particular element, because it would be contrary to due process, effectively the guarantee of a trial "in due course of law" in Article 38.1 of the Constitution, it would not be right for the accused to be convicted should the burden on the defence be a probability. A jury not satisfied that the accused had discharged the burden of proving a defence on the balance of probabilities might nonetheless have a reasonable doubt as to his or her guilt. Hence, where the legislature has intervened and reversed a burden onto the accused, that is to be discharged by the accused having the persuasive burden of proving a reasonable doubt. An example is in the definition of the elements of the offence of possession of controlled drugs. There, section 29(2) of the Misuse of Drugs Act 1977 puts the burden of defence on an accused who is proved to be in possession of a controlled drug to prove that "he did not know and had no reasonable grounds for suspecting … that what he had in his possession was a controlled drug … or … that he was in possession of a controlled drug." Within that particular statutory scheme, the burden cast on the accused is to prove a reasonable doubt; *The People (DPP) v Smyth*.[272] That decision of the Court of Criminal Appeal was followed by the Supreme Court in *The People (DPP) v Forsey*.[273] Section 4(1) of the Prevention of Corruption (Amendment) Act 2001 had inserted a section into the original Prevention of Corruption Act 1906 which provided that "any gift, consideration or advantage" received by a person holding a relevant position in government or administration should "be deemed to have been given and received corruptly as an inducement to or reward for the person performing or omitting to perform any of the functions aforesaid unless the contrary is proved." O'Malley J regarded as incorrect any instruction to the jury stating that an accused was required to prove as a probability that a payment was not received corruptly. Instead, the burden on the accused which arose in consequence of the presumption was to establish by whatever means of admissible evidence that there was a reasonable doubt as to the corrupt nature of the payment:[274]

> The jury in a case of this nature should therefore be instructed clearly as to the elements of the offence. They should then be told that the prosecution has the burden of proving beyond reasonable doubt all of the elements, with the exception of the component that is the subject of the presumption – the corrupt intention. They should be told that if the prosecution has satisfied them beyond reasonable doubt of the matters it has to prove, they are to take corrupt intention as having been proved, regardless of whether the prosecution has given evidence in relation to it or not, or has given only weak evidence, unless there is something in the evidence that makes them doubt that the accused had a corrupt motive. The overriding consideration is that a jury should not convict if left in doubt as to guilt.

This accords with the suggested jury direction of Charleton J in the *Smyth* case:[275] As to whether sections such as those dealing with proof of a reasonable mistake as to age under sexual violence

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[269] See generally Glanville Williams, The Proof of Guilt: A Study of the English Criminal Trial (London, 1963), 184-186.
[270] *The People (DPP) v Byrne*, *Healy and Kelleher* [1998] 2 IR 417.
[271] See paras 10.228–10.230.
[272] [2010] 3 IR 688.
[273] [2018] IESC 55.
[274] ibid [145].
[275] [2010] 3 IR 688 [22-23].

legislation will follow this or will instead follow *The People (DPP) v Heffernan*[276] as to insanity and diminished responsibility remains to be seen. The suggested direction from *Smyth* was:

> In directing the jury on this issue, trial judges should in future, in the view of the court, give the ordinary direction as to the burden and standard of proof and the presumption of innocence. In stating the burden and standard of proof, however, a trial judge should point out that the prosecution are obliged to prove the elements of possession of the substance, and that the substance is a controlled drug, beyond reasonable doubt. A trial judge should then tell the jury that the burden of proof shifts to the defence to prove the existence of a reasonable doubt that the accused did not know and had no reasonable ground for suspecting that what he had in his possession was a controlled drug. It should be clearly stated that this burden cast on the accused is discharged if the defence prove a reasonable doubt, and no more than that, on that issue.
>
> Finally, we should add that there is nothing improper in the prosecution seeking in their case to show evidence whereby that defence, of not knowing or having no reason to believe that what the accused had in their possession was a controlled drug, could be argued by them not to have been made out by the accused.

The Standard of Proof

In a civil case, the standard of proof is the balance of probability. This resolves an issue as to whether a party has proved a fact in issue by deciding it as being more likely than not that a fact contended for occurred.[277] Since it is useful to instruct juries as to the contrast between the probability burden and the burden of proof beyond reasonable doubt, defining that term is of assistance. Denning J in *Miller v Minister of Pensions*[278] stated that the civil standard "must carry a reasonable degree of probability, not so high as is required in a criminal case. If the evidence is such that the tribunal can say: "we think it more probable than not", the burden is discharged, but if the probabilities are equal it is not." In a criminal case, the prosecution is required to prove every element of the offence charged beyond reasonable doubt. That standard must not be watered down or misstated by a trial judge in addressing a jury. It is the fundamental bedrock of the criminal justice system.[279] It is wrong to refer to an issue as being likely or probable in a criminal trial; except as expressly otherwise provided, the issue is whether there is proof beyond reasonable doubt, or, put another way, does the material constitute a reasonable doubt in favour of the accused?[280] The Court of Criminal Appeal, through Kenny J, has offered the following views in criticising a misdirection by a trial judge on the burden of proof:[281]

> The correct charge to a jury is that they must be satisfied beyond reasonable doubt of the guilt of the accused, and it is helpful if that degree of proof is contrasted with that in a civil case. It is also essential, however, that the jury should be told that the accused is entitled to the benefit of the doubt and that when two views on any part of the case are possible on the evidence, they should adopt that which is favourable to the accused unless the State has established the other beyond reasonable doubt. In this case the trial judge used the words 'satisfied' and 'to your satisfaction' on many occasions when explaining the onus of proof. He then said that 'being satisfied' means the same thing as 'beyond a reasonable doubt'. This is not correct because one may be satisfied of something and still have a reasonable doubt. The Judge made no attempt to explain to the jury what degree of satisfaction is required and it is in this respect that the time honoured words 'beyond reasonable doubt' are of such

[276] [2017] 1 IR 82.
[277] For an example see *Forshall v Walsh* [1998] IESC 67.
[278] [1947] 2 All ER 372.
[279] *The People (AG) v Byrne* [1974] IR 1; see also *Yap Chuan Ching* (1976) 63 Cr App R 7.
[280] *The People (DPP) v Bambrick* [1999] 2 ILRM 71.
[281] *The People (AG) v Byrne* [1974] IR 1, 9.

> assistance; nor did the judge tell the jury that the accused were entitled to the benefit of the doubt. The court thinks that jury men understand the meaning of the expression 'beyond reasonable doubt', particularly when it is associated with a comparison of the standard of proof in a civil case.

Standard formulae

There are a number of formulae, which have been honoured by repetition, for explaining to a jury the meaning of proof beyond reasonable doubt. The contrasting of that standard with the civil burden of proof is regarded as helpful. They may be told that they should not convict the accused unless the credibility of the witnesses on whom they propose to rely and the overall state of the evidence at the close of the prosecution case is such that in considering very important decisions in their business or domestic affairs, they would be satisfied to rely upon it.[282] A reasonable doubt may be defined as a doubt which may be reasoned out and explained. If, however, at the end of the case the jury are in a state of unhappiness as to the state of the evidence in relation to the guilt of the accused, that might be a reasonable doubt and they are then duty bound to acquit. Proof beyond reasonable doubt is not, however, proof by mathematical formula of exact accuracy. Since nothing in life can be proved to that degree, the same is not required of the prosecution in presenting a criminal case. Nor is proof beyond reasonable doubt to be confused with the shock of a parent or friend on a child or someone close to them being implicated in a crime: the process of judicial adjudication is entirely objective and emotional feelings, much less conflicts of interest, have no place. In *The People (DPP) v Eadon*,[283] Charleton J commented:

> The function of finding fact exercised by a jury in a criminal trial is objective, the jury are acting as part of the judicial function but only in relation to fact, and no one with an emotional interest in a case should serve as a juror or judge. The presumption of innocence is not a belief in the innocence of a close relative, but an open mind that assumes nothing against the accused; unless, and until, the prosecution prove a relevant fact beyond reasonable doubt. In that respect, the presumption of innocence is like a blank sheet of paper upon which the jury may write proven facts, but may only write proven facts, not supposition or conjecture; and then the jury must assess such facts in the context of the argument of counsel as to the meaning of the facts, as to what they do or do not amount to; and then the task of the jury is to decide if there is sufficient proof to pronounce the accused guilty of the crime charged. If not, the verdict is not guilty.

Once the burden and standard of proof has been explained to the jury, it is their function as the judges of fact in a criminal case to decide if it has been met. In *Bisson*[284] the trial judge had explained that proof beyond a reasonable doubt was that degree of certainty which one uses in important activities. He then gave an example. He asked what checks are necessary to determine if there is enough oil in an automobile. When the checks are done properly a person could feel sure beyond reasonable doubt that there was the correct amount of oil for the vehicle to run without damage. The Supreme Court of Canada held that this direction was an error. Two reasons prevented the use of such everyday examples. First, they may indicate to a juror that a decision as to guilt can be made on the same basis as they would formulate a decision in their daily routines: those decisions are commonly reached by using a probability standard. This may lower the requisite standard. Secondly, those examples will be applied subjectively and will vary with the life experience of individual jurors.

Since the jury are required to act judicially, and since judges should not decide cases in which they have a personal interest, proof beyond reasonable doubt has nothing to do with being woken by a

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[282] *Walters* [1969] 2 AC 26.
[283] [2019] IESC 98 [13].
[284] [1998] 1 SCR 306.

phone call and being told a shocking and unbelievable story that a close relation has committed a serious crime. That state of disbelief is emotional and has nothing to do with the shrewdness and common sense that must be applied by a jury to the analysis of whether the prosecution have proved their case beyond reasonable doubt. The accused is presumed to be innocent. That means no more, however, than that the jury should never assume guilt. Rather, the jury start their deliberations with what might metaphorically be described as a blank sheet of paper. When considering their verdict, if any fact is proven against the accused beyond reasonable doubt, that may be filled in on the paper and accompanied by any other fact likewise proven. In a consideration of the entirety of the case, the issue is then whether the case is proven. Inferences from evidence are conclusions reached by reason of the existence of a proven fact or facts. That it has been raining may be inferred from coming out of the court building and seeing the roadways drenched with water. Inferences may only be drawn where these arise to the same standard of proof beyond reasonable doubt. In *The People (DPP) v Smyth*, Charleton J stated as follows:[285]

> The fundamental principle of our criminal justice system is that an accused should not be convicted unless it is proven beyond reasonable doubt that the accused committed the offence. The legal presumption that the accused is innocent, until his guilt is proven to that standard, operates to ensure objectivity within the system. It is a matter for the Oireachtas to decide whether on a particular element of an offence an evidential burden of proof should be cast on an accused person. Of itself, this does not infringe the constitutional principle that the accused should be presumed to be innocent until found guilty. Reasons of policy may perhaps require that any reversed element of proof cast on the accused should be discharged as a probability. That should either be stated in the legislation or be a matter of necessary inference therefrom. The construction of a criminal statute requires the court to presume that the core elements of an offence must be proven beyond reasonable doubt; otherwise the accused must be acquitted.

Instructing the jury

Achieving such a standard requires that the prosecution should be able to present evidence from which an inference of the accused's guilt is inescapable. It is wrong that reasonable people with the same knowledge of the facts as the jury may yet consider that the accused may be innocent. The prosecution may prove guilt either by presenting direct evidence as to the accused's guilt or by presenting circumstantial evidence. Direct evidence would indicate that the accused is guilty from testimony available to the prosecution. For example, in a burglary case, the accused may be caught inside a house collecting together jewellery in a bag. The obvious inference is that he intended to steal. Where the proof is by circumstantial evidence, it must be consistent with the guilt of the accused and must be inconsistent with any other rational hypothesis consistent with innocence.[286] For example, an accused is alleged to have assisted in a kidnapping. At the time when ransom demands are made he is spotted by different policemen in the vicinity of the five different call boxes from which the ransom demands are made at around the same time. Of course, his presence there may be a mere coincidence. He may present evidence indicating that a series of personal errands took him along the same route used by the real kidnapper and at the same precise time as him. Coincidences can occur. Several coincidences may be argued as being consistent with innocence. However, any such argument should be assessed shrewdly. Extraordinary coincidences rarely occur in sequence and seldom are juries taken in by such stories. As a matter of practice, juries seem most often to be motivated to acquit where the gardaí are shown to have been, apparently, less than fully professional or honest. Such an acquittal may occur notwithstanding that the accused is, apparently, obviously guilty. This phenomenon is known as jury nullification.

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[285] [2010] 3 IR 688 [20].
[286] *The People (AG) v McMahon* [1946] IR 267, *McGreevy* [1973] 1 All ER 503.

In *Ching*[287] the English Court of Criminal Appeal showed some impatience with the attempts being made by English judges to elaborate upon the meaning of "beyond reasonable doubt" and opined that "[i]f judges stopped trying to define what is impossible to define there would be fewer appeals." The Court suggested the following guidelines:

(1) The issue of the burden of proof should be dealt with at the start of a summing-up.

(2) It is advisable not to explain "beyond all reasonable doubt" as doing so usually confuses the jury.

(3) An appeal court should look at the whole effect of a summing up when considering whether it was correct or not.

In *Finnerty*[288] the trial judge appeared to give the jury a choice whether to accept prosecution evidence or the defendant's evidence. The defendant successfully appealed to the Court of Criminal Appeal which held that the trial judge should have indicated to the jury that the onus of proof lay at all times on the prosecution and that their consideration of the defence evidence was merely for them to consider whether a reasonable doubt would remain thereafter as to the validity of the prosecution case. In *The People (DPP) v DO'T*,[289] the accused was convicted of rape and other serious sexual offences following a trial where the trial judge did not refer to the presumption of innocence in his charge to the jury. Hardiman J in the Court of Criminal Appeal noted that while the onus of proof was referred to as being on the prosecution, this was done:[290]

> without explaining its basis in the presumption of innocence and without explaining as its ultimate corollary, the entitlement of the defendant to the benefit of any reasonable doubt. The trial judge did not contrast the standard of proof with that applicable to a civil case, proof on the balance of probabilities, which is important as an illustration of the meaning of the phrase "proof beyond reasonable doubt". Nor did he state what was to happen if two views on any part of the case were possible.

A trial judge will therefore instruct the jury that the prosecution has to prove its case beyond a reasonable doubt and that if the jury have a reasonable doubt about the accused's guilt, they must acquit. Hardiman J reiterated the importance of the presumption of innocence:[291]

> The presumption of innocence, thus so securely entrenched nationally and internationally, is not only a right in itself: it is the basis of other aspects of a trial in due course of law at common law. The rule that, generally speaking, the prosecution bears the burden of proving all the elements of the offence necessary to establish guilt is a corollary of the presumption. To state the incidence of the burden of proof without indicating its basis in the presumption is to risk understating its importance and perhaps relegating it to the status of a mere technical rule. The presumption is the basis of the rule as to the burden of proof and not merely an alternative way of stating it.

In *DD*[292] when instructing the jury on reasonable doubt, the trial judge instructed them that the words were used in the ordinary, natural meaning and that the prosecution was not required to prove the accused's guilt beyond a "shadow of a doubt". They had to make a decision between a reasonable doubt and the shadow of a doubt. The Manitoba Court of Appeal held that this was an inadequate explanation and, in particular, the use of "shadow of a doubt" was unnecessary and potentially misleading.

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[287] [1976] 63 Cr App R 7.
[288] [1999] 4 IR 364.
[289] [2003] 4 IR 286.
[290] ibid, 291.
[291] ibid, 290-291.
[292] (1998) 126 CCC (3d) 435.

The trial judge is entitled to put a witness at his or her ease and in particular a child witness who is giving evidence on video link. However, the Court of Criminal Appeal held in *The People (DPP) v Morrissey* that it is inappropriate for the trial judge to congratulate the witness on the conclusion of their evidence and it is equally inappropriate to refer to such matters again in the charge to the jury.[293] In *The People (DPP) v Hourigan & O'Donovan*,[294] the accused was convicted of murder and the evidence of the deceased's mother was crucial. On appeal, the applicants argued that the trial judge, in referring to the mother as "a victim", prejudiced the accused and that this had an adverse influence on the jury. The Court of Criminal Appeal found that while the deceased's mother was a victim given the violent death of her son in her presence, the trial judge's remarks "clearly gave [her evidence] the seal of approval". Unlike in *Morrissey*, the trial judge did not go on to point out that his remarks "had nothing to do with her veracity", thus "[i]n circumstances where [her] evidence … was so crucial this court considers that there is a real danger that the trial judge's remarks may have influenced the jury to reach verdicts of murder and thus rendered the trial unfair and unsatisfactory."[295]

Traditionally the doctrine of recent possession provided that if a defendant was found with recently stolen goods in his possession, there was an onus on him to come up with some kind of an explanation as to how he came by the goods. The existence of such a doctrine in this jurisdiction was soundly rejected in *Oglesby*.[296] In *The People (DPP) v Rawley*, the Court of Criminal Appeal stated that "[t]he essential principle being established in *Oglesby's* case was that a jury should not be charged in such a way as to think that an onus was being placed upon an accused to give an explanation for his possession of goods which he had recently stolen."[297]

Direction to acquit

Once the prosecution has adduced evidence upon which a reasonable jury, properly instructed, could find the accused guilty of the crime charged, the case should be left for their consideration.[298] Article 38.5 of the Constitution gives to the jury the task of trying all offences which are not minor, military or requiring a special court. Hence, a jury trial is not simply an entitlement of the accused but a constitutional imperative. In sitting with a jury, the trial judge has the duty to control the trial so that it may meet the standard in Article 38.1 of being "in due course of law." Hence, where an element of the prosecution case is missing, meaning that proof of the offence is impossible, then the trial judge should stop the trial at the close of the prosecution case. An example would be where an accused is charged with arson but the prosecution fail to adduce evidence that the fire was started deliberately. A prosecution case may also reach an extreme state of self-contradiction and inconsistency to the degree that it would be unsafe for any jury to attempt to resolve the evidence so as to convict. Finlay CJ in *The People (DPP) v O'Shea (No 2)* offered the following explanation as to the role of the trial judge in this latter regard:[299]

> One of the functions of a trial judge in a criminal trial is to reach a decision at the conclusion of the evidence tendered on behalf of the prosecution as to whether there is evidence which if accepted by a jury could as a matter of law lead to a conviction. This may frequently occur in practice in cases where there is a gap in the evidence tendered on behalf of the prosecution and where some vital link in the chain of proof is missing. It also arises in my view, however, and not infrequently, in cases where an apparent link in the chain of proof is so tenuous that it would clearly be perverse for a jury properly directed as to the onus of proof upon the prosecution to act upon it.

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293 Court of Criminal Appeal, unreported, 10 July 1998.
294 [2004] IECCA 7.
295 ibid, 21.
296 [1966] IR 162.
297 *The People (DPP) v Rawley* [1997] 2 IR 265.
298 *Dublin, Wicklow and Wexford Railway Company v Slatter* (1878) 2 LR 319.
299 [1983] ILRM 592, 594.

In *Galbraith*[300] the first of those principles was explained by Lord Lane CJ thus: "If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case." Cases in the second category, where it would be perverse for a jury to convict, involve an assessment by the trial judge of whether that situation truly arises at the close of the prosecution case. Where the strength or weakness of a prosecution case depends on how a jury may reasonably regard the reliability of a witness or a series of witnesses, the jury retain their function of trying the case.[301] In *The People (DPP) v Nolan*[302] Herbert J explained that for the judge to exercise the function of withdrawing a case from the consideration of a jury, the matter must go beyond issues as to credibility, and amount instead to a situation where the jury could not properly find the accused guilty. In *The People (DPP) v M*[303] cross-examination of a complainant in a sexual violence case elicited inconsistencies as between accounts of an attack. While different terms had been used to describe the incident, the central core of the narrative remained consistent. The Court of Criminal Appeal was satisfied that the jury retained its function and could properly convict on the narrative. The question for the trial judge was whether the "prosecution evidence taken at its highest" could not enable a properly directed jury to convict. Issues as to "reliability and credibility" were, on the other hand, "solely matters for the jury", unless those were "such as to render it unfair to proceed with the trial".[304]

In *The People (DPP) v Leacy*, Geoghegan J approved Blackstone's Criminal Practice (1991) summary of the English case law as representing the law in this jurisdiction:[305]

> (a) If there is no evidence to prove an essential element of the offence a submission must obviously succeed.
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> (b) If there is some evidence which - taken at face value - establishes each essential element, then the case should normally be left to the jury. The judge does, however, have a residual duty to consider whether the evidence is inherently weak or tenuous. If it is so weak that no reasonable jury properly directed could convict on it, then a submission should be upheld. Weakness may arise from the sheer improbability of what the witness is saying, from internal inconsistencies in the evidence or from its being of a type which the accumulated experience of the courts has shown to be of doubtful value (especially in identification evidence cases, …)
>
> (c) The question of whether a witness is lying is nearly always one for the jury, but there may be exceptional cases (such as *Shippey*) where the inconsistencies (whether in the witness's evidence viewed by itself or between him and other prosecution witnesses) are so great that any reasonable tribunal would be forced to the conclusion that the witnesses is untruthful. In such a case (and in the absence of other evidence capable of founding a case) the judge shall withdraw the case from the jury.

In *The People (DPP) v Buckley*, Charleton J considered the issue of when a trial can be stopped following the close of the prosecution case. The approach to be taken was summarised in this way:[306]

> In considering, at the close of the prosecution case, whether sufficient evidence has been adduced to allow the case to proceed to the defence case, or to submissions, a trial judge should be concerned to see whether the proofs necessary to make out the charge have been adduced in evidence. At that stage, the trial judge is not concerned with issues of

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[300] *Galbraith* [1981] 2 All ER 1060; [1981] 1 WLR 1039.
[301] [1981] 2 All ER 1060, 1062; [1981] 1 WLR 1039, 1042.
[302] Central Criminal Court, unreported, 27 November 2001.
[303] Court of Criminal Appeal, unreported, 15 February 2001.
[304] ibid, 15.
[305] Court of Criminal Appeal, unreported, 3 July 2002, 6-7.
[306] [2007] 3 IR 745 [14].

> credibility or with sufficiency of proof but with the technical nature of the elements of the offence and whether these have been reflected in evidence by proof. There can be exceptional cases where the nature of a necessary proof is found to be so tenuous that a trial judge would be compelled to make a conclusion that any consequent conviction would be unsafe. In those very rare cases the issue as to conviction might be withdrawn from the jury, or from the judge acting as the tribunal of fact.

The Supreme Court, in *The People (DPP) v Connolly*[307] found that there was a gap in the evidence adduced by the prosecution which should have led to the withdrawal of the case from the jury. This case involved an alleged offence under the Misuse of Drugs Act 1977 and a central issue as to the value of the drugs.

In *The People (DPP) v AD*,[308] the Supreme Court found that the trial judge in a rape and assault case had correctly applied the *Galbraith* test where there was an application for a direction to acquit, and allowed the case to go to the jury. The Court, with Clarke J delivering the judgment, upheld the Court of Criminal Appeal's finding that the trial judge's ruling in allowing the case to go to the jury meant "no more than "that it was possible on the evidence in its then state that a jury could convict the applicant"."[309]

More recently, in another case *The People (DPP) v M*,[310] the Court of Appeal considered an appeal against a conviction for a single count of rape. One of the grounds was that the trial judge should have withdrawn the case from the jury at the end of the prosecution case. Edwards J, delivering the judgment, stated:[311]

> At the outset the Court wishes to address a misconception that it occasionally encounters, that the second limb of Lord Lane's celebrated statements of principle in *R v Galbraith* represents authority for the proposition that a case must be withdrawn from the jury if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies. This Court wishes to emphasise that it is not authority for that proposition.
>
> On the contrary, the emphasis in *Galbraith* is on the primacy of the jury in the criminal trial process as the sole arbiter of issues of fact. What Lord Lane was in fact saying in *Galbraith* was that even if the prosecution's evidence contains inherent weaknesses, or is vague, or contains significant inconsistencies, it is for the jury to assess that evidence and make of it what they will, unless the state of the evidence is so infirm that no jury, properly directed, could convict upon it. Accordingly, what *Galbraith* is in fact concerned with is fairness.
>
> Moreover, implicit in the *Galbraith* principles enunciated by Lord Lane, is that withdrawal of a case from a jury should be an exceptional measure, to which resort should only be had for the purpose of avoiding a manifest risk of wrongful conviction.

The Court concurred with the judgment of Denham J in the earlier *M* case and dismissed the appeal.

Essentially, while the question of a missing element of proof causes no controversy, withdrawal from the jury of a case on any ground related to credibility should only be reserved to those cases at the extreme end of inconsistency and unreliability such that a jury's verdict, if rendered, could not be regarded as safe. It is not for the trial judge to impose his or her own view on the jury's

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[307] [2011] IESC 6.
[308] [2012] 2 IR 332.
[309] ibid, [7.10].
[310] [2015] IECA 65.
[311] ibid [47-49].

function, but only to act to withdraw a case where no other course of action would maintain the overall fairness required of the trial process.

Functions of jury

It is the function of a jury to act with shrewdness and with common sense. That is the reason that jury assessment of evidence in criminal trials is at the heart of the common law system. It is not for the jury to be swayed by emotional considerations either in favour of or against the prosecution or the defence, but to engage in an objective assessment of the evidence based on the collective pooling of their life experience.

Juries, however, can regard a reasonable doubt as existing in relation to any element of a case put before them. Issues of fact are within the exclusive realm of a jury, save where a trial judge is bound by law to resolve an issue through a trial within a trial. If a jury is not satisfied for whatever reason that on a murder charge, the accused, even though he ran the victim through with a knife, did not intend to kill or cause serious injury, then manslaughter is the appropriate verdict and it is for the trial judge to impose an appropriate sentence.[312] As we note in the chapter in relation to sexual violence offences, there are many cases of rape or indecent assault where the sole issue before the jury is whether the complainant consented to the sexual acts in question. Notwithstanding the existence of a complaint and the giving of sworn evidence of a sexual assault or rape, in many cases the jury have found that there has been a reasonable doubt as to whether the complainant consented and, in consequence, have acquitted the accused. These are mere illustrations of the general rule that the role of finding facts is entrusted under Article 38.5 of the Constitution to randomly chosen members of the community.[313] As in the judicial function as exercised by professional judges, there may be cases which result in decisions that may reasonably be regarded as outliers.

One example may suffice. At one time it was thought that in order to prove murder, the prosecution must have found the body of the victim. This was later held not to be good law once the prosecution proved by direct or circumstantial evidence that the accused had unlawfully killed the deceased.[314] Hence, it is sufficient proof of death that a man was pushed overboard in winter in the middle of the Irish Sea. It is, however, almost invariably the case that the prosecution will have found the body of the victim and will have subjected it to a rigorous post-mortem examination. This will show the cause of death, provided the body is not too far decomposed or burnt. Very often, as well, a post-mortem examination will provide evidence as to the weapon used; the manner of attack; whether the victim had a chance to defend himself or herself; some approximate idea as to the degree of force used to bring about the death; the time it took the victim to die; the approximate time of death; the angle of attack of a sharp instrument; and the victim's distance from a discharged firearm. In a case in the 1930s an accused was charged with murdering his brother.[315] The trunk of a body was found buried in the Dublin Mountains. This was clearly the headless and limbless body of a deceased human being and evidence, in that regard, was given by a pathologist on behalf of the State. A pathologist on behalf of the defence, who later found an avocation as a monk, argued that the body in question was not that of a human being, but swore, instead, that it was the corpse of a pig. In terms of anatomy, this proposition was bizarre. The jury acquitted the accused.

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312 *The People (DPP) v Mahon* [2019] IESC 24.

313 *De Búrca v Attorney General* [1976] IR 38; (1977) 111 ILTR 37.

314 *AG v Edwards and Edwards* [1935] IR 500; *The People (AG) v Kirwan* [1943] IR 279; *The People (AG) v Thomas* [1954] IR 319.

315 The authors are grateful to Dr James P O'Neill for bringing the facts of this case to their attention. They have been unable to find any reference in respect of it.

Relevance

Evidence is admissible if it is relevant. Unless evidence which is relevant is required by the laws of evidence to be excluded, it is part of the function of a trial in due course of law under Article 38.1 and 38.5 of the Constitution for the jury to consider it. Furthermore, the court system uses compulsion to ensure that all relevant evidence is to be adduced before the tribunal of fact at a criminal trial. In *The People (DPP) v JT*, Walsh J expressed that principle in near maxim form: "the administration of justice itself requires that the public has a right to every man's [and every woman's] evidence except for those persons who are privileged in that respect by the provisions of the Constitution itself "or other established and recognised privilege"".[316]

Evidence may be defined as relevant if that evidence renders more probable or more improbable any fact in issue in the trial. It follows, for any decision on relevance to be properly made, that the prosecution must present a coherent narrative of the way they say the crime was committed and of the involvement of the accused in that crime. Any expressed defence, whether in fact or in law, of the accused is also to be taken account of. It is in this context that relevance may be assessed. That is done on the basis not of philosophical deduction but on the basis of ordinary sense and experience. Hence, where the accused is charged with murdering the victim, it is relevant that the accused had expressed hatred of the victim and a desire to see him or her dead. It is relevant on a burglary charge that the accused was seen near the scene of the crime proximate to the time it was committed. It would be a perversion of sense to adjudge relevance on any such basis as requiring that each piece of evidence should be sufficient in itself to bring home a conviction. That is to mix up relevance and weight. Facts are relevant because of their relationship with facts in issue and assume importance in terms of weight because either a witness who has direct experience of the accused committing the crime, such as by being present and identifying him, is regarded as highly reliable, or because a fact, that may at first instance seem almost trivial, assumes importance because of its relationship to other facts.

Central to any issue of relevance is to ask what case is being made and whether common sense renders a fact disputed as relevant more likely in consequence of being considered as part of the overall body of evidence. Cole puts the matter thus:[317]

> It must be borne in mind that in its ordinary meaning "relevance" denotes something which is variable and elastic: variable because a particular fact may be relevant in one context and irrelevant in another, elastic because the relevance of any relevant fact may vary in degree from being only minimally of interest to being highly or compulsively persuasive. Facts which are only minimally relevant maybe excluded on that ground alone

Evidence only remotely relevant may be excluded as may items of evidence liable to lead the tribunal of fact into side issues. Since *Talbot v Hermitage Golf Club*[318] the courts have emphasised the importance of identifying and deploying court time only on issues which are of central importance to the case. That is a principle of universal application. Jury time should not be wasted on irrelevancies and a central role of the trial judge is to keep focus on what will enable a just disposal of a criminal trial.

The weight to be attached to evidence is a clumsy way of describing the importance attached by the jury to any particular fact. That a witness had a clear view and was independent of any controversy that may have led to a motive for the accused to commit the crime may mean that more reliance is place by the jury on that witness's testimony. That may be contrasted with testimony that comes from the wife of the accused as to an alibi of being at home when the crime was being committed or evidence from an accomplice who has a reason to minimise his or her

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316 (1988) 3 Frewen 141.
317 JSR Cole, Irish Cases on Evidence (2nd edition, Dublin, 1982), p 1-2.
318 [2014] IESC 57.

own involvement, or, because of a grudge or through mischief, may put someone in the frame for the commission of the crime when perhaps they were not.

It used to be that evidence was only receivable in criminal trials if counsel for the prosecution had outlined that proposed testimony in opening the case to the jury. In modern terms, evidence is receivable if outlined in the book of evidence. The Criminal Procedure Act 1967 as amended by the Criminal Procedure Act 2010 provides under section 4B for the accused to be served with a statement of the charges against him or her; a copy of any sworn information in writing upon which the proceedings were initiated; a list of the witnesses proposed to be called by the prosecution at the trial; a statement of the evidence expected to be given by each of them; a copy of any document containing information which it is proposed to give in evidence; and a list of exhibits, if any. *The People (DPP) v Doyle*[319] concerned whether an accused in the District Court was entitled to be given statements on which the prosecution case will proceed prior to a trial. The Court noted that a District Court judge "has the duty of ensuring that justice, incorporating fundamental constitutional concepts of fair procedures" are implemented, but in the absence of legislation requiring such statements to be given to an accused in the District Court, it was for a judge in each case to decide whether "in the interests of justice on the facts of the particular case" the accused should be given such statements.[320] It was noted that in many "very minor cases" this will not be required. Denham J referred to O'Higgins CJ in *The State (Healy) v Donoghue*[321] where he stated that:

> There are thousands of trivial charges prosecuted in the District Courts throughout the State every day. In respect of all these there must be fairness and fair procedures, but there may be other cases in which more is required and where justice may be a more exacting task-master. The requirements of fairness and of justice must be considered in relation to the seriousness of the charge brought against the person and the consequences involved for him.

Thus, it was held that for more serious and complex cases, it may be required that copies of statements and other relevant documents be provided to the accused in order to enable him or her to prepare a defence.[322] Denham J thus set out the following as being relevant factors for a trial judge to consider in "deciding whether or not constitutional justice requires statements or documents to be furnished" pre-trial to an accused:[323]

(a) the seriousness of the charge;

(b) the importance of the statements or documents;

(c) the fact that the accused has already been adequately informed of the nature and substance of the accusation;

(d) the likelihood that there is no risk of injustice in failing to furnish the statements or documents in issue to the accused.

Direct versus circumstantial evidence

Central to any investigation is actual fact. But fact depends on who is asserting the truth of any such apparent fact. This brings into question not only their means of knowledge, but also any reason they may have to speak contrary to the truth or to conceal the full truth. While classifications assume an obsessive, and thus not useful, character through over use, it is nonetheless worth noting that direct evidence is of testimony from a witness who has perceived, seen or heard, the facts to which the witness testifies. Simply because a witness gives direct

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[319] [1994] 2 IR 286.
[320] ibid, 301.
[321] [1976] IR 325 at 350.
[322] [1994] 2 IR 286 at 302.
[323] ibid.

evidence does not mean that he or she is to be afforded all the weight that such evidence may carry on its face. It is proper for the defence, on instructions, to explore any infirmity that may lessen the apparent impact of the testimony of a direct witness; such as whether he or she had slept well, or had drunk alcohol, or was missing corrective lenses or had a hearing issue. Such cross-examination does not attack credit but merely the foundation upon which the witness stands as to fact. Motive for giving testimony is another matter. Questioning someone as to credibility may be necessary where the accused wishes to allege that false or dubious testimony is being given out of an ill-motive.

An example may help: matters which show that a witness may have been fraudulent in the past, or has previous convictions, should be disclosed where known to the prosecution, as should matters showing poor character such that it might be reasonable to put such matters to a witness with a view to testing the trustworthiness of a person apparently seeking to undermine the good name of a witness at trial. Under section 6 of the Criminal Procedure Act 1865, a witness may be questioned about previous convictions, "and upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction." In *Gertz v Fitchburg*, the Massachusetts Supreme Court, with Holmes J giving the judgment, set out the principle behind the introduction of such evidence about a witness:[324]

> W]hen it is proved that a witness has been convicted of a crime, the only ground for disbelieving him which such proof affords is the general readiness to do evil which the conviction may be supposed to show. It is from that general disposition alone that the jury is asked to infer a readiness to lie in the particular case, and thence that he has lied in fact. The evidence has no tendency to prove that he was mistaken, but only that he has perjured himself, and it reaches that conclusion solely through the general proposition that he is of bad character and unworthy of credit.

In *Harris v Tippett*, Lawrence J highlighted the importance of relevance in this context:[325]

> I will permit questions to be put to a witness as to any improper conduct of which he may have been guilty for the purpose of trying his credit; but, when the questions are irrelevant to the issue on the record, you cannot call witnesses to contradict the answers he gives.

Any examination by counsel of what a witness says is subject to the rule that it should be based on instructions and directed towards what a represented party wishes to assert as an explanation of what happened, or to present a contrary point of view. Where focus is kept, cross-examination of witnesses is concise. Any party examining a witness is expected to come to the point, with reasonable latitude, and to be polite, with no latitude. Examination should converge on what is important. While cross-examination is an instrument for finding the truth, it can also be used to obfuscate and to divert attention away from the central issues. Trial in due course of law implies that represented parties will provide their legal representative with clear instructions; that they will tell them what facts they will later testify to. Cross-examination as to credit can be legitimate. That may, or may not, be in the discretion of counsel. It may depend on the client or it may be within counsel's hands. The credit of a witness may be important, apart from their opportunity of observation, sureness of memory or possible motive. Where a witness is coming from may be germane to some cases. If, for instance, a prisoner sharing a cell with an accused person on remand

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[324] (1884) 137 Mass 77, 78.
[325] (1811) 2 Camp 637, 638.

on a charge of murder claims that the accused confessed to him his motive for killing the victim, then the fact that the prisoner as a witness himself has previous fraud convictions is important. It would be less important if he had been unfaithful to his girlfriend, or perhaps had done something discreditable while under strain or while young. The law of evidence allows the control of cross-examination as to the credit of a witness based on its usefulness to the determination of the facts at issue and its length.[326]

Since witnesses are subject to potential infirmity as to both perception and as to possible motive, perhaps the best evidence of the guilt of the accused is a set of circumstances which point inexorably to his having committed the crime. Witnesses may also be under a disability, by reason of the category by which the law defines them. Even apart from such categories, which are dealt with hereunder, witnesses may be dishonest or mistaken, and very frequently are one or both. It is submitted that the following statement of the law by Sandes constitutes the correct exposition of the nature and use of circumstantial evidence in proof of crime:[327]

> The testimony of a witness who actually saw the accused person kill the deceased is direct evidence, but if the prisoner had died of poisoning the pecuniary embarrassment of the prisoner, his buying poison and attempting to avoid an inquest and other such facts would be relevant as circumstantial or indirect evidence. See *R v Palmer* (1856), Stephen's History of the Criminal Law, P 389. Circumstantial evidence is very often the best evidence that the nature of the case permits of. It is evidence of surrounding circumstances which by undesigned coincidence is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial, *R v Taylor*, 21 CAR 21. A jury may convict on purely circumstantial evidence, but to do this they must be satisfied, not only that the circumstances were consistent with the prisoner having committed the act, but also that the facts were such as to be inconsistent with any other rational conclusion than that he was the guilty person. *AG v O'Brien* CCA 11-7-32; *R v Hodge*, 2 Lew 227; Halsbury, First Ed, Vol IX, Art 1190; page 588.

It is the function of the trial judge to decide whether any particular piece of circumstantial evidence may tend, if accepted, to show that the accused committed the crime in question. It is submitted that it is not proper to divorce a consideration of the relevance of that evidence from such other evidence which the prosecution proposes to offer. It is submitted that it is the function of the jury to first consider the weight to be attached individually to each piece of circumstantial evidence and then to consider as a whole the cumulative weight of each piece of circumstantial evidence which has been proved to their satisfaction beyond a reasonable doubt. If the weight of the accumulation of evidence is such as to prove to their satisfaction beyond reasonable doubt that the accused committed the crime, then the jury may convict. Circumstantial evidence may usefully be regarded as a rope made up of individual threads of evidence. The issue is whether the accumulation of such evidence suffices to meet the beyond reasonable doubt standard borne by the prosecution.[328] In *The People (DPP) v Gilligan*,[329] Denham J on behalf of the Supreme Court described the nature of circumstantial evidence thus:

> Circumstantial evidence may be corroborative evidence. Thus in *Attorney-General v O'Sullivan* [1930] IR 552, the court was of the opinion, having considered the evidence, that there was a

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[326] See further: Healy, Irish Laws of Evidence (Thomson Roundhall, 2004), ch 3; Fennell, The Law of Evidence in Ireland (3rd ed, Bloomsbury, 2009), from p 191; Phipson on Evidence (19th ed, Sweet and Maxwell, 2018), ch 22.

[327] Sandes, Criminal Law and Procedure in the Republic of Ireland (3rd ed, 1951), p 177. See also: The *People (AG) v Cadden* (1956) 1 Frewen 157; *The People (AG) v McKeogh* (1960) 1 Frewen 208; *The People (AG) v Joyce and Walsh* [1929] IR 526; *The People (AG) v Thomas* [1954] IR 319; *The People (AG) v McMahon* [1946] IR 267; *Greevy* [1973] 1 All ER 503.

[328] *Exall* (1866) 4 F&F 922, 929.

[329] [2006] 1 IR 107, 142.

> body of circumstantial evidence of a material kind which supported the boy's story, including the commission of the offence, and which directly implicated the accused. Thus, corroboration may be obtained in a body of circumstantial evidence, more than one piece of circumstantial evidence, which has a cumulative effect and establishes corroboration. Not every piece of the independent circumstantial evidence may implicate an accused with the offence, but the collection of circumstantial evidence as a whole tends to implicate the accused.

In *The People (DPP) v Nevin*,[330] one of the grounds of appeal of the accused related to the trial judge's charge to the jury on circumstantial evidence where she had been found guilty of murder and soliciting the murder of her husband. The accused argued that the trial judge's charge was more favourable to the prosecution as she had not referred the jury to the alternative explanations of the circumstantial evidence put forward by defence counsel in his closing speech to the jury. The Court of Criminal Appeal rejected this submission, finding that the trial judge's charge was appropriate:[331]

> It must be assumed that the jury followed the directions of the learned trial judge and understood in their deliberations that at all times the applicant was presumed to be innocent. Each item of evidence and the combined effect of the evidence had to be considered in that light. Without ever abandoning the presumption of innocence, the prosecution in proceeding against the applicant on the murder charge is perfectly entitled to rely on any piece of evidence which might be suspicious or uncannily coincidental and such items of evidence cannot just be viewed in isolation of each other. It is the combined effect of the circumstantial evidence which is of importance even though, in respect of each item of such circumstantial evidence, the jury has to consider whether it accepts it or not and also has to consider whether an inference suggested to be drawn from it is warranted or not.

Putting the accused's case

Fundamental to a fair trial is the requirement both that the case being made is that which emerges from the instructions of the accused, in other words, is not made up by counsel, and that matters impacting on the weight or credibility of any contrary witness should be put to that witness and not held back. This matter is dealt with in detail in the chapter dealing with witness examination.

Witnesses and Warnings

Generally, no warning about a witness is required to be given by a judge charging a jury at the conclusion of evidence and speeches in a criminal trial. In general, all witness are both competent and compellable since, as stated, the law has an interest in, and an entitlement to, the evidence of every person who can assist in the trial of an accused.[332] Some witnesses who fall into particular legal categories may be classified, in terms of their treatment, as requiring special consideration. Particular kinds of witnesses may be regarded as requiring a more than usually cautious approach which common sense suggests is the correct means of the shrewd assessment of any testimony. It is appropriate to set out here the main categories of witnesses and types of evidence required by law to be treated in some special or exceptional way.

(1) Visual identification evidence

Miscarriages of justice have occurred by reason of a witness mistakenly identifying the accused as the perpetrator of the crime. Extreme errors have been made in the past. During the years 1876-1877 John Smyth perpetrated a series of petty frauds upon women in London.[333] Posing as a

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330 [2003] 3 IR 321.
331 [2003] 3 IR 321 at 347.
332 *The People (DPP) v JT* (1988) 3 Frewen 141.
333 The account of this case is taken from Williams, The Proof of Guilt (3rd ed, Steven & Sons Ltd 1963), p 106-131.

"gentleman of means" he would visit women at their homes and make an offer that they should come and live with him. He would then borrow a piece of jewellery and some money and disappear. That particular man was convicted and imprisoned. After Smyth's release in 1895, similar frauds, thirteen or so, again began to be perpetrated against women in London. One of the defrauded women purported to identify the person who had perpetrated the frauds. The person identified was not John Smyth but a man called Adolf Beck who was in South America when the earlier series of frauds had been committed by John Smyth. Upon being arrested, Beck was identified in all by twelve women in the course of identification parades. In fact the victims identifying him had been defrauded by John Smyth who had resumed his activities upon release from jail. Only one woman who had been defrauded by Smyth was certain that Beck was not the man responsible. Beck was imprisoned and the prison records registered him as John Smyth. In 1904, two years after Adolf Beck had been released from prison, the frauds began again. Four further women picked out Beck in identification parades. A handwriting expert identified Beck's handwriting in his pocket-book as being that which the fraudster, who was in fact John Smyth, had used in letters to the women. While Beck was in custody awaiting sentence, however, there was a further spate of similar frauds. Smyth was then arrested. It had taken nine years to uncover an identification error committed coincidentally by sixteen different women supported by the dubious testimony of a handwriting expert.[334] A legal committee to enquire into the case concluded that "evidence as to identity based on personal impressions is perhaps of all classes of evidence the least to be relied upon, and, therefore, unless supported by other facts, an unsafe basis for the verdict of a jury".[335] Influenced by this, among other cases, the Court of Criminal Appeal in *The People (AG) v Casey (No 2)*[336] required a mandatory warning to juries in cases where the prosecution is relying substantially or wholly on the visual identification of the accused as the person who perpetrated the crime. This passage from the judgment of Kingsmill Moore J is often read by trial judges to juries either in whole or in part:[337]

> We are of opinion that juries as a whole may not be fully aware of the dangers involved in visual identification nor of the considerable number of cases in which such identification has been proved to be erroneous; and also that they may be inclined to attribute too much probative effect to the test of an identification parade. In our opinion it is desirable that in all cases, where the verdict depends substantially on the correctness of an identification, their attention should be called in general terms to the fact that in a number of instances such identification has proved erroneous, to the possibilities of mistake in the case before them and to the necessity of caution. Nor do we think that such warning should be confined to cases where the identification is that of only one witness. Experience has shown that mistakes can occur where two or more witnesses have made positive identifications. We consider juries in cases where the correctness of an identification is challenged should be directed on the following lines, namely, that if their verdict as to the guilt of the prisoner is to depend wholly or substantially on the correctness of such identification, they should bear in mind that there have been a number of instances where responsible witnesses, whose honesty was not in question and whose opportunities for observation had been adequate, made positive identifications on a parade or otherwise, which identifications were subsequently proved to be erroneous; and accordingly that they should be specially cautious before accepting such evidence of identification as correct; but that if after careful examination of such evidence in the light of all circumstances, and with due regard to all the other evidence in the case, they feel satisfied beyond reasonable doubt of the correctness of the identification they are at liberty to act upon it.

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[334] See ER Watson, (eds) The Trial of Adolf Beck, (William Hodge 1924).
[335] Quoted in Williams, p 122.
[336] [1963] IR 33. Seamus Sorohan SC has informed the authors that the facts of the case of Adolph Beck were among the materials he argued for the defence in the Supreme Court.
[337] ibid, 39.

> This direction is not meant to be a stereotyped formula. It may be too condensed to be fully appreciated by a jury without some further explanation and the facts of an individual case may require to be couched in stronger or more ample terms, as when the witness or witnesses had no previous acquaintance with the appearance of the accused or had only an indifferent opportunity for observation. It does, however, contain a minimum warning which should be given in any case which depends on visual identification. No specific reference is made to 'corroboration in a material particular implicating the accused'. An item of evidence falling within this formula may, according to its nature, have very little or very great probative value. This consideration is meant to be covered by the words, 'in the light of all the circumstances, and with due regard to all the other evidence in the case,' and it is for the judge to deal with the lesser or greater probative value of any item of corroborative evidence.

Identification parades

As the Adolf Beck case suggests, identification parades are not necessarily a fool proof method of overcoming the dangers inherent in visual identification. According to Glanville Williams, at the majority of such parades the witnesses either pick out nobody or an uninvolved person.[338] It would be wrong to suppress the fact that a witness had previously identified a person incorrectly and this fact should be disclosed to the defence. There should be a full disclosure at the trial of all the circumstances of identification, so as to enable a jury to find whether it has been established beyond reasonable doubt that the correct person has been picked out and not merely a person who comes closest to a general description.[339] Williams comments:[340]

> Even granting a reasonably good memory on the part of the witness, the danger of the identification parade is that the witness expects to find the guilty person present, and therefore points out the man who he thinks is most like the one he can remember. Thus all that an identification parade can really be said to establish is that the accused resembled the criminal more closely than any other members of the parade did, which is not saying very much.

The circumstances of identification should conform with fundamental standards of fairness of procedure. If, however, a suspect refuses to take part in an identification parade, it lessens the impact of a complaint about his later identification in less than satisfactory circumstances.[341] Whether the circumstances of an identification are satisfactory or not always, notwithstanding the behaviour of the accused, goes to the weight to be attached to such evidence. Dock identifications carry very little weight, but may, subject to a stringent warning, be regarded as adequate.[342] Informal identification parades are not completely satisfactory, as where an accused, while remanded on bail, is identified by a witness in the precincts of the District Court. They are, however, admissible in evidence.[343]

The Supreme Court in *The People (DPP) v Cooney*[344] noted the inherent risks of dock identifications, with Keane J stating that "the identification of the accused for the first time when he or she is sitting in the place normally reserved for the accused and usually flanked by prison officers is of limited probative value", with judges having a discretion as to whether to admit a dock identification into evidence or not.[345] Such evidence was correctly admitted in *Cooney* in exceptional circumstances where "the admittedly prejudicial nature" of a dock identification did not "outweigh

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338 Williams, p 120.
339 *The People (AG) v Fagan* (1974) 1 Frewen 375.
340 Williams, p 121.
341 *The People (AG) v Martin* [1956] IR 22.
342 *The People (DPP) v Cooney* [1997] 3 IR 205. See also *The People (AG) v Bond* [1966] IR 214.
343 *The People (DPP) v O'Reilly* [1990] 2 IR 415.
344 [1997] 3 IR 205.
345 ibid, 212.

its probative value".[346] In *The People (DPP) v Gilligan,*[347] it was argued on behalf of the accused that the identification of the accused was a dock identification, however the Supreme Court agreed that the identification of the accused amounted to recognition as opposed to a dock identification as the witness had previously met the accused on at least five occasions.[348] Denham J thus reiterated the statement of O'Flaherty J in *O'Reilly* to the effect that holding an identification parade would "probably be a redundant exercise" where the witness previously knew the accused.[349]

The courts have emphasised in numerous cases that the ideal procedure for identification is an identification parade.[350] In *The People (DPP) v Duff,* Finlay CJ stated:[351]

> [T]he proper, regular and optimum method of holding an identification [procedure] for a witness who believes he or she can visually identify an accused person in a criminal case is an identification parade. Any other method of visual identification where it is a real issue in the case is necessarily a second-best.

Similarly, in *The People (DPP) v Lee*,[352] Murray J stated:

> [B]ecause of certain inherent dangers in relying exclusively or predominantly on evidence of visual identification there is an onus on the investigating gardaí and the prosecution to ensure that evidence of visual identification is obtained in the most reasonably reliable form which, in the absence of reasonable cause, should be in the form of a formal identification. It is possible that a reasonable explanation for not holding a formal identification parade may be evident or inferred from the particular circumstances of the case or there may be a specific explanation given in evidence of the kind referred to [in *The People (DPP) v O'Reilly*] such as the refusal of the accused to participate in one. Neither should it be said that the absence of the holding of a formal identification parade without adequate explanation would in all circumstances be a bar to a jury being permitted to consider evidence of an informal identification provided that the circumstances in which it occurred were not such as to materially prejudice an accused in the conduct of his or her defence.

The People (DPP) v Mekonnen summarised the procedure for identification parades in the following way, with ideally eight or nine persons "of similar age, height, appearance, dress and walk in life, to the suspect and also coming from a similar detailed socioeconomic background" taking part:[353]

> The parade should be conducted by a garda independent of the investigation team and of the knowledge and information which it possesses: a full record of what occurs, including details of the foils should be kept: the suspect should be entitled to a solicitor and have him or her present if so desired: any objection reasonably made should be considered on its merits: the suspect should be told of his right not to participate and he should not be seen in advance of the parade by any potential witnesses. In addition, and overriding any individual element of this procedure, is a duty on the gardaí to conduct such a parade fairly as dictated by the circumstances. Other safeguards relative to the specific facts may therefore, be required. The gardaí must be vigilant and proactive in this regard. However, whilst every effort must be made to comply with these requirements and any others necessitated by the individual circumstances of any given case, there will of course be occasions where some single element(s) may have to yield to the practicality of the circumstances at hand.

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346 ibid, 215.
347 [2006] 2 IR 107.
348 [2006] 2 IR 107, 158.
349 ibid.
350 *The People (DPP) v O'Reilly* [1990] 2 IR 415; *The People (DPP) v Duff* [1995] 3 IR 296, 300; *The People (DPP) v Lee* [2004] 4 IR 166, 179; *The People (DPP) v Mekonnen* [2012] 1 IR 210.
351 [1995] 3 IR 296, 300.
352 [2004] 4 IR 166, 179.
353 [2012] 1 IR 210 [17].

While there may be accepted reasons for an identification parade to not be held, in *Mekonnen* McKechnie J summarised the circumstances in which it had been found in previous cases to not be acceptable:[354]

(a) that the suspect was not readily available: (*The People (Director of Public Prosecutions) v Fagan* [1974] 1 Frewen 375);

(b) that the witness did not want personal contact with the suspect (*The People (Director of Public Prosecutions) v Duff* [1995] 3 IR 296); and

(c) that the gardaí felt it was in the suspect's interest not to conduct such a parade (*The People (Director of Public Prosecutions) v O'Reilly* [1996] 2 IR 415).

Naturally, this list is not closed. It is, however, a persuasive guide. An accused has the right to refuse to participate in an identification parade, but if they do so, then gardaí are entitled to have recourse to other more informal procedures. Flaherty J in *The People (DPP) v O'Reilly* stated that if a suspect refuses to take part in an identification parade or attempts to frustrate the parade taking place, then "he may have to live with the consequences".[355]

Photographs

The identification of a suspect by means of photographs can be helpful but also may be subject to error:[356]

> It is the practice of the police when tracking a professional criminal whose identity is unknown to use the modus operandi index at Scotland Yard, and to show a witness a number of photographs (including photographs of non-criminals) in order to enable him if possible to identify the person whom he observed. If the witness 'identifies' one of the photographs as being that of the culprit, the person whose photograph is thus picked out is likely to be arrested, in the absence of cogent evidence that he is not guilty; he will be put in an identification parade, where he will again be 'identified' by the witness; he may then be tried, and at the trial evidence may be given that the witness identified him at the parade. It need scarcely be said that this procedure offers a grave possibility that the innocent may be convicted. When the witness is shown the photographs, he is likely to pick on the face that best accords with his recollection of the culprit. Thereafter, his recollection of the culprit and recollection of the photograph are likely to be so merged that he can no longer separate them, even though in fact his identification was mistaken.

It is permissible for a garda who has received a description of an offender to show photographs to the describing witness. The proper course is to use a series of photographs, not merely one or two, and to leave it to the unaided recollection of the witness as to whether any are identified. The trial judge should direct the jury's attention to the fact that the identification at a later identification parade may have been coloured by his having seen such a photograph.[357] The defence may introduce the fact that such photographs were official garda photographs, but the prosecution, for fear of prejudicing the trial, may not do so. The defence may claim that this may show that the accused has a criminal record. That is not necessarily so. Precautions may, not must, be taken to assist a neutral presentation. It thus appears sufficient if reference is made to photographs in such a neutral way as not to warn the jury that these were official garda photographs of suspected criminals or convicts.

Section 12 of the Criminal Justice Act 2006 provides the gardaí with the power to photograph a person who is arrested, "for the purpose of assisting with the identification of him or her in

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354 [2012] 1 IR 210 [20].
355 [1990] 2 IR 415, 421; see also The People (DPP) v Maples, Court of Criminal Appeal, unreported, 26 February 1996.
356 Williams, pp 121-122.
357 *The People (AG) v Mills* [1957] IR 106.

connection with any proceedings that may be instituted against him or her for the offence in respect of which he or she is arrested." In *The People (DPP) v Rapple,*[358] the Court of Criminal Appeal, Barron J giving the judgment, referred to "two separate and distinct situations in which photographs might be shown to a witness": the first being where the police are seeking to find a suspect, the second is where the police have a suspect and want the witness to attend an identification parade.[359] That particular case fell within the first category and thus the Court found no issue with the use of photographs. The Court also quoted Lord Hewart in *Melany*:[360]

> If a witness is asked to identify and that witness is shown the photograph of the person before what has been called a 'corporal identification' that is one thing. It is quite another thing where the person has not been arrested and the police are in the greatest doubt who is the culprit. If in that state of the evidence photographs are put before the prosecutor and he is invited to say who among these is the person who ought to be arrested, there is a great difference.

In *The People (DPP) v Brazil*,[361] an armed robbery case, the accused was identified in an identification parade, and later the identifying witness was shown a photograph of the accused and reassured by the investigating garda that she had chosen the person whom he suspected was involved in the robbery. There was no issue with this and the Court of Criminal Appeal rejected the appeal, however Keane CJ pointed out that if the photograph had been shown to the witness prior to the identification parade, this would have "so tainted and rendered almost valueless the identification that it should never have gone before the jury."

Voice

In *The People (DPP) v Prunty*[362] Judge Martin warned that voice identification may be subject to infirmities. Such a warning is not required by law and, in any event, there will be considerable focus on the evidence in terms of a defence attack as to the weight to be attached to it. In that case, the accused had kidnapped the victim from his home in Enniskerry, County Wicklow. There followed a number of ransom demands. These were tape-recorded by the gardaí and identified as the voice of the accused by a Detective Inspector, who had known him over a period of years as a garda officer in the Bray area. The first conviction was overturned on a hearsay evidence point and on a second trial the jury again convicted.

In *The People (DPP) v Kavanagh*,[363] the holding of identification parade would have been an "unreal" exercise because witnesses stated that they recognised the accused from his voice and not physical appearance. In *The People (DPP) v Crowe*,[364] the admissibility of voice identification evidence by a garda member was at issue. The garda had listened to 15 seconds of a recording of an interview with the accused and made the identification in a case where the accused was convicted of sending a menacing message to a member of An Garda Síochána. The Court of Appeal recognised the "significant infirmities" in the voice identification evidence in the case. The Court ultimately found that it "lacked the necessary degree of cogency to allow it to be admitted before the jury, even as a piece of circumstantial evidence"[365] The appeal was thus allowed, with the Court concluding:[366]

> While it has not been prepared to do so in this particular case, the Court does not foreclose on the possibility that in a future case it might be persuaded to uphold the admission of voice identification evidence in the absence of appropriate procedural safeguards, depending on the

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358 [1999] 1 ILRM 113.
359 ibid, 117.
360 (1923) 18 Cr App Rep 2, 3.
361 Court of Criminal Appeal, unreported, 22 March 2002.
362 The decision of the Court of Criminal Appeal is reported at [1986] ILRM 716, but the first-named author appeared for the prosecution.
363 Court of Criminal Appeal, unreported, 7 July 1997.
364 [2015] IECA 9.
365 ibid [66].
366 ibid [71].

circumstances of the case, and in particular the degree of procedural unfairness involved, and whether the attendant risk of wrongful conviction was capable of being adequately offset by other measures such as a Casey/Turnbull type warning.

(2) Accomplices

A person who participates in a crime is an accomplice to that crime. A person who aids the concealment or escape of a perpetrator becomes an accomplice after the fact where that is done in the knowledge that the crime has been committed. Participation is dealt with elsewhere in this work: but it is worth reiterating that awareness of the crime coupled with some material assistance, from encouragement to supplying weapons or implements, is required to be a participant. Very often the prosecution will have no option but to call evidence from those who have been involved in the commission of a crime or who have aided the escape of a perpetrator. This is particularly so in the case of organised crime where those most responsible for the pursuit of criminal activity will hide behind a wall of silence. Key personnel are likely to distance themselves through having subordinates commit the crime. No accomplice to crime is likely to be entirely blameless. Otherwise the definition would make no sense. The accomplice should have pleaded guilty or the Director of Public Prosecutions should have made a decision not to charge him or her prior to the accomplice giving evidence.[367] Where the trials of those accused of the same crime or crime are conducted separately, one accused should not be called to give evidence against another until the State witness's case has been disposed of.[368] Where an accused has pleaded guilty, it is generally thought desirable that he should have been sentenced before being called on behalf of the prosecution.[369] That has been the practice in this country. In principle, reasons to follow the prosecution line are removed by the accomplice being tried and sentenced prior to testimony against another participant in a crime. In *Pipe*, Parker LCJ, on behalf of the English Court of Appeal, commented:[370]

> In the judgment of this court, it is one thing to call for the prosecution an accomplice, a witness whose evidence is suspect, and about whom the jury must be warned in the recognised way. It is quite another to call a man who is not only an accomplice, but is an accomplice against whom proceedings have been brought which have not been concluded. There is in his case an added reason for making his evidence suspect. In the judgment of this court, this well-recognised rule of practice is one which must be observed and, accordingly, in the circumstances of this case there is no alternative but to quash the conviction.

In *Coffey*[371] the Court of Appeal indicated that it is not necessary to dispose of an accomplice who has pleaded guilty by sentencing him prior to his giving evidence against a former co-accused. It is enough that the accused has pleaded guilty.[372] That is not likely to be followed in this jurisdiction where the practice is contrary.

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367 *Conti* (1973) 58 Cr App R 387; *Richardson* (1967) 51 Cr App R 381.

368 *Pipe* (1967) 51 Cr App R 17.

369 *Payne* [1950] 1 All ER 102. See further Phipson on Evidence, paras 9.19-9.20.

370 (1967) 51 Cr App R 17, 21.

371 (1976) 74 Cr App R 168.

372 In *The People (DPP) v Sacco*, O'Higgins J took the opposite view. He held there that a 15-year-old girl who had murdered the accused's husband, allegedly at Mrs Sacco's behest, could not be called to give evidence even though, on the prosecution case, she had pleaded guilty. O'Higgins J ruled that there might be an interest in the girl giving evidence against the accused and that therefore it was required, prior to her being allowed to give evidence, that she should receive a sentence – Central Criminal Court, unreported, 11 May 1998. Of course, a sentenced person may also have an interest in giving evidence: eg, to persuade the Minister to order early release.

While there is a multiplicity of cases as to who may be regarded as an accomplice,[373] the principles stated by Charleton J in *Fitzgerald* suffice:[374]

> The rule as to the accomplice warning and corroboration, however, is related to participation in a crime. Where a witness participates in a crime and later gives evidence against those who are co-participants, he or she by nature is a suspect witness. The necessity to warn the jury, in that regard, comes from the composition of the tribunal of fact, the randomly selected jury of citizens, not being exposed to that of which a judge will be aware, namely the temptations of exaggeration and substitution that are sometimes beyond the normal inclination of a person confronted with their own conduct. The essence of an accomplice is that they have been a participant in the crime with which an accused is charged and to which they are a witness. To participate in a crime requires some act of positive assistance, coupled with the realisation that such assistance will assist in the commission of that crime. Hence, supplying a weapon in the realisation that it will be used for an assault is to participate in an assault. To participate in murder, that weapon has to be supplied with the intent that it be used to cause death or serious injury; section 4 of the Criminal Justice Act 1964. Any lesser state of mind, for instance of simply aiding an assault, however, renders the person an accomplice to that crime. The distinction between felonies and misdemeanours having been abolished, knowing or reckless assistance in the commission of a crime through some act such as providing encouragement or supplying some physical tool that might assist suffices to render someone an accomplice. Section 3 of the Criminal Law Act 1997 provides that the law and practice in relation to misdemeanours is of general application. In that regard, being aware that a crime has been committed but taking steps to ensure the escape of the perpetrators, whether through hiding them or destroying evidence, can draw a person previously innocent into being an accomplice after the fact; in this regard see the speech of Lord Simonds LC in *Davies v DPP* [1954] AC 378 at 400.

It will rarely be a matter of debate as to whether someone is or is not an accomplice. In the *Fitzgerald* case however the Supreme Court made it clear that failing to reveal that a murderer was hiding in one's home in consequence of threats to children did not put a witness into that category. As Charleton J stated:[375]

> Circumstances will usually make it obvious to everyone in court that an accomplice to a crime is to give evidence. The rules of practice on dealing with accomplices make it clear that this is the case. Thus, the ordinary situation is that where the prosecution seeks to undermine a criminal gang by calling evidence from inside it; for instance see *The People (DPP) v Meehan* [2006] 3 IR 468. Of its nature, such an exercise will show that the witness proposing to testify against others involved in the crime charged will have more than the usual compulsion of shame and evasion in minimising his or her own involvement. This makes sense. After all, it follows that where one person's share of criminal complicity is minimised, then, consequently, the involvement of some other participant is likely to be exaggerated. See for example *DPP v O'Reilly* [2017] IECA 89. It may also be that, given the nature of the exercise, those planning crime meet in secret and operate through concealment, an accomplice can falsely add in an individual at a meeting or allege that he or she supplied a weapon or somehow otherwise acted in order to aid the commission of the crime.

Form of warning

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[373] See *Davies v DPP* [1954] AC 378, 400; *Attorney General v Linehan* [1929] IR 19, *Dental Board v O'Callaghan* [1969] IR 181; *The People (Attorney General) v Henry Kearney and Patrick Mulcahy* [1955] IR 4, *The People (DPP) v Diemling*, Court of Criminal Appeal, unreported, 4 May 1992; *People (AG) v Carney* [1955] IR 324; *DPP v Dundon* [2013] IESCC 1.
[374] [2018] IESC 58 [19].
[375] ibid [17].

An accomplice is both a competent and a compellable witness against any accused, including a former co-accused or co-conspirator in a crime. The jury may convict on the uncorroborated testimony of an accomplice, but they should consider with particular care the nature of the evidence against the accused and the possibility that the accomplice may be acting out of reasons of revenge, spite or ill-will towards a former criminal confederate in giving his evidence. The Court of Criminal Appeal has approved the following direction by Judge Dominic Lynch as a full, complete and extremely correct direction to a jury with regard to how it should approach the evidence of an accomplice:[376]

> The law provides that the trial judge must warn you of the dangers of convicting on the uncorroborated evidence of an accomplice. You are entitled to convict on the evidence of an accomplice, but if you so decide you must bear in mind that there are dangers and you must bear in mind the warning which I am about to give you. Because of the fact that there is complicity in the crime and that Mark Kelleghan in this case had something to gain by giving this evidence from the time of his arrest onwards, you must treat that evidence with suspicion. That is a danger that lies in convicting on uncorroborated evidence of an accomplice. The object of corroboration in dealing with the evidence of an accomplice is to indicate to you that, although the particular witness is believed, experiences in the courts have shown that it is unsafe to act on the evidence of an accomplice alone, unless it is confirmed by other evidence implicating the accused in the crime. So, you have to look to see if there is corroboration. You should look to see if there is corroboration by evidence independent of the evidence of Mark Kelleghan. Corroboration is independent testimony which affects the accused by connecting or tending to connect him with the crime, something independent of the evidence of Mark Kelleghan.

In the *Fitzgerald* case, this was referenced by the Supreme Court through the judgment of Charleton J:[377]

> The jury is entitled to convict on the evidence of an accomplice, but because of the fact that there is complicity in the crime and the accomplice has something to gain by giving evidence as and from the time of arrest onwards, the jury should treat that evidence with suspicion. When the evidence is not backed up by corroboration, independently tending to show the involvement of the accused against whom the accomplice gives evidence, in the crime, that danger arises from the ease with which the actions of another participant can be exaggerated or whereby it can be alleged that someone is a participant who is not. Because of the bitterness and deceit inherent in criminal activity, it is necessary to treat accomplice evidence as dangerous unless it is so corroborated; see for example *The People (DPP) v McGinley* [1987] IR 340 at 343.

It has been argued that the rule requiring a warning in the case of accomplice evidence does not apply to informers; co-defendants who give evidence on their own behalf and implicate the accused; persons who are not accomplices in the particular crime with which the prisoner is charged; and co-defendants in technical offences.[378] It is submitted, however, that in any case where reason may conclude that a witness may have an interest in giving evidence against an accused by reason of former involvement in crime with the accused, the accomplice warning, or a similar warning to it, ought to be given.

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376 *The People (DPP) v McGinley* [1987] IR 340, 343.
377 [2018] IESC 58 [23].
378 Phipson on Evidence, paras 14-07-14-08.

(3) Children

Formerly section 30 of the Children Act 1908, as amended by section 28(2) of the Criminal Justice Administration Act 1914, enabled a child of "tender years" who does not, in the opinion of the court, understand the nature of an oath, to give evidence not upon oath if, in the opinion of the court, the child has sufficient intelligence to justify the reception of the evidence and understand the duty of speaking the truth.[379] Under the 1908 regime, corroboration was a statutory requirement.[380] The notions underlying the theory of unreliability in relation to children's evidence have been undermined. The reform of the law is more precisely dealt with from para [8.76]. What matters in this context is that section 27 of the Criminal Evidence Act 1992 abolished the statutory requirement for the evidence of a child to be corroborated. The trial judge may give a warning about acting on the uncorroborated evidence of a child but the form of that warning, and whether to give any warning at all, is at the discretion of the trial judge. Carney J has ruled that a consideration of the modern statutory requirement as to whether the child can give an intelligible account of events may best be done by examination in the presence of the jury. This is because that examination may assist the jury as to the weight to be attached to such evidence. The law on assisting children and people with special needs to give evidence is considered in the context of sexual offences in this volume.

(4) Sexual offences

Formerly, it was the law that where the offence alleged was any form of rape or sexual assault, the judge should warn the jury in clear and unmistakable terms that it was dangerous to convict on the uncorroborated testimony of the complainant.[381] It was not accurate for a jury always to be warned, as the former law required, "that convicting on the uncorroborated testimony of the complainant is dangerous." This law has been swept away.[382] Section 9 of the Criminal Law (Rape) (Amendment) Act 1990 provides that in sexual violence cases, it is for the judge to decide if any warning "about the dangers of convicting the person on the uncorroborated evidence" of the complainant should be given and the form of the words is also at the discretion of the judge. Thus, the judge may give a warning at his or her discretion, but the form and content of the warning, if given, is a matter for the judge. This is considered in greater detail in the chapter on sexual offences.

(5) The gardaí

The law in relation to confessions by accused persons to members of An Garda Síochána is more detailed and exacting than any other branch of the law of evidence. It is now often the case that the trial within the trial as to the admissibility of confession material, held in the absence of the jury, takes as long as the trial itself as to whether the prosecution has proved its case beyond reasonable doubt in front of the jury. Notwithstanding these detailed and technical rules, there remained the issue as to whether any special form of warning was required where a conviction depended wholly or, as it often does, substantially on a confession allegedly made by the accused to the gardaí. The closest investigation of the circumstances of taking a confession is carried out by the courts. On occasion, stringent criticism of garda methods has emanated from judges trying cases depending substantially on confession evidence.[383]

Statutory requirement

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379 *See AG v O'Sullivan* [1930] IR 552; (1930) 64 ILTR 181.

380 *AG v Kearns* (1946) 80 ILTR 45; *AG v Levison* [1932] IR 158; *AG v O'Sullivan* [1930] IR 552.

381 *The People (AG) v Williams* [1940] IR 195; *AG v Trayers* [1956] IR 110; *The People (AG) v Cradden* [1955] IR 130.

382 See the treatment of the Criminal Law (Rape) (Amendment) Act 1990 in the context of sexual offences in this volume.

383 See the judgment of the Special Criminal Court in The People (DPP) v Ward, Special Criminal Court, unreported, 27 November 1998.

During the third hearing in the Supreme Court in 1992 of the extraordinary case of *The People (DPP) v Quilligan and O'Reilly*,[384] the Supreme Court declined to make the consideration of confessional evidence obtained from an accused while in garda custody subject to a mandatory warning by the trial judge as to the dangers of relying on same. It is within the discretion of the trial judge in each particular case to give such a warning, or to warn the jury of the difference in quality and persuasiveness of verbal admissions as opposed to signed confessions, or where appropriate, to exclude such evidence altogether on grounds of involuntariness or basic unfairness. Where an accused person has made allegations of harassment or of sustained oppression in the process of interrogation, it is essential for the trial judge to put these matters to the jury because they go to the weight to be attached to such evidence, even if the trial judge has ruled as a matter of law on a trial within a trial that the confession statement is admissible. This is part of the obligation to put the defence case before the jury. The judge ought to indicate to the jury, in a very clear and unqualified form, in accordance with the onus of proof, that if such allegations should raise in their minds any doubt as to the truth of the admissions alleged to have been made, the accused should be acquitted. This was always the law and it remains the law. The Oireachtas, however, was also moved to act. The result was s 10 of the Criminal Procedure Act 1993 which provides:

> (1) Where at a trial of a person on indictment evidence is given of a confession made by that person and that evidence is not corroborated, the judge shall advise the jury to have due regard to the absence of corroboration.
>
> (2) It shall not be necessary for a judge to use any particular form of words under this section.

Since it is for a judge to rule what evidence may be corroboration, and for a jury to decide whether corroboration is present which indicates that the accused committed the crime, it had been arguable up to the Supreme Court's decision in *The People (DPP) v Power*[385] that this limited form of warning must necessarily be given in every case where a jury are considering a prosecution case which depends to any degree upon admissions made either in garda custody, or otherwise. The section does not draw a distinction between a crime where the confession is peripheral, one where the confession is the only evidence and one where the confession is accompanied by DNA or fingerprint evidence from the scene and is thus merely part of a prosecution case. Thus, the same rule might apply, for example, where a person returns home late at night and confesses to his lover that he has just stolen money from the night safe of a bank. The Supreme Court took a pragmatic approach, approving the approach of the trial judge, Murphy J. Her direction to the jury on the corroboration issue was thus:

> Now, essentially, at the end of the day, this case stands or falls on the confession which the prosecution alleges the accused man, Maurice Power, made. Either you are satisfied beyond reasonable doubt that the confession is true and reliable, in which case you convict, or you're not so satisfied, in which case you acquit. Because of the experiences, particularly in the 1970s and 1980s in this country, where undoubtedly false confessions were extracted, sometimes quite brutally from people, the law was changed in 1993 and since then the law has been that when reliance was placed on confession evidence, juries should consider whether or not there is independent confirmation of the truth and reliability of the confession. That's –it's called in law

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384 [1993] 2 IR 305. The case involved an attack on two brothers in Ballycurreen, County Cork, in November 1984. One brother died of injuries designed to elicit from him the whereabouts of a mythical stash of treasure while the other died in a nursing home within a year. The accused were charged with murder and with burglary, even though at the time it was usual for murder to appear alone on an indictment. At their trial before the Central Criminal Court, Barr J ruled that section 30 of the Offences Against the State Act 1939, giving arrest powers, could only be used against suspected subversives. This was reversed by the Supreme Court. On an application for a retrial, the Supreme Court refused, Hederman J giving no reasons. The accused were tried on the burglary count and convicted. On a later appeal, one of the accused had his conviction overturned because of the death of a witness.

385 [2020] IESC 13.

> corroboration. So, if reliance is being placed on a confession, you must consider whether or not there's independent evidence which confirms the truth and reliability of the confession and independent confirmation is evidence that comes from sources other than the gardaí. If there isn't and if at the conclusion of your analysis of the evidence you find that there's no independent confirmation of the truth and reliability of the confession, you must ask yourselves then whether the absence of independent confirmation diminishes your trust in the confession to the point where you're not confident of its truth beyond reasonable doubt. You must bear in mind, however, that even if there is no independent confirmation, you're still perfectly entitled to convict so long as you are satisfied of the truth of the accused's confession beyond reasonable doubt. The law does not say that you cannot convict without independent confirmation of the truth and reliability of a confession, it merely states you must consider its absence if you find that it's absent and what weight, if any, you should give to the factor and once you do that you can have considered whether or not there is corroboration and if its absence –what weight you should give to that absence, whether that absence diminishes your confidence in the truth of the confession, the decision is yours and is a matter for you.

O'Malley J took the view that the mischief at which the section was aimed was the unthinking use of a confession in cases where the proof of guilt depended very substantially on the accused's own admission. In such cases, a warning such as that quoted above should be given, but where the prosecution case strongly supported guilt, with confession evidence as merely a component, it was up to the trial judge to assess was there corroboration of the truth of the accused's admissions to having committed the crime and only if the trial judge considered that there was not, was there a necessity to give the warning.

> I do not consider that the section is intended to have the effect that a warning is to be given in all cases where confession evidence is adduced. Firstly, the wording of the provision specifically imposes the obligation to address special advice to the jury if a confession is uncorroborated, rather than an obligation in respect of every confession in every case. That seems to me to require a ruling or finding by the judge, solely for the purpose of instructing the jury, that the section is applicable because the confession is uncorroborated.
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> 87.Secondly, to apply the section in every case where a confession is part of the prosecution case has the potential to cause significant confusion for juries. It could have the radical and, in my view, unintended consequence that evidence that is clearly probative of guilt in its own right (such as robust forensic evidence, eyewitness evidence or circumstantial evidence) could be relegated to the role of supporting evidence. Such evidence might not even be accepted as corroboration in some cases, if it does not come from a witness who is independent from the gardaí who say that the accused confessed. To take one simple example, gardaí who witness an offence may arrest the suspect and receive a confession from him. It would be absurd, and confusing, for the jury to have to treat the confession as uncorroborated simply because the eyewitness evidence comes from the same gardaí. On the other hand, it would be even more confusing if they were instructed to assess the evidence twice –once as potential corroboration and once in its own right.88.
>
> I appreciate that traditionally, in other categories of cases where corroboration may be an issue, the judge does not determine whether any corroboration exists. He or she has to decide only whether the threshold criteria are met –for example, whether a particular witness can or cannot be treated by the jury as an accomplice, or whether the circumstances of a trial for a sexual offence are such that a discretionary corroboration warning should be given. Once that decision is made, it is clearly not for the judge to determine whether any part of the evidence does in fact amount to corroborative evidence. That is a matter for the jury, subject to appropriate guidance as to what evidence can, or cannot, be taken as corroborative if accepted by them.

> 89.However, if, as I believe, s.10 requires the trial judge to determine whether the confession is uncorroborated, for the purpose of deciding whether or not some special advice as contemplated by the section should be given to the jury, it follows that the judge will have to make some qualitative assessment of the evidence. I would emphasise that this is for the purpose of deciding whether or not to give a particular warning, and not for the purpose of instructing the jury that there is, or is not, corroboration in the case.90.I do not consider that this approach is contrary to the constitutional principle that juries are the finders of fact in a criminal trial. It is true that the judge cannot know which evidence they will accept. However, it is equally true that after a verdict of "Guilty", there is no way of knowing whether the jury accepted all, or only part, of the prosecution case. Yet that does not prevent an appellate court from determining, by reference to the evidence as a whole, that there was sufficient evidence on a particular issue to sustain the verdict.

Warnings and focus

A proliferation of warnings may add unnecessary and undue complexity to the jury's consideration of a case. In other jurisdictions, corroboration warnings have been abolished as confusing, complex and productive of appeals.[386] In England and Wales, the changes have been noted as being "driven by several concerns; in particular, some of the old rules were based on assumptions about the general characteristics of certain categories of witnesses which derived from outdated views or even prejudice", and directions "were complex, confusing and gave rise to many appeals."[387] Thus, the modern law has adopted a position where judges have a discretion as to whether a warning will be given or not, and such warnings when given are "usually in a simple form urging caution before relying on the type of evidence concerned".[388]

An individual prosecution case may depend upon three pillars of evidence. The first pillar may be the evidence of an accomplice which indicates that he was involved with the accused as a criminal confederate and that together they planned and perpetrated the crime with which the accused is charged. That evidence must be subject to the accomplice warning. The second pillar might be the visual identification of the accused at the scene of the crime by, for example, those watching while the accused and his confederates ripped an automated teller machine out of a wall using a JCB digger before loading it onto a pickup truck. That evidence must be subject to the visual identification warning. The third pillar might consist of the confession by the accused to complicity in the crime while under arrest by the gardaí using the powers of arrest and detention contained in s 30 of the Offences Against the State Act 1939, or other arrest and questioning power. That evidence should be subject to a warning that the jury should have due regard to the circumstances placed before it, either by evidence or cross-examination, as to the manner in which it is alleged the gardaí took the statements. The judge should explain to them the nature of corroboration and distinguish evidence which merely shows that the crime was committed from evidence which implicates the accused in the commission of the crime. If the jury are not satisfied beyond reasonable doubt as to the truth and accuracy of the first and second pillars of the prosecution case, but propose to rely wholly or substantially upon the third pillar, the confession evidence, then the judge should warn them that if they are not satisfied that there is corroboration of that evidence by the first and second pillars of the prosecution case, they should have due regard to the absence of such corroboration and should try carefully the matters in issue between the prosecution and the defence as to the circumstances in which the confession was taken. If,

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[386] Phipson on Evidence, para 14-01. In England and Wales, the law was described as being in "arcane, technical and difficult to convey" by the Law Commission in its report "Corroboration in Criminal Trials" (Cmnd 1620, 1991). In that jurisdiction, therefore, the common law rules as to corroboration were abolished through section 34(2) of the Criminal Justice Act 1988 and section 32 of the Criminal Justice and Public Order Act 1994. The law as to corroboration has been beset by so many problems that its demise was not limited simply to the neighbouring kingdom. It has also been overturned, as regards accomplices, in both Canada and New Zealand.

[387] Phipson on Evidence, para 14-01.

[388] Phipson on Evidence, para 14-01.

following a careful consideration of that evidence, they are not satisfied that it is sufficiently reliable to convince them of the guilt of the accused beyond reasonable doubt, they must acquit. If, however, following such a consideration, and bearing in mind the warning given to them, and notwithstanding that they may find that the confession is not corroborated, they were convinced beyond reasonable doubt of the truth and reliability of the confession material, they are entitled to convict.

In *The People (DPP) v Connolly*[389] Hardiman J for the Court of Criminal Appeal suggested the following as a model form of charge dealing with the jury having due regard to the absence of corroboration of a confession statement:

> This case stands or falls on the confessions which the prosecution allege the accused made. Either you are satisfied beyond reasonable doubt that that confession is true and reliable, in which case you will convict, or you are not so satisfied, in which case you will acquit. The law requires me to point out to you that there is no corroboration of the evidence of the confession. Corroboration means independent confirmation. In a case like this, it would mean some evidence independent of that of the gardaí who say they heard the accused confess, which you could fairly and reasonably regard as confirming the truth of the confession. There might have been forensic evidence placing the accused in the injured party's house, which would certainly confirm the truth of the alleged confession. He might have been found in possession of the stolen property or he might have been identified by some person as the robber. On the other hand, there are cases which, of their nature, make it hard to find corroboration. You must consider what sort of case this is from the point of view of corroboration. When you are considering whether you can feel sure that the statement is true and reliable beyond reasonable doubt, you must ask yourselves whether the absence of any corroboration or independent confirmation of the statement should reduce your trust in it to the point where you are not confident of its truth beyond reasonable doubt. Since the earliest times, people faced with important decisions have sought to make their task easier by looking for independent confirmation of one view or another. It is very natural and prudent to do so, and very comforting if you find it. But if it is absent, the decision still has to be made. If it is absent where you would expect to find it, that fact in itself may affect the decision.
>
> I am obliged to give you this warning because of a law passed by the Oireachtas in 1993, which says that I must advise you to give due regard to the absence of corroboration. It is essential that you do so. You must also bear in mind that, despite the absence of corroboration, you are perfectly entitled to convict if you are indeed satisfied of the truth of the accused's confession beyond reasonable doubt. The law does not say that you cannot convict without corroboration, merely that you should specifically consider the absence of corroboration and what weight, if any, you should give to this factor. Once you do this, your decision is a matter for your own good sense and conscience.

As long as the judge instructs the jury to have "due regard" to the absence of corroboration, if they find that there is no other evidence tending to implicate the accused in the crime, the above is not a necessary formula. Corroboration is about independent evidence tending to implicate the accused in a crime. It does not mean that two police officers are there for the confession, one supporting the other. As in visual identification, where two identifiers may add weight to the testimony of the other if accepted, or in accomplice evidence, where two participants giving evidence against the accused may be regarded as better than one, corroboration is evidence apart from the confession that tends to show that the accused committed the crime to which he or she

[389] [2003] 2 IR 1, 16-17.

confessed. That means being seen near the place of the offence or marks or trace evidence or something else that is apart from the confession and the evidence about it.[390]

Summary

Technical language should be eschewed in explaining corroboration. Focus instead on the evidence requiring corroboration and pointing out the items of evidence which the jury may accept as tending to show the accused's involvement in the crime is what is required.[391]

It thus follows that of what were formerly five instances, the only categories of evidence where a warning is required are accomplices, confession cases where the only or predominant evidence is the accused's own admission, and visual identification. A judge may give a warning, in whatever form seems right to the judge, about the evidence of children and about complainants in sexual violence cases.

Mutual corroboration is idea that the evidence of a witness who is the subject of a corroboration warning can corroborate the evidence of another witness also subject to a warning. There cannot be corroboration by one accomplice of another accomplice's evidence where both participated in the crime.[392] There are few Irish cases on this issue, but it appears that two accomplices cannot corroborate each other's evidence.[393] However, in *The People (DPP) v Murphy*,[394] a corroboration warning was given in respect of the statements of witnesses who were not accomplices. It was held that they could provide mutual corroboration, stating that "provided such statements are credible, each is capable of corroborating the other, with it being a matter for the jury to determine if in fact they do so. No case law has been cited to the contrary and such view accords with general principles."[395]

In *The People (DPP) v Morrissey,*[396] Barron J stated: "Corroboration must come from independent evidence. The mere fac[t] that two parties in conspiracy with each other give the same evidence does not make the evidence of one corroboration of the evidence of the other." *Morrissey* was distinguished in *The People (DPP) v Cooke*[397] where Macken J found that "corroboration cannot, as a matter of law, be ousted from a case simply because collusion is alleged."

Cooke discussed mutual corroboration in relation to sexual offences, citing Healy as follows:[398]

> Mutually corroborative evidence of sexual offences conducted in private is necessarily co-dependent evidence. It is also highly prejudicial and difficult to rebut, particularly in cases of sexual offence, proof of which tends, by its nature, to be sparse and indirect. In some cases the similarity in accounts that first justified the joinder of indictments against the accused may later prove to be the very elements giving rise to suspicion of collusion or complicity between the complainants.

In *Cooke,* Macken J commented that while "the evidence of one complainant cannot normally, in fact or in law, corroborate the evidence of another complainant(s)", in that case, the "evidence of the complainants was of simultaneous assaults, and of assaults in the presence of one another, a wholly different scenario", thus in the circumstances of the alleged offences in that case which were "exceptionally … not committed in private" there was no reason why the eye witness evidence of one complainant could not corroborate the evidence of the other complainant, "provided all other criteria are met, and no valid argument is made otherwise in this application."

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390 But see *The People (DPP) v Power* [2020] IESC 13.
391 ibid [79].
392 *DPP v Hester* [1973] AC 296, 324.
393 *The People (DPP) v Dundon* [2014] IESPC 1.
394 [2013] IECCA 1.
395 ibid [77].
396 Court of Criminal Appeal, unreported, 10 July 1998.
397 [2009] IECCA 55.
398 Healy, Irish Laws of Evidence (Thomson Roundhall 2004), para 5-51.

In *The People (DPP) v CC (No 2)*,[399] the corroboration warning given by the trial judge was criticised as being insufficiently clear and not detailed enough about the extent to which one complainant's evidence could corroborate the evidence of another. The trial judge had told the jury that the evidence of each of the complainants was capable of acting as corroboration for the complaints of the other complainants, which was in principle correct according to O'Donnell J.[400]

What may be corroboration and the procedure that usefully can be followed in considering putting a corroboration for decision to the jury is usefully considered now.

Corroboration

What corroboration is not, is proof of itself beyond reasonable doubt that the accused committed the crime.[401] Indeed, the evidence of corroboration may be such that it is afforded such weight by the jury as to of itself convince the jury that the accused is guilty; but that is not required. What is required of evidence before it can be regarded as corroboration is that it tend to show that the accused committed the crime. A fallacy is easily engaged in here. Any single piece of evidence, testimony of an eye witness, a fingerprint at the scene not otherwise explicable but on the basis of participation in the crime, trace evidence of fibres, flesh or blood of a victim of violence found on the accused, can be enough of itself to convict if the jury regard it as carrying sufficient reliability. More usually, prosecution cases are constructed on building blocks of motive, opportunity, sightings near the scene, testimony of others, forensic analysis of connection to the accused and other items, perhaps a confession, considered together. If anything requires a corroboration warning, the jury may look outside the evidence requiring corroboration to evidence in the ordinary way. They should first consider the item or items identified to them by the judge as possibly being corroboration. Do they accept that evidence, in the sense that any evidence is acceptable? If it is, then how much weight do they attach to it? Finally, if the evidence subject to the warning and the evidence which they accept as corroboration are both accepted, is the level of proof enough for the jury to say: this case is proved beyond reasonable doubt? If no corroboration is accepted as present in the case and only the evidence subject to a special warning is left, notwithstanding the warning do they accept that evidence and do they attach such weight to it as convinces them that the prosecution have made out the guilt of the accused?

Corroboration and fact

Corroboration is some evidence independent of the evidence subject to a warning, the accomplice or the confession or the visual identification, that in some material way implicates, though not of itself necessarily proves completely, the accused in the commission of the offence. A witness cannot be corroborated as to what is said in testimony by others being called to state that they had heard that account previously from him or her. It is otherwise if an allegation of recent fabrication is made. Usefully, McKechnie J in *The People (DPP) v Murphy*[402] reviewed all of the relevant authorities in Ireland and elsewhere and produced a summary. He stated:[403]

> Corroboration in essence may be defined as independent evidence which implicates the accused, in a material way, in the offence charged. Many years ago it was authoritatively articulated by Lord Reading C.J. in the English Court of Criminal Appeal in *R. v. Baskerville* [1916] 2 K.B. 658 at p. 667 where he stated:

[399] [2012] IECCA 86.
[400] ibid [36].
[401] See the discussion in *The People (DPP) v Power* [2020] IESC 13.
[402] [2013] IECCA 1.
[403] ibid [68-70].

> "… evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it."

This dictum has been approved and applied by the Irish Courts on numerous occasions: see for example *People (A.G.) v Phelan* (1950) *1 Frewen* 98 at p. 99 and more recently in *People (D.P.P.) v. P.C.* [2002] 2 I.R. 285, where this Court, confirmed (at p. 300) the following definition of "corroboration" as:

> "… independent testimony or evidence which affects the defendant by connecting or tending to connect him to the crimes alleged. It is evidence which implicates him, which confirms in some material particular not only the evidence that the crime has been committed but also that the accused committed it" (pp. 297 to 298).

The reference to evidence being independent means independent of the evidence in respect of which corroboration is thought necessary. Such evidence also of course, must always be credible.

Thus, whilst evidence, in order to be corroborative, "does not have to directly prove that the offence was committed" *(People (D.P.P.) v. Meehan* [2006] 3 I.R. 468 at 491, para. 56), nor does it have to "corroborate the whole of the evidence of the witness who requires corroboration" (People (D.P.P.) v. Murphy [2005] 2 I.R. 125 at 159, para. 103, citing Richard May, Criminal Evidence (2nd ed.), p. 330), nonetheless it must be some independent evidence which implicates the accused in the offence charged in some "material particular".

Corroboration is fact dependent. It depends upon what the prosecution case is and what the defence is, in so far as that is ascertainable. In terms of principle, the judgment of O'Byrne J in *The People (DPP) v O'Sullivan* for the Court of Criminal Appeal is a useful exposition of the law:[404]

> What constitutes corroboration must depend on the facts and circumstances of each particular case, on the Defence set up by the accused, and on the nature of the question to be determined by the jury … it seems to us evidence of any material circumstance tending to connect the accused with the crime and to implicate him in it would appear to us to be corroboration.

In *O'Sullivan*, the child victim of a sexual offence testified to the use of ointment to facilitate the crime. The finding of such a sexual aid in the accused's house constituted corroboration.[405] However, as in the examples given above, if the child's knowledge of the ointment might have come through an innocent visit, then the tendency of the evidence to implicate the accused might not be accepted beyond reasonable doubt by the jury. Similarly, the giving of a present to a child

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[404] [1932] IR 158, 165.
[405] *The People (AG) v William O'Sullivan* [1930] IR 552; (1930) 64 ILTR 181.

might speak either to natural affection or to a desire to silence the victim in the aftermath of a sexual crime. In *The People (AG) v McGrath*,[406] the accused was convicted of an indecent assault on a girl under the age of 13. The corroboration accepted by the jury, and approved by the Court of Criminal Appeal, was the possession by the child of a toy bird in the aftermath of the offence. The accused chose to set up an alibi against the story told by the victim. Consequently, the exposure of that alibi as deceitful was what tended to implicate him in the crime in the circumstances of the case:[407]

> The defence was an alibi. He appealed against the conviction on the ground that there was no … corroboration as is required by law …. In the trial court a sister of the complainant deposed that the complainant returned home on the day in question at or about the offence was alleged to have been committed, carrying in her hand a small toy bird. That complainant then told her that she had been to the prisoner's bedroom, that he had behaved improperly with her, and after doing so had presented her with the toy bird which she had then with her and which he had taken off a cabinet in his room, and in doing so, had warned her not to tell her mother. The mother of the complainant, who happened to be in an adjoining room, immediately interrogated the complainant and as a result of her interrogation, informed the Garda. Both the mother and the sister knew the toy bird to be an ornament which had stood on a cabinet in the prisoner's room for some time previously … the Court of Criminal Appeal dismissed the appeal, holding that the evidence of the mother and the sister as to the possession by the complainant immediately at the time of her return home of the toy bird was some such material corroborative evidence … implicating the prisoner.

Order of consideration

It is wrong, and profoundly illogical, for a judge to tell a jury that only if they find beyond reasonable doubt that the evidence requiring corroboration, the accomplice's account for instance, is reliable that they then move on to consider the corroboration. The correct order is to consider what the prosecution put forward as corroboration first and then, in the light of that and their finding, consider the confession or visual identification or accomplice evidence. A categorisation of the evidence which can be used to corroborate suspect evidence can be useful. That evidence must come from a source which is independent of the suspect evidence and is untainted by a requirement that it, in itself, should be corroborated. It is not the law that the jury, or other tribunal of fact, must first decide whether they believe the evidence of a witness requiring corroboration before going on to consider whether that evidence is corroborated. No process of reasoning exists whereby facts are taken and analysed in isolation from each other without reference to admitted or proven background circumstances or other facts which tend to show their accuracy. In *Hester*,[408] a suggestion to the contrary was made by Lord Morris but it is not part of the ruling in the case and it has not been accepted in any common law jurisdiction. In any circumstance of uncertainty as to the credibility of any particular piece of evidence, the jury is entitled to analyse it in light of the other available evidence. Further, it would be foolish to rush to a conclusion of certainty as to any witness's evidence without considering that testimony as to its consistency with the other facts and circumstances proved in relation to the event in question. All evidence should be tested with

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[406] Court of Criminal Appeal, unreported, 15 June 1925, referred to in Sandes, Criminal Practice (1st ed, 1930) 142.
[407] As reported in Sandes above.
[408] [1973] AC 296, 315.

a view to seeing where the totality of the consistency within the evidence points. The following statement by Lord Reed in *Kilbourne* is no more than common sense:[409]

> There is nothing technical in the idea of corroboration. When in ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the particular matter; the better it fits in, the more one is inclined to believe it.

In *Attorney General of Hong Kong v Wong Muk Ping*,[410] the accused was charged with importing drugs. The buildings blocks of the case involved proof that he had attended a meeting at which the importation was planned and had then supervised the transfer of the drugs from a boat to a van and then followed it in order to be sure that it had arrived safely at a warehouse. The Hong Kong police stopped the van containing the drugs and they also stopped the following car which was being driven by the accused with two of the boatmen as passengers. On his arrest, the accused made a confession statement. When summing up the trial, the judge warned the jury of the dangers of convicting on the uncorroborated evidence of accomplices and explained the meaning of corroboration. The jury were told that they could convict even if they rejected evidence which was identified as capable of amounting to corroboration, if they were satisfied beyond reasonable doubt of the truth of the accomplices' evidence in the light of the warning given. The appeal was on the issue that the judge had erred in failing to direct the jury that the evidence of an accomplice had to be credible in itself, and in isolation of any corroborating circumstances, before the jury could go on to analyse the corroboration. The appeal was rejected. Lord Bridge stated:[411]

> Where the prosecution relies on the evidence of an accomplice and where (in contrast with the incident case) the independent evidence capable of providing corroboration is not by itself sufficient to establish guilt, it will have become obvious to the jury in the course of the trial that the credibility of the accomplice is at the heart of the matter and that they can only convict if they believe him. The accomplice will inevitably have been cross-examined to suggest that his evidence is untrue. The jury will have been duly warned of the danger of relying on his evidence without corroboration. Their Lordships can see no sense in the proposition that the jury should be invited, in effect, to reject his evidence without first considering what, if any, support it derives from other evidence capable of providing corroboration.

Credibility is thus not to be approached in two stages. The credibility of the suspect evidence is to be considered in the light of all of the evidence and it is the function of the jury or other tribunal of fact to decide whether or not there is independent evidence implicating the accused in the commission of the crime. In *Turner*[412] a number of persons were accused of involvement in a series of bank robberies. The proof of the case essentially relied on the evidence of an accomplice called Smalls. The Court of Appeal in England rejected a submission that the jury had to be satisfied that Smalls was a credible witness before they considered any issue as to whether there was evidence which corroborated Smalls in a material particular implicating the accused in the crime charged. James LJ stated:[413]

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409 [1973] AC 729 at 750.
410 [1987] 1 AC 501.
411 ibid, 512.
412 (1975) 61 Cr App R 67.
413 ibid, 83.

> The credibility of the witness whose evidence requires corroboration is judged not on his evidence alone but on all the evidence in the case. In some cases that which adds credence to the evidence of the witness also serves to corroborate his evidence. In other cases evidence capable of providing corroboration is more clearly distinguishable from evidence which only goes to credibility. Some cases may call for a more emphatic or elaborate direction than others. In the present case it must have been obvious to the jury from the start of the trial that, if they did not find Smalls to be a credible witness, that was the end of the case for the prosecution. This must have been made even more obvious after the attack that was made upon the credibility of Smalls in the course of the trial.

Thus, there is no authority for the notion of considering suspect evidence in isolation from the other building blocks of a case. That notion was expressly rejected by the Supreme Court in *The People (DPP) v Fitzgerald*.[414]

Procedure

It is a matter of law as to whether evidence is capable of amounting to corroboration. It is a matter of fact as to whether the interpretation placed on the evidence in the light of all the circumstances of the case allows a jury to accept it as corroboration. In a jury trial, it is therefore the function of the trial judge to identify and describe the evidence which the jury are entitled to treat as corroborative.[415] For a judge to incorrectly identify evidence as capable of amounting to corroboration constitutes a misdirection which provides that a conviction need not be overturned where no miscarriage of justice has occurred.[416] If no corroboration of the suspect testimony exists, then the judge should so instruct the jury. The giving of a warning followed by a failure to isolate the evidence that can, as a matter of law, be treated as corroboration can lead to confusion. It is therefore good practice for the trial judge to hear submissions in the absence of the jury as to what evidence may constitute corroboration to assist in the charge to the jury including a passage which points out the evidence which may amount to corroboration, while indicating to the jury that it is their function to decide whether it implicates the accused in the commission of the offence. It is then a matter for the jury to decide whether to accept the evidence and, if equivocal, whether to accept beyond reasonable doubt the interpretation which implicates the accused and to draw such inferences as are consistent with the burden and standard of proof from it. Thus, whether evidence is corroborative or not is for the jury to decide.[417] In the *Fitzgerald* case, Charleton J set out the procedure thus:[418]

> In that regard, there is a procedure to be followed. Since a criminal trial is one where the role of a tribunal of fact and tribunal of law is bifurcated, in cases where there is an issue about the matter, it is for the trial judge at the end of the evidence both for the prosecution and the defence to rule as a matter of law whether there is any evidence that a particular witness is an accomplice. While this direction, given in the absence of the jury, is not often called for because of the nature of the way accomplice cases run, that responsibility remains with the trial judge. Similarly, in the absence of the jury, the trial judge should seek submissions from counsel for the prosecution as to what particular pieces of evidence it is contended by the prosecution could amount to corroboration. That latter argument

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[414] [2018] IESC 58 from [25].
[415] *Charles* [1977] AC 177; (1976) 63 Cr App R 252; Reeves (1978) 68 Cr App R 331.
[416] See *The People (AG) v Richmond* (1935) 1 Frewen 28; *The People (AG) v Berber and Levey* [1944] IR 40; *The People (AG) v Griffin* [1974] IR 416.
[417] *Farid* (1945) 30 Cr App R 168; *Willoughby* (1988) 88 Cr App R 91.
[418] [2018] IESC 58 [24-25].

should happen in every accomplice case. It should be clarified by the trial judge as to what pieces of evidence counsel on each side may address themselves as to whether corroboration may be found by the jury or not. The defence, in that regard, also have a role to play in making submissions in the absence of the jury. The defence may make submissions as to whether there is evidence that a witness is an accomplice, in the rare case where that is in issue, and, in every accomplice case, as to whether any particular piece of evidence could amount to independent testimony tending to implicate the accused in the commission of the crime. The judge, in the absence of the jury, will then rule, if necessary, as to whether there is evidence that a particular witness is or is not an accomplice and will also rule which pieces of evidence can as a matter of law, if accepted by the jury, independently of the accomplice support the commission of the crime by the accused. Clearly, the practice of ruling if a witness is or is not an accomplice will not be necessary in the event that the witness has pleaded guilty to the same event as the accused. Then, it will be obvious. What will always be necessary, however, is a discussion in the absence of the jury as to what elements of the prosecution case can amount to corroboration.

The judge will rule as a matter of law that a witness is capable of being regarded as an accomplice. The judge, in the charge to the jury, should tell the jury this about the witness and tell them what, related to the facts of the case at trial, may demonstrate that he or she is an accomplice. That can be as simple as pointing out that the accused and the accomplice were, on the accomplice's account in testimony, or by a guilty plea or jury finding, involved in the same crime. As to whether a witness is an accomplice is then a question of fact for the jury. The accomplice warning will be given where that issue is left to the jury. The judge will then go on to point to those pieces of evidence, or item of evidence, which, as a matter of law, if accepted by the jury, can amount to evidence independent of the testimony of the accomplice and which tend to implicate the accused in the commission of the crime. It is then for the jury to make a decision as to whether, in fact, the witness was an accomplice, in those rare cases where that issue is in doubt, and in all accomplice cases to then consider whether they accept the evidence that might amount to corroboration. Then, in the light of that decision as to whether there is or is not corroboration proven, the jury should proceed to analyse whether they accept the evidence of the accomplice.

Examples

While corroboration is fact-dependent, some examples may be of assistant. In *The People (DPP) v Gilligan*,[419] the accused was convicted of importing and distributing controlled drugs. He was acquitted of murdering an investigative journalist, the Special Criminal Court wrongly applying an obiter dictum in *Hester* which had already been specifically overruled by the Privy Council. Accomplice evidence was given against him. The Court of Criminal Appeal held that the violent threats which he had issued to the investigative journalist when she had approached him with a view to investigating the source of his wealth, and the subtly threatening letters which he had written to the accomplices when he knew they would give evidence against him, constituted circumstances of corroboration.

The requirement that corroboration should tend to implicate the accused in the commission of the crime may be satisfied by direct evidence, such as the testimony of a witness who tends to implicate the accused in the commission of the crime, or by circumstances which point to his guilt. These circumstances must be independent of the suspect witness' testimony.[420] If circumstantial

[419] [2006] 1 IR 107.
[420] *Hills* (1988) 86 Cr App R 26.

evidence is to be used as corroboration then it would be appropriate for the trial judge to explain the nature of that evidence to the jury; that they should rely on it only if it is not explicable on an innocent basis.[421] In turn, the manner in which the circumstances tend to implicate the accused can be viewed only in the light of the building blocks of the case against him. As in the examples given above, the independent proof of the presence of items of sexual paraphernalia in the accused's bedroom may corroborate testimony given against him of an unlawful sexual act. If that knowledge could have come through an innocent association, then, as a matter of fact, the jury cannot treat it as corroborative.[422] A single circumstance can provide corroboration as where, for example, trace evidence referable to the accused, by way of fingerprint, DNA or otherwise, is found at the scene of the crime provided there is no rational innocent explanation. In turn, as in the cases already mentioned in this text, that may depend on the answer given by the accused to the charge. If there is nothing to suggest that the alleged victim and the accused were previously acquainted with each other, then a precise knowledge of the interior of the accused's bedroom or motor car may, through being confirmed by other witnesses, independently confirm that the alleged victim was there. In the absence of a prior innocent association, the confirmation of that knowledge could be a strong corroboration as trace evidence left by the victim at the scene of a crime.[423] Similarly, knowledge by the alleged victim of an intimate part of the accused's body might be corroboration if it is not otherwise innocently explicable through a prior association, or, perhaps, through being told of a distinguishing mark during a Garda interview.[424]

The notion that lies told by a party to litigation can constitute evidence against that party is a proposition that at first instance appears to be common sense, but requires to be handled carefully. The full Court of South Australia, in 1926, held that in affiliation proceedings, a false denial by the putative father that he had had certain meetings with the mother could amount to evidence. Napier J stated:[425]

> If a party to litigation is shown to have attempted to subvert the course of justice, this is a fact which may be used as circumstantial evidence tending to a conclusion adverse to his case … the subornation of false testimony or the setting up of a false alibi, as distinct from the failure to establish it, are familiar instances; and the giving of wilfully false testimony stands on no other footing. [The court must be able] to infer not merely that the testimony is false, but that it is deliberately false; and, further, that the motive which prompts the falsehood is not merely the fear of an unjust judgment, but a fear of the truth. If this inference is … reached, the result is in the nature of an admission by conduct.

Previous case law in this matter was reviewed by the Court of Appeal in England in the case of *Lucas*.[426] The passage which follows has been opened to the Court of Criminal Appeal in Ireland

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[421] See above paragraph.

[422] *The People (AG) v O'Sullivan* [1930] IR 552 (1930) 64 ILTR 181; *The People (AG) v McGrath*, Court of Criminal Appeal, unreported, 15 June 1925, recorded in Sandes – Criminal Law and Procedure in Eire (1st ed, 1930), p 142; *The People (AG) v Kearns* (1946) 80 ILTR 45.

[423] *McInnes* (1990) 90 Cr App R 99.

[424] *Nagy* [1990] Crim LR 187; *Hills* (1988) 86 Cr App R 26. It is submitted that the example given by Lord Lane CJ in that case is extreme and beyond the authority of *The People (DPP) v Mulvey* [1987] IR 502. Lord Lane stated: "for example, in a rape case, where the Defendant denies he ever had sexual intercourse with a complainant, it may be possible to prove (1) by medical evidence that she had sexual intercourse within an hour or so prior to the medical examination, (2) by other independent evidence that the Defendant and no other man had been with her during that time, (3) that her underclothing was torn and that she had injuries to her private parts. None of these items of evidence on their own would be sufficient to provide the necessary corroboration, but the judge would be entitled to direct the jury that if they were satisfied so as to feel sure that each of these three items had been proved, the combined effect of the three items would be capable of corroborating the girl's evidence."

[425] *Pitman v Byrne* [1926] SASR 207, 212.

[426] [1981] QB 720. See also *Rahmoun* (1985) 82 Cr App R 217; *O'Leary* (1988) 87 Cr App R 387.

on several occasions. While it has not been expressly adopted or rejected, it is submitted that it constitutes the law here:[427]

> To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly, it must relate to a material issue. Thirdly, the motive for the lie must be a realization of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family. Fourthly, the statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness.

It is a natural human response to resolve a series of issues against a party because they have been proven to lie in respect of one of them.[428] Corroboration by lies should thus sensibly be confined to the material issue in respect of which the lie was told. Apart from reasons related to guilt, a person may simply be a habitual liar. He or she may have done something disgraceful, unrelated to the case, and may therefore feel the need to lie in relation to a series of circumstances, some of which overlap with the facts in issue. An innocent person may also, when faced with an accusation of crime, panic and embellish an innocent story with colourful lies. If, on the evidence, reasons emerge which possibly explain the lies told by an accused, these should be drawn to the jury's attention.[429]

In *Lucas*, the Court of Appeal also stated that a lie on a material issue told by the accused when giving evidence can be capable of amounting to corroboration when subjected to testing on the basis of the criteria set out above. If there are a series of offences, then the focus of the corroboration must relate to the requirement for separate but contemporaneous trials. In other words, it can relate only to the material issue in respect of which the lie was told and in respect of the evidence relevant to that to charge. Lies, however, cannot of themselves constitute proof. For a man to deny that he murdered AB, does not, of itself, prove that AB was murdered. Where an accused person gives evidence, then the rejection of that evidence does not of itself mean that the prosecution evidence is correct. The accused may be accepted, beyond reasonable doubt by the jury, to have been lying but this does not mean that the accomplice was not lying.[430] The model direction set out in *Lucas* is complex. However, it provides a framework within which ordinary human reasoning should be drawn in order to prevent error. It is a common experience of practitioners that where an accused person gives evidence and is caught out lying, that the case will almost inevitably resolve against him or her. While courts in New Zealand and Australia have accepted that lies told in court can constitute corroboration, it is submitted that a proper direction should be given in respect of this matter.[431] In *Burge and Pegg*[432] the Court of Appeal suggested four possible occasions where the *Lucas* direction ought to be given: firstly where the defence relied on an alibi that was proven to be false;[433] secondly where the judge suggests lies told by the accused as supporting a piece of evidence; thirdly where the prosecution relies on the lies of the accused

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[427] Cited in *The People (DPP) v David Curran* [2011] IECCA 95, *JS v DPP* [2013] IECCA 41; *The People (DPP) v Massoud* [2009] IECCA 94; The People *(DPP) v BR* [2017] IECA 339*; The People (DPP) v Kelly* [2013] 1 IR 729.
[428] See Miller, The Crucible (Penguin, 1954).
[429] *Dowley* [1983] Crim LR 169.
[430] *Chapman* [1973] QB 774; (1974) 57 Cr App R 511.
[431] *Collings* [1976] 2 NZLR 104; *Perera* [1982] VR 901.
[432] (1996) 1 Cr App R 163.
[433] *Harron* (1996) 2 Cr App R 457; *Peacock* [1998] Crim LR 681.

as an independent part of its case;[434] and fourthly where the judge thinks that it is possible that the jury will rely on the lies of the accused to bolster the prosecution's case.[435]

Sexual offence corroboration

Where a statutory prohibition exists against sexual conduct in particular circumstances, then the consent of the victim can never be a defence. Thus where the accused has sexual intercourse with a child, the fact that the child had sufficient understanding to consent and, in fact, did consent, is rendered irrelevant by the statutory prohibition against sexual conduct with minors. In circumstances where sexual conduct is lawful, it is the absence of consent which constitutes the crime. Since in the vast majority of sexual assault cases it is the question of consent which is being tried as the ultimate issue, this has become the focus of legal rules as to complaint and corroboration. All too easily, the two are mixed up. In every sexual assault case, including where the charge is of sexual conduct rendered unlawful by reason of age or relationship, the prosecution is entitled to lead evidence that the alleged victim made a voluntary complaint as soon as reasonably possible after the event in issue. The terms of the complaint, as well as the fact that it was made, may be given in evidence. The purpose of admitting such evidence is to establish the consistency of the witness as distinct from corroborating the witness' account.[436] Sandes, from the perspective of 1951, continues to state the law accurately for the present day:[437]

> On charges of sexual offences the fact that a complaint was made by the prosecutrix, and the particulars of such a complaint, are admissible and relevant if made voluntarily and at the first opportunity which reasonably presents itself after the alleged occurrence. The particulars of the complaint are admissible not as evidence to prove the truth of the facts complained of, but after proof of such facts, they are relevant as [supporting] the credibility of the complainant and as evidence of the consistency of her conduct; and when consent is in issue as evidence negativing consent moreover the judge must warn the jury that it is only relevant for these purposes. R. v Osborne; R. v Lillyman (infra). This Rule is not limited to sexual offences against females. R. v Camelleri [1922] 2 KB 162; 16 CAR 162. If a considerable time has elapsed between the commission of the offence charged and the complaint, it is inadmissible. R. v Rush 60 JP 777; R. v Pantaney, 71 JP 101. But the complaint need not be on the very earliest opportunity. R. v Kiddle, 19 Cox 77; R. v Marsh, 33 CAR 185. The complaint must be spontaneous and voluntary and not elicited by questions of a leading or suggestive character, or by intimidation. R. v Lillyman [1896] 2 QB 167; R. v Osborne [1905] 1 KB 551. The mere fact that the complaint is made in answer to a question does not in itself render it inadmissible. It is not inadmissible because made in answer to a natural question put by a mother or a person in charge. Unless the question is of a leading or suggestive character, so that but for the questioning there probably would have been no voluntary complaint it is admissible. R. v Norcott [1917] 1 KB 347.

A response to leading, inducing or intimidating questions tends not to show a consistent pattern of complaint from the time of the offence to the date of trial. A statement of complaint wrung from an alleged victim is therefore inadmissible.[438] The theory behind the admissibility of the

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[434] *Goodway* [1993] 4 All ER 894; 98 Cr App R 11.
[435] *Jackson* [1953] 1 All ER 872.
[436] See Ní Raifeartaigh, The Doctrine of Fresh Complaint in Sexual Cases (1994) 12 ILT 160; The People (DPP) v Brophy [1992] ILRM 709; The People (DPP) v Kiernan, Court of Criminal Appeal, unreported, 11 March 1994.
[437] Sandes, Criminal Law and Procedure in Éire (3rd ed, Sweet & Maxwell 1951), p 131.
[438] *Osborne* [1905] 1 KB 551.

complaint is that it provides evidence to the jury to assess the credibility of the main prosecution witness. The weight of that testimony is thus tested in the light of her or his earliest declaration on this issue. An early complaint is inconsistent with any later allegation or fabrication and shows a constant insistence that consent was absent. It is not anything beyond evidence going to weight as to consistency. It is not corroboration in itself.. The complaint is admissible if made at the first opportunity which reasonably afforded itself. In *The People (DPP) v DR*,[439] the appellant had been convicted of rape. In the Court of Criminal Appeal it was argued that the trial judge had erred in admitting evidence of complaint which was not made until the evening after the incident in question. While the prosecutrix undoubtedly had opportunity to complain to her husband that night or the following morning, she was then staying at the house of her husband's sister with whom the accused had an ongoing relationship over a period of several years. The effect of the incident on the complainant is admissible in explaining the delay in order that the trial judge might rule as to whether the complaint is admissible as a fresh complaint. The following passage from the judgment of the Court of Criminal Appeal makes this clear:[440]

> The relevant facts would appear to be that the incident complained of took place some time on a Sunday morning. The prosecutrix undoubtedly had an opportunity to complain to her husband that night or the following morning on her way home. She also had an opportunity to complain to her husband's sister with whom she was staying, but the circumstances of this case were rather extraordinary in that the accused was her host and her husband's sister had an ongoing relationship over a period of some twelve years, and had been living with this particular man, and her husband, according to his evidence and according to hers, was a man who while not in the habit of losing his temper, apparently was a man who had a violent temper which he had difficulty in controlling. So she was, according to herself, frozen by the incident, which had a profound psychological effect on her which made it difficult to talk about. She found it hard to make a complaint to the partner of the man who had been guilty of the assault and she found it hard to complain to her husband in circumstances where, had she complained to him in the house, there might have been a violent confrontation between him and her host. Under these circumstances she said nothing and she, according to herself, did not sleep on that particular night. She still could not bring herself to talk to her husband while they were driving home but later on the Monday while she was in the garden, her husband came into the garden and sat down beside her and she told him, according to herself, and to him, what had happened. It has been suggested that even then what she said was not voluntary because to a degree her complaint was made in response to a question asked by her husband. Her opening remark in the conversation was extraordinary. She began by saying "Denis is no gentleman" and then her husband asked her a question and then the story apparently came out. In these circumstances it was not a question of her husband interrogating her. Her husband merely assisted her in saying something which she herself wished to say. But that is not a question for us. It was a question for the trial judge and the trial judge took the view that she was in such a psychological state that it was not in fact reasonably possible for her to make the complaint until she did make it. This it appears to Court was a decision of the trial judge which was primarily for him. He had evidence

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[439] [1998] 2 IR 106.

[440] ibid, 109-110; see also *The People (AG) v McLoughin* (1937) 71 Ir LTR 247. There sexual offences were alleged to have occurred on 4 and 7 April. The complainant, who was a domestic help, complained to the mistress of the house on 8 April and was then interviewed by a sergeant. The Court of Criminal Appeal admitted the complaint in respect of 7 April but that in respect of 4 April was ruled out because of the nature of the questioning and the delay; see further Sandes, p 131-132.

> to support him in reaching that particular view and the Court accordingly rejects that ground of appeal.

The practice is to admit the first substantial account of the complaint but to disallow its repetition.

The common law attitude to complaints of sexual offences was historically typified by the writings of Sir Matthew Hale on this subject. In his Pleas of the Crown[441], Volume 1, he wrote that the credibility of "the party ravished" would be more or less credible "according to the circumstances of fact that concur in that testimony". As a matter of logic, this statement applies to all offences and is unexceptionable. However, he went on:

> For instance if the witness be of good fame, if she presently discovered the offence and made pursuit after the offender, showed circumstances and signs of the injury whereof many are of the nature, that only women are the most proper examiners and inspectors, if the place, wherein the fact was done, was remote from people, inhabitants or passengers, if the offender fled for it; these and the like are concurring evidences to give greater probability to her testimony, when proved by others as well as herself. But on the other side, if she concealed the injury for any considerable time after she had opportunity to complain, if the place where the fact was supposed to be committed, were near to inhabitants, or common recourse or passage of passengers, and she made no outcry when the fact was supposed to be done, when and where it is probable she might be heard by others; these and the like circumstances carry a strong presumption that her testimony is false or feigned… It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent.[442]

Sir Hale went on to recount how an allegation of rape tried before him had been disproved by the physical disfigurement of the accused "so hideous and great, that it was impossible he could kindly know any woman". Another account of the complainant confessing to a malicious allegation after conviction was also recorded by him.

Over a century later, Wigmore echoed those words in the following way:[443]

> The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex-incidents of which the narrator is the heroine or the victim. On the surface the narration is straightforward and convincing. The real victim, however, too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale.

It was against the background of this attitude that two balancing rules, unique to complaints of sexual misconduct, were plied one against the other. A complaint was admissible to so consistency, but that was so because the very character of the complainant was, by virtue of her making a complaint, put in issue. Now, section 3 of the Criminal Law (Rape) Act 1981, as amended by section 13 of the Criminal Law (Rape) (Amendment) Act 1990 provides that evidence as to the prior sexual history of the alleged victim, and questions relating thereto, are inadmissible without leave of the trial judge. The 1990 amendment includes a prohibition on questions or evidence concerned with prior sexual history of the alleged victim with the accused. Before a judge should

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441 Sir Matthew Hale, Historia Placitorum Coronae 290 (London, 1736).
442 ibid, 633.
443 Wigmore, Evidence (3rd ed, 1940), 924A.

permit that the complainant be cross-examined as to her previous sexual history, it must be shown that it is more likely than not that the particular question, or line of cross-examination, if allowed, might reasonably lead the jury, properly directed in the summing up, to take a different view of the complainant's evidence from that which they might take if the question or a series of questions was or were disallowed.[444] In *Seaboyer*,[445] the Supreme Court of Canada struck down as unconstitutional legislation which imposed a total ban on cross-examination as to prior sexual conduct save in limited exceptions.[446]

It can be corroboration that another witness has seen the complainant in a distressed condition in the aftermath of the alleged offence. In order to be corroboration, the jury must be satisfied that the distress in question was genuine and that it was brought about by the conduct of the accused.[447] In *The People (DPP) v Mulvey*,[448] the Court of Criminal Appeal stated:

> It is a valid comment to make that a distressed condition might be regarded as a likely ingredient, where a prosecutrix was making a false complaint, to lend an added appearance of truth to the allegation. With equal force, it may be said that the absence of a distressed condition would be a significant argument to a jury to disbelieve the complainant's story. These circumstances point to the role of the jury, which is critical in both meanings of the word. Here, the real issue was consent or no consent; the distressed condition might, in the jury's view, lend credence to the complainant's account but having regard to the circumstances at the time, the jury should be wary of relying upon it. The formula to be used in making that clear to a jury would vary from judge to judge; it is undesirable that a trial judge should be obliged to use any particular formula, so long as he conveys the problem correctly to the jury. In the view of the court, in the incident case, the trial judge more than adequately conveyed to the jury the proper method of approach to the resolution of the real issues in the case. The jury were adequately warned of the need for corroboration, the weakness of evidence of a distressed condition as corroboration in cases of this kind, and the danger of convicting in the absence of such corroboration; the jury was told of its own role in assessing what was corroboration; the phraseology quoted in respect of what the defence case on this issue was made it abundantly clear to the jury that they should consider this question in the light of defence's submissions.

In that case the trial judge had warned the jury that they should be wary of relying on evidence of distress as constituting corroboration.[449] This accords with the English law on the subject which allows evidence of a distressed condition to be capable of constituting corroboration only in certain circumstances. A jury should perhaps be told that even if distress is interpreted as genuine and referable to the actions of the accused, people who consent to sexual acts can experience immediate regret and distress and therefore the jury need to be sure that the distress is preferable to coerced consent and not merely to regret. As was stated in the introduction to this chapter, the precise circumstances will determine whether a piece of evidence is corroboration in the light of the entire circumstances of the case. In *Chauhan*,[450] for example, the prosecutrix alleged that she had been indecently assaulted while she and the accused were alone at their work premises. Her

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444 *Lawrence* [1977] Crim LR 492.
445 [1991] 2 SCR 577.
446 See generally Adler, The Relevance of Sexual History Evidence in Rape [1985] Crim LR 769; Elliot, Rape complainant's sexual experience with third parties [1984] Crim LR 4.
447 *Wilson* (1973) 58 Cr App R 304; *Franklin* [1989] Crim LR 499; Luisi [1964] Crim LR 605.
448 [1987] IR 502, 509.
449 *Redpath* (1962) 47 Cr App R 319; *Chauhan* (1981) 73 Cr App R 232.
450 (1981) 73 Cr App R 232.

evidence was that she left the room where the assault occurred and ran to a place where her condition was observed by a fellow employee. The accused gave an account that nothing untoward had occurred and that the girl was completely normal on leaving the room. In *Redpath* it was held to be corroboration that the complainant, a small girl, was seen to go to a moor with the accused and to come away shortly afterwards in a distressed condition. Evidence was given that the accused approached the child and drove off with her in a car. Immediately after the incident in question the child emerged from the moor in a distressed condition. The Court of Criminal Appeal held that it was possible to regard the evidence of distress as being corroboration because the witness was a stranger and the child had no idea that she was being observed.

Drawing Inferences

Essentially, a case is only ever proved against an accused person through the application by the jury of their common experience of life and of the state of mind with which people act in individual sets of circumstances. A person is presumed to intend the natural and probable consequences of an action. This is a proposition of ordinary good sense. A person is usually able to foresee what the natural consequences of his or her act are and so it is reasonable, in general, to infer that they did foresee and intend them. This is an inference which may be drawn but it is not one which must be drawn if, on all the facts of the case, it is not the correct inference.[451] Suppose there is a burglar in a house who has broken in during the night with a special glass cutting tool and carries an empty shoulder bag. No one who acts in that way could ordinarily be intending to do anything other than steal whatever jewellery comes to hand. If there is an alternative explanation and it is not supported on the facts of the prosecution case then the accused must establish it either by cross-examination or by giving evidence. That is the burden of adducing evidence. Without adducing sufficient evidence of a factual defence upon which a reasonable doubt may be based, that issue cannot be left to the jury.

Failure to Explain

The effect of a failure to explain provision in legislation can conflict with the right of the accused to remain silent in the face of the charge. In *The People (DPP) v Finnerty*,[452] the accused had been charged with rape. During 12 hours of detention he provided no explanation of the relevant events other than that he had kissed the complainant after a disco. During the trial, counsel for the defendant cross-examined the complainant at length and, as is the duty of opposing counsel, put a detailed exculpatory account of the incident which he said that the accused would give in evidence to the jury. At the conclusion of the complainant's evidence, counsel for the prosecution asked for and was granted liberty to prove that no such account had been given by the accused to the gardaí during the period of his detention and that he had maintained silence throughout. Counsel for the prosecution also cross-examined the accused to the same effect. The accused unsuccessfully argued before the Court of Criminal Appeal that the permission to give evidence of his silence and to cross-examine him about the silence was a breach of his right to silence. The trial judge had emphasised the accused's right to silence and had charged the jury that the only purpose of this evidence, and the cross-examination, related to the reliability of the accused's detailed statement of explanation at the trial. There were before the jury, two contradictory versions of what had happened on the relevant night. The issue was which of these versions was to be believed and it was quite proper and reasonable for the prosecution to ask the accused why he had not given the full exculpatory account of the evening's events at an early stage instead of giving it for the first time during the course of the trial. The decision of the Court of Appeal was

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451 *Hosegood v Hosegood* (1950) 56 TLR (Pt 1) 735.

452 Court of Criminal Appeal, 22 June 1998, Lynch J (for the Court) ex tempore.

subsequently overturned by the Supreme Court.[453] Keane J held that there existed a constitutional right to remain silent in custody. There had been no obligation on the accused to give an exculpatory account of the evening's events when he was detained. This may not have been clear to the jury and thus the conviction was therefore unsafe.

Presumptions[454]

Apart from common sense, which is the touchstone of jury deliberations, in certain respects the Oireachtas has intervened in order to provide that from one fact another fact may be inferred. Such interventions are exceptional. In exceptional circumstances the prosecution has been assisted by the legislature in discharging the burden of proof by provisions which require that a mental state should be inferred on the proof of certain external factors. In consequence of litigation challenging such presumptions, the situation has been reached whereby provided the legislature do no more than enable an inference from particular circumstances, this does not infringe the Constitution, but intruding on the right to silence and presumptive conclusions that are not simply open but commanded by legislation falls into infringement.

In *O'Leary v The Attorney General*,[455] two provisions were challenged. Section 24 of the Offences Against the State Act 1939 provides that:

> On the trial of a person charged with the offence of being a member of an unlawful organisation, proof to the satisfaction of the court that an incriminating document relating to the said organisation was found on such person or in his possession or in lands or in premises owned or occupied by him or under his control shall, without more, be evidence until the contrary is proved, that such a person was a member of the said organisation at the time alleged in the said charge.

By virtue of s 2 of the 1939 Act an incriminating document is:

> a document of whatsoever date, or bearing no date, issued or emanating from an unlawful organisation or appearing to so emanate or purporting or appearing to aid or abet any such organisation or calculated to promote the formation of any unlawful organisation.

Section 3(2) of the Offences Against the State (Amendment) Act 1972 provides that:

> Where an officer of the Garda Síochána, not below the rank of Chief Superintendent, in giving evidence in proceedings relating to an offence under the said section 21, states that he believes that the accused was at a material time a member of an unlawful organisation, the statement shall be evidence that he was then such a member

The accused had been convicted of two counts of membership of an unlawful organisation after 37 posters containing the words "IRA calls the shots" were found in his possession and a Chief Superintendent gave evidence that the accused was a member of the IRA. In the High Court Costello J accepted that every accused in every criminal trial enjoys a constitutionally protected right to the presumption of innocence and that any statute which permitted a trial to be held otherwise than in accordance with this presumption would be unconstitutional. However, he concluded that, although the legal burden of proof (ie the duty to prove all the elements of the offence beyond reasonable doubt) remained on the prosecution throughout a criminal trial, there was nothing unconstitutional about shifting an evidential burden onto the accused in respect of certain matters. Shifting such an evidential burden onto the accused did not discharge the legal burden on the prosecution. Thus the accused could elect not to call any evidence and would still be entitled to an acquittal if the evidence adduced by the prosecution did not establish his guilt

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453 *The People (DPP) v Finnerty*, Supreme Court, unreported, 17 June 1999.

454 See generally Ní Raifeartaigh, 'Reversing the Burden of Proof in a Criminal Trial: Canadian and Irish Perspectives on the Presumption of Innocence' (1995) 5 ICLJ 135.

455 [1993] 1 IR 102 (HC), [1995] 1 IR 254 (SC).

beyond all reasonable doubt. Costello J concluded that the 1972 Act simply made admissible in evidence certain statements of belief which would otherwise be inadmissible and the 1939 Act merely shifted an evidential burden onto the accused. On appeal, the Supreme Court upheld this judgment. In respect of the incriminating document provision O'Flaherty J held that:

> It is clear that such possession is to amount to *evidence* only; it is not to be taken as proof and so the probative value of the possession of such a document might be shaken in many ways: by cross-examination; by pointing to the mental capacity of the accused or the circumstances by which he came to be in possession of the document, to give some examples. The important thing to note about the section is that there is no mention of the burden of proof changing, much less that the presumption of innocence is to be set to one side at any stage.[456]

In *Redmond v Ireland*, the same provision was upheld by the Supreme Court, Charleton J commenting that what was involved was merely an item of evidence and one which otherwise might be impossible of proof[457]:

> There is no presumption of special merit attaching to the evidence of a Chief Superintendent in giving evidence of his or her belief on a trial of membership of an unlawful organisation contrary to s.21 of the Offences Against the State Act 1939 that an accused is such a member. There is nothing in the text of s. 3(2) of the Offences Against the State (Amendment) Act 1972 which establishes any element of favouritism towards such evidence or which in any way reverses the ordinary standard and burden of proof. Nor does any decision of this Court or any other court. Such belief evidence is merely admissible evidence. As such, it may be rejected, contradicted or challenged in the ordinary way. Article 38.1 of the Constitution establishes "due course of law" as a standard of fairness which guarantees that criminal trials are conducted as a rigorous examination of the prosecution proofs and that guilt is not pronounced unless the proof of the accused's guilt is established beyond reasonable doubt within the context of fair procedures. The impugned provision does not offend against that constitutional guarantee where such belief evidence is part of a body of evidence. That is what happened in this case. No guarantee within Article 38 is offended where such belief evidence is supported by some other piece of evidence or circumstance which supports the charge. The impugned subsection applies only: before the Special Criminal Court; where a written ruling is given explaining the reasons for relying on such evidence; on an offence of membership of an unlawful organisation; where the Government has made a proclamation that the ordinary courts are inadequate to secure the effective administration of justice; where the accused may in the ordinary way give evidence; where privilege may be claimed as to sources which are confidential, as in any other case, but which privilege is subject to review by the court of trial; where the nature of the offence charged is continuing, allowing a belief to build up over time; where that belief may be challenged; and may be the subject of rebutting evidence by the accused.

In *Hardy v Ireland*,[458] s 4(1) of the Explosive Substances Act 1883 was unsuccessfully challenged. The section provided that where a person makes, possesses or controls an explosive substance in circumstances such as to give rise to a reasonable suspicion that he is not making, possessing or controlling it for a lawful object, it shall be an offence unless he can show that he made it or had it in his possession or under his control for a lawful object. The Supreme Court held that there was nothing unconstitutional about placing an evidential burden on the accused. Such a burden could be discharged by him on the balance of probabilities. Murphy J concluded:

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456 ibid, 265.
457 [2015] IESC 98 [44].
458 [1994] 2 IR 551.

> I do not see that there is any inconsistency between a trial in due course of law as provided for by Article 38, s.1 of the Constitution and a statutory provision such as is contained in s 4 of the Explosive Substances Act 1883, which affords to an accused a particular defence of which he can avail if, but only if, he proves the material facts on the balance of probabilities.

Hederman J examined the constitutional right to a trial in due course of law in terms of the prosecution bearing the burden of proof but enabling conclusions to be drawn once particular facts had been proven and no evidence countered what was in essence an inference:

> It protects the presumption of innocence; it requires that the prosecution should prove its case beyond all reasonable doubt; but it does not prohibit that, in the course of the case, once certain facts are established, inferences may not be drawn from those facts and I include in that the entitlement to do this even by way of documentary evidence. What is kept in place, however, is the essential requirement that at the end of the trial and before a verdict can be entered the prosecution must show that it has proved its case beyond all reasonable doubt.[459]

In *Rock v Ireland*,[460] the provisions under scrutiny were s 18 and s 19 of the Criminal Justice Act 1984. Section 18 permits an inference to be drawn from the accused's failure to account for any object, substance or mark found on his person, clothing or in his possession or in any place where he is at the time of his arrest. Section 19 permits an inference to be drawn from the failure of an accused to explain his presence at a particular place if a member of the Garda Síochána reasonably believes that the presence of the person at that place and at that time may be attributable to his participation in the commission of the offence. The High Court rejected the challenge to the two sections and the Supreme Court upheld this decision on appeal. Hamilton CJ held that although the Act permitted the court to draw inferences from an accused's failure to offer an explanation, the court was not obliged to draw any such inference. In deciding whether or not to draw such an inference the court would be obliged to act in accordance with the principles of constitutional justice and thus would be under a constitutional obligation to ensure that no improper or unfair inferences were drawn. The sections in question did not interfere in any way with the accused's right to the presumption of innocence or the obligation on the prosecution to prove his guilt beyond all reasonable doubt:

> If inferences are properly drawn, such inferences amount to evidence only; they are not to be taken as proof. A person may not be convicted of an offence solely on the basis of inferences that may properly be drawn from his failure to account; such inference may only be used as corroboration of any other evidence in relation to which the failure or refusal is material. The inferences drawn may be shaken in many ways, by cross-examination, by submission, by evidence or by the circumstances of the case.[461]

He was also of the view that any interference with the right to silence was proportional to the duty of the State to protect the life, person and property of all its citizens:

> It is the opinion of this Court, that in enacting ss 18 and 19 of the Act of 1984, the legislature was seeking to balance the individual's right to avoid self-incrimination with the right and duty of the State to defend and protect the life, person and property of all its citizens. In this situation, the function of the Court is not to decide whether a perfect balance has been achieved, but merely to decide whether, in restricting individual constitutional rights, the legislature have acted within the range of what is permissible. In this instance, this Court finds that they have done so, and must accordingly uphold the validity of the impugned statutory provisions. While it is true that ss 18 and 19 could lead

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459 ibid, 565.
460 High Court, 10 November 1995 Murphy J; [1997] 3 IR 484 (SC).
461 [1997] 3 IR 484, 498.

> to an accused being convicted of a serious offence in circumstances where he or she might otherwise have been acquitted, there are two important limiting factors at work. Firstly an inference cannot form a basis of conviction in the absence of other evidence. As the learned trial judge pointed out: –
>
> > '… there is no doubt a strengthening of the State's case but in no sense is it final and in neither event is the accused required to exculpate himself.'
>
> Secondly, only such inferences 'as appear proper' can be drawn: that is to say, an inference adverse to the accused can only be drawn where the court deems it proper to do so. If it does not, then neither judge nor jury will be permitted to draw such inference. Thus, for example, a court could refuse to allow an inference in circumstances where its prejudicial effect would wholly outweigh its probative value as evidence.
>
> The Court is not satisfied that the provisions of the impugned sections are so contrary to reason and fairness as to constitute an unjust attack on the applicant's constitutional rights and the appeal herein must be dismissed.[462]

In terms of the right to silence, *Sweeney v Ireland*[463] reaffirms that an accused cannot be compelled to speak against his or her own interests. Whereas the right to silence may be circumscribed under the European Convention on Human Rights, the Supreme Court left little room for any statutory intervention to compel an accused person to confess to a crime. That, however, is different to statutory schemes whereby inferences may be properly drawn from existing evidence as opposed to any situation which compels an accused to breach the constitutional right not to incriminate himself or herself. In *Gilligan v Criminal Assets Bureau*[464] the applicant claimed that by requiring him to establish that property frozen pursuant to the Proceeds of Crime Act 1996 was not the proceeds of crime, the 1996 Act was unconstitutional. McGuinness J rejected this claim on two grounds:

(1) The forfeiture of assets under the 1996 Act is a civil, and not a criminal, procedure. Once it is established that the proceedings are in fact civil "there is no constitutional infirmity in a procedure whereby the onus is placed on a person seeking property to negative the inference from evidence adduced that a criminal offence has been committed;[465]

(2) Even in criminal cases, "the State in certain circumstances is entitled to require a defendant to rebut an inference of criminal conduct".[466]

Examples of presumptions

Examples of presumptions include s 4 of the Explosive Substances Act 1883 which provides:

> (1) Any person who makes or knowingly has in his possession or under his control any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he is not making it or does not have it in his possession or under his control for a lawful object, shall, unless he can show that he made it or had it in his possession or under his control for a lawful object, be guilty of felony and, on conviction, shall be liable to penal servitude for a term not exceeding fourteen years, or to imprisonment for a term not exceeding two years with or without hard labour, and the explosive substance shall be forfeited.
>
> (2) In any proceeding against any person for a crime under this section, such person and his wife, or husband, as the case may be, may, if such person thinks fit, be called, sworn, examined, and cross-examined as an ordinary witness in the case.

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462 ibid, 501.
463 [2019] IESC 39.
464 [1998] 3 IR 185, followed in M v M High Court, 4 June 1999, O'Higgins J.
465 [1998] 3 IR 185, 225.
466 ibid, 226.

A similar statutory construction is to be found in s 2(2) of the Prohibition of Incitement to Hatred Act 1989. This allows the accused to prove that where the prosecution has not shown that he intended to stir up hatred, that he was not aware of the content of the material or recording concerned and did not suspect, or have reason to suspect, that the material or recording which he displayed or distributed was threatening, abusive or insulting. Analogous defences are included under ss 3 and 4 which are to be construed in the same way as in *The People (DPP) v Smyth*,[467] as followed by the Supreme Court in *The People (DPP) v Forsey*.[468]

Similarly, s 4 of the Criminal Justice Act 1964 provides, in relation to murder, that an accused person is to be presumed to have intended the natural and probable consequences of his conduct, but that this presumption may be rebutted.[469] This section is not treated as a reversed burden because it is no more than a specific application of the general rule that it applies to all human conduct. Instead, a series of cases hold that if there is material upon which the presumption might be displaced, in either prosecution or defence cases, it is then for the prosecution to prove that the presumption has not been rebutted beyond reasonable doubt. Sometimes the construction of a statutory formula gives rise to the conclusion that the ordinary burden of proof on the prosecution has been reversed, in some respect, on to the accused who must then assert a positive case on the balance of probabilities. The classic statutory formulation giving rise to this situation is set out in ss 15 and 29 of the Misuse of Drugs Act 1977 as amended by s 6 of the Criminal Justice Act 1999 which provides:

> Any person who has in his possession, whether lawfully or not, a controlled drug for the purpose of selling or otherwise supplying it to another in contravention of regulations under section 5 of this Act, shall be guilty of an offence.(2) Subject to section 29(3) of this Act, in any proceedings for an offence under subsection (1) of this section, where it is proved that a person was in possession of a controlled drug and the court, having regard to the quantity of the controlled drug which the person possessed or to such other matter as the court considers relevant, is satisfied that it is reasonable to assume that the controlled drug was not intended for the immediate personal use of the person, he shall be presumed, until the court is satisfied to the contrary, to have been in possession of a controlled drug for the purpose of selling or otherwise supplying it to another in contravention of regulations under s 5 of this Act.

How a reversed burden works

Section 29 of the Misuse of Drugs Act 1977 was considered by the Court of Criminal Appeal in *The People (DPP) v Byrne, Healy and Kelleher*.[470] The three appellants had been observed by the gardaí handling bulky packages on a beach in Connemara. A boat had twice come in to land at dawn, to be met by the appellants who then dragged bulky packages up the beach They buried some of them in the sand and put others in a camper van parked on the beach. Just as they were about to drive off the Emergency Response Unit appeared over the dunes and arrested the accused. The packages were found to contain 640 kg of cannabis resin. The applicants were charged with unlawful possession of a controlled drug, possession for the purposes of sale or supply and importing the same. They were convicted on each of the counts except importation since it was impossible to say if the boat, or the yacht off-shore, had come from outside territorial waters. Speeches were made to the jury claiming the packages could have contained "anything", even poitín. The jury convicted. On their appeal, the appellants claimed that the prosecution had failed to prove that they knew that the said packages contained substances controlled under the Misuse

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[467] [2010] 3 IR 688.
[468] [2018] IESC 55.
[469] See generally: O'Higgins and O'Braonain, 'Section 4 of the Criminal Justice Act 1964: A Constitutional Presumption?' (1992) 2 ICLJ 179; O'Higgins and O'Braonain, 'Section 4 of the Criminal Justice Act 1964: the Redundant Presumption?' (1991) 1 ICLJ 113.
[470] [1998] 2 IR 417.

of Drugs Acts. In the Court of Criminal Appeal Keane J rejected this plea and upheld the convictions. He held that once the prosecution had proved possession, s 29 shifted the onus of proof onto the defendant to prove that he did not know that he was in possession of a controlled drug. The applicants did not challenge the constitutionality of s 29 and there is no discussion of this issue in the judgment of Keane J. The decision was that the accused, in having an evidential burden, were required to prove as a probability that they had no knowledge as to the contents of the package. Since this would leave a situation whereby the accused might fail to prove a probability but a failure to prove a probability is not a failure to prove a reasonable doubt. This is the modern standard: where the accused has an evidential burden, he or she does not have to prove innocence in respect of the element where proof of a negative is on them, that on the prosecution proving possession of a drug that they did not know what was in the package was a drug, the accused's burden is to raise a reasonable doubt; *The People (DPP) v Smyth*,[471] *The People (DPP) v Forsey*.[472]

Under s 7 of the Criminal Justice (Drug Trafficking) Act 1996 inferences may be drawn from a failure to mention when questioned a fact which is later relied upon in defence at trial, and that failure may be used as evidence. Such evidence is only corroborative; hence the prosecution must prove potentially incriminating facts and the inference drawn adds to such other facts potentially enabling the jury to conclude that the accused committed the crime. By analogy from the reasoning in *Rock v Ireland*,[473] s 7 would be likely to pass constitutional scrutiny. Inferences adverse to the accused can only be drawn where the court deems it proper to do so. Thus a court would be obliged to refuse to permit an inference to be drawn under s 7 where the probative value of such inference was outweighed by its prejudicial effect. Nor does anything in s 7 permit an accused to be convicted on the basis of an inference alone in the absence of any other evidence. In considering this section a court would be likely to focus on s 7(3) which provides some protection for an accused by requiring that he be "… told in ordinary language when being questioned, charged or informed, as the case may be, what the effect of such failure might be." Section 7 provides a model which is worth reproducing:

> (1) Where in any proceedings against a person for a drug trafficking offence evidence is given that the accused –
>
> (a) at any time before he or she was charged with the offence, on being questioned by:
>
> (i) a member of the Garda Síochána, or
>
> (ii) pursuant to regulations made under section 6, an officer of customs and excise, within the meaning of that section,
>
> endeavouring to ascertain whether an offence had been committed, or by whom, or
>
> (b) when being charged with the offence or informed by-
>
> (i) a member of the Garda Síochána, or
>
> (ii) pursuant to the said regulations, a said officer of customs and excise,
>
> that he or she might be prosecuted for it, failed to mention any fact relied on in his or her defence in those proceedings being a fact which in the circumstances existing at the time he or she could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, then the court, in determining whether to send forward the accused for trial or whether there is a case to answer and the court (or, subject to the judge's directions, the jury) in determining whether the accused is guilty of the offence charged (or of any other offence of which he or she could lawfully be convicted on that charge) may draw such inferences from the failure as appear proper; and the failure may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence

[471] [2010] 3 IR 688.
[472] [2018] IESC 55.
[473] [1997] 3 IR 484.

> in relation to which the failure is material, but a person shall not be convicted of an offence solely on an inference drawn from such failure.
>
> (2) Subsection (1) shall not have effect unless the accused was told in ordinary language when being questioned, charged or informed, as the case may be, what the effect of such failure might be.
>
> (3) Nothing in this section shall, in any proceedings-
>
> (a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his or her presence relating to the conduct in respect of which he or she is charged, in so far as evidence thereof would be admissible apart from this section, or
>
> (b) be taken to preclude the drawing of any inference from the silence or other reaction of the accused which could properly be drawn apart from this section.
>
> (4) This section shall not apply in relation to a failure to mention a fact if the failure occurred before the commencement of this section.

It is instructive to consider some of the provisions of the Offences Against the State (Amendment) Act 1998 in the light of the existing case law on inferences and presumptions. Section 2 permits an inference to be drawn from the failure of the accused to answer material questions in relation to an offence under s 21 of the Offences Against the State Act 1939. The wording of s 2 is similar to the wording of s 18 of the Criminal Justice Act 1984 which was upheld in *Rock v Ireland*.[474] Section 4 amends s 3 of the Offences Against the State (Amendment) Act 1972 by extending the meaning of conduct which an accused may be asked to explain at the risk of an adverse inference to include a refusal "to deny published reports that he was a member of an unlawful organisation, but the fact of such denial shall not by itself be conclusive." Section 3 of the 1972 Act was upheld in *O'Leary v The Attorney General*.[475] Nonetheless, it is submitted that making a failure to deny published newspaper reports presumptive evidence could be problematic. For example, how is the evidential weight of a tabloid assertion that someone is a member of a terrorist group to be assessed without calling the journalist to give evidence and to reveal his sources? Is an individual expected to purchase a newspaper every day to see if he has been "outed" as a terrorist, or is the section limited to reports that are brought to his attention, perhaps by a newspaper being pushed across the interview table by a Guard in the middle of an interview. Under s 5 an inference may be drawn from the failure of an accused to mention any fact when questioned that he later relies on in his defence, being a fact which in the circumstances existing at the time, he could reasonably have been expected to mention when so questioned. This is a broad sweeping provision, but again would seem to come within the scope of the decided cases. Section 5 provides

> (2) Where in any proceedings against a person for an offence to which this section applies evidence is given that the accused –
>
> (a) at any time before he or she was charged with the offence, on being questioned by a member of the Garda Síochána in relation to the offence, or
>
> (b) when being charged with the offence or informed by a member of the Garda Síochána that he or she might be prosecuted for it,
>
> failed to mention any fact relied on in his or her defence in those proceedings, being a fact which in the circumstances existing at the time he or she could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, then the court, in determining whether to send forward the accused for trial or whether there is a case to answer and the court (or, subject to the judge's directions, the jury) in determining

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474 [1997] 3 IR 484.
475 [1993] 1 IR 102 (HC), [1995] 1 IR 254 (SC).

> whether the accused is guilty of the offence charged (or of any other offence of which he or she could lawfully be convicted on that charge) may draw such inferences from the failure as appear proper; and the failure may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence in relation to which the failure is material, but a person shall not be convicted of an offence solely on an inference drawn from such a failure.
>
> (3) Subsection (2) shall not have effect unless the accused was told in ordinary language when being questioned, charged or informed, as the case may be, what the effect of such a failure might be.
>
> (4) Nothing in this section shall, in any proceedings-
>
> (a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his or her presence relating to the conduct in respect of which he or she is charged, in so far as evidence thereof would be admissible apart from this section, or
>
> (b) be taken to preclude the drawing of any inference from the silence or other reaction of the accused which could properly be drawn apart from this section.
>
> (5) This section shall not apply in relation to a failure to mention a fact if the failure occurred before the passing of this Act.

In *Redmond v Ireland*,[476] dealing with the admissibility of the evidence of a Chief Superintendent that an accused was a member of a proscribed organisation, Charleton J allowed for the prosecution to be relieved of certain burdens of proof, provided that the intervention was necessary and the consequence accorded with logic:

> The Oireachtas has chosen to alter the rules of evidence only in respect of a particular offence within a particular legal context and in which both common sense and experience demonstrate would make practical proof otherwise impossible in practical terms. It is only within that context that the section should be analysed as meeting the standard of fairness in criminal trials which is guaranteed by Article 38.1 of the Constitution.

Section 7 of the Offences Against the State (Amendment) Act 1998, similarly provides a model whereby an article which, apart from special circumstances such as police or army possession, is unlawful if an accused has it to be an offence. This carries a 10 year penalty:

> (1) A person shall be guilty of an offence if he or she has any article in his or her possession or under his or her control in circumstances giving rise to a reasonable suspicion that the article is in his or her possession or under his or her control for a purpose connected with the commission, preparation or instigation of-an offence under the Explosive Substances Act 1883, or the Firearms Acts, 1925 to 1990, which is for the time being a scheduled offence for the purposes of Part V of the Act of 1939.

In setting out the defence model, it is clear that the prosecution could not prove more than a reasonable suspicion that a bomb or a gun was possessed by the accused for an unlawful purpose. But, that proof of possession of such an article has, nonetheless, to be met. The model of the offence is possession of such an article and circumstances tending to indicate an unlawful purpose. The reversed burden is then on the accused to show a lawful purpose:

> (2) It shall be a defence for a person charged with an offence under this section to prove that at the time of the alleged offence the article in question was not in his or her possession or under his or her control for any purpose specified in subsection (1).

Summary

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[476] [2015] 4 IR 84 [80].

It may be concluded that burdens of proof may be reversed only where the prosecution bear the task of putting before a court evidence from which the commission of a criminal offence may ordinarily be inferred. A model for so doing is that of proof of possession and proof of reasonable suspicion. What is involved, after all is a bomb, or a gun, or dealership quantities of drugs. What may be a defence, lack of knowledge, being duped by another, concealment, is known only to the accused. It is the item and the possession of the item that the prosecution prove. This model is followed in drugs and in weapons cases. Only the accused, after all, knows what the accused thought in possessing such an article. It is not constitutionally suspect to enable the court to proceed to conviction where there is no explanation forthcoming from the accused. After all, the accused is represented and can bring out any fact suggesting innocence or the accused can give or call evidence. It is not the lack of explanation that grounds the conviction but rather such models do not offend constitutional fairness where the inference which the court makes accords with good sense. It may also be commented that statutory models enabling inferences accord with constitutional fairness where they do not instruct a court how to think but merely enable facts such as incriminating marks and the absence of explanation to lead to a conclusion. Enabling a conclusion is not the same as infringing the accused's right not to incriminate himself or herself and nor is it the same as directing a conclusion.

Conclusive Certificates

Whilst shifting an evidential burden onto the accused may be permissible, this seems to be so only in the context of the prosecution retaining the burden of proving such primary facts as will enable an inference or where the proof of a negative in terms of the accused's mental element is entirely within his or her province in terms of stating a possible defence. Any attempt to conclusively prove all the ingredients of a criminal prosecution by means of a certificate, in contrast, completely removes the fact finding role of the jury in a criminal trial. In *O'Callaghan v Clifford*[477] the tax provisions contained in the Finance Act 1967 as amended made the failure knowingly or wilfully to make a return of income within a limited time as required by notice from the inspector of taxes an offence which could be proved by a certificate. Denham J, giving judgment for the Supreme Court, stated that[478]:

> The only method by which the Court may conclude on the State's case that the necessary *mens rea* exists is by inferring from the said certificate (which does not mention *mens rea*) that a notice was duly given to the appellant and that the appellant refused knowingly or wilfully to make the return.
>
> The burden of proof in criminal matters is higher than that in civil matters and thus whereas a particular certificate may be adequate in a civil matter it may not be so in a criminal matter.

This warning went unheeded by the drafters of s 63 of the Employment Equality Bill 1996, which provided that on the offence of obstruction of an equality officer "a document purporting to be certified by the Director or to be sealed with the seal of the Court and relating to the circumstances in which the offence is alleged to have occurred shall be received as prima facie evidence of the facts stated therein." The net result would be that the prosecution was proven by a piece of paper, leaving the accused to defend the case by actual evidence. In *Re Article 26 and the Employment Equality Bill 1996*[479] the Supreme Court held the section to be unconstitutional as it went beyond merely shifting an evidential burden onto the accused, rather it permitted an entire case to be proved by way of certificate. In the analysis of the constitutionality of the Bill the Supreme Court struck the legislation down. Hamilton CJ reasoned that Article 38.1 of the Constitution guaranteed that accused persons were to be tried "in due course of law"[480]:

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477 [1993] 3 IR 603.
478 ibid, 613.
479 [1997] 2 IR 321.
480 ibid, 379.

> Trial in due course of law includes the constitutionally protected concept of the right to have a fair trial. A trial in due course of law is one wherein the rights of the individual are protected and yet they may be limited in a fair and just way for the benefit of society. In *Re the Criminal Law (Jurisdiction) Bill 1975* [1977] IR 159 O'Higgins CJ said of Article 38.1:
>
> > 'The phrase "due course of law" requires a fair and just balance between the exercise of individual freedoms and the requirements of an ordered society'.
>
> The subsection raises a fundamental matter wider than either the presumption of innocence or the shifting of an evidential burden of proof. It concerns the essence of a constitutional criminal trial. Historically trials, whether in summary form or on indictment, have proceeded *viva voce* although documentary evidence and inferences therefrom may be part and parcel of the trial. It is a fundamental principle in our system that, in general, criminal trials are conducted on viva voce evidence. In *Re Haughey* [1971] IR 217 at p 261 O'Dálaigh CJ stated 'in a criminal trial, evidence must be given orally; a statute may authorise otherwise ...' Whereas *viva voce* evidence is the norm in the majority of cases, proof by written statement is allowed in certain circumstances but with the consent of the accused, and, in other cases, certificates may provide prima facie evidence of specific issues of a scientific or technical nature. Such limitation of *viva voce* evidence is reasonable in circumstances where the nature of the evidence is, for example, technical and by its form appropriate in a certificate, as such form means that, for example, many technicians and officials are not required to be called to Court in each case. A reasonable balance is obtained.

The Chief Justice commented that the entire nature of a criminal trial would be altered by such a procedure. It would have the result that the accused would have to undermine facts stated on paper only:[481]

> Proof by way of certification is an interference with the norm of a trial *viva voce*. A certificate is an appropriate form of proof when it is proportionate to the ends to be achieved. It is a justifiable method of proof when the process is, for example, of a technical nature and there are other issues before the Court.
>
> It is a question of whether the constitutionally guaranteed right to trial in due course of law has been interfered with and if so whether it has been limited in a reasonable and justifiable manner appropriate to the circumstances. It is clear that in s 63, sub-s 3 there is an interference with the right to a trial in due course of law. The issue is whether the intrusion is constitutional.
>
> The objective of the legislation is a laudable social policy. However, nothing inherent in that policy or in the nature of the legal rights granted by the legislation renders it necessary to have the remedy in the form proposed. It is neither rational nor necessary to so limit the right of due process to achieve the objective of the legislation.
>
> In effect a form of proportionality test must be applied to the proposed section. (a) Is it rationally designed to meet the objective of the legislation? (b) Does it intrude into constitutional rights as little as is reasonably possible? (c) Is there a proportionality between the section and the right to trial in due course of law and the objective of the legislation? A similar test was used by the Canadian Supreme Court in *R v Oakes* [1986] 1 SCR 103 and *Chaulk v R* [1990] 3 SCR 1303. Applying this test to s s 63, sub-s 3 it is clear that s 63, sub-s 3 is not specifically designed to meet the objectives of the Bill. The process is not rationally connected to the objective. The process of certification is an intrusion into the constitutional rights of an accused, yet there is no rational reason why trial by certification process is necessary in this type of case. Thus, there is no proportionality between the process of trial

[481] ibid, 382-383.

by certification and the objective of the Bill and the limitations of the right to trial in due course of law. The objective of equality in employment does not require that the offence in issue be tried by the method set out in s 63, sub-s 3. The intrusion, the interference in the due course of law, is not limited in a rational way. Or to put it a slightly different way, s 63, sub-s 3 when read in the context of the Bill is a failure to protect the constitutional rights of the citizen and not warranted by the objectives which it is sought to secure: See *Cox v Ireland* [1992] 2 IR 503 at p 523.

Chapter 3

Hearsay evidence and confession statements

One of the most common mistakes that juries are inclined to make is that assertions by counsel are to be considered as evidence or that propositions counsel put to witnesses and which denied thereby become testimony. They are not. Courts act on evidence and not on assertion. If a witness loses credibility in consequence of an allegation being put to that witness, that is a matter of the jury considering that testimony as carrying less weight; it does not make evidence of the proposition of fact unless the witness both agrees with it and has direct knowledge of it. The assertion or the question itself is not evidence. It is a classic example of hearsay. The jury may appropriately be so instructed. In *The People (DPP) v Connolly*,[482] counsel had made a speech to the jury declaring "that questions put by him at cross-examination should be regarded as the equivalent of his client putting that account into evidence." The Court of Criminal Appeal stated that the trial judge rightly corrected this. An assertion by counsel is a classic example of hearsay. Hardiman J for the court stated:[483]

> There is no such thing as "the [accused's] version of events as presented by counsel", to quote the grounds of appeal. If the accused wished to put a version of events before the jury he could do so only by calling evidence or giving evidence himself. Counsel is not in a position to put a version of events before the jury for the good and sufficient reason that he was not present when the relevant events occurred and, in any event, is not sworn and open to cross-examination. If one witness gives sworn evidence as to wheat he says happened and is cross-examined by counsel to the effect that he is not telling the truth, that does not mean that there are two versions of events before the jury, or that it "is one person's word against another". Unless and until the accused or some other person gives evidence, and exposes themselves to cross-examination, there is only one version of the facts before the jury, for them to accept if they are satisfied beyond reasonable doubt as to its truth, or otherwise to reject.

The rule

A statement other than one made by a witness while giving oral evidence in the proceedings is inadmissible as evidence of any facts stated.[484] In other words, the court may only accept as evidence the account of witnesses who have themselves perceived the events in issue. What is excluded is any account which depends upon what the witness knows from information supplied by other people.

The hearsay rule is subject to many exceptions. The most pertinent, in terms of criminal litigation, is that a statement against interest is admissible in both civil and criminal proceedings where that statement is made by the accused in a criminal case or a party to proceedings in a civil case. Most relevantly, a confession made by an accused of his or her complicity in the offence, or some admission which connects the accused to the commission of the offence, is admissible against the maker of the statement; but not against others he may choose to implicate. A statement by a party to proceedings as to a matter material to those proceedings is admissible in evidence as an exception to the rule against hearsay and may be proved by someone who witnessed such an admission.[485] Further, since *Christie* in 1914[486] it has generally been held that statements made in the presence of an accused are always admissible in evidence. This has been the interpretation of that case in this jurisdiction, and invariably acted upon by trial judges hearing criminal cases. The

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[482] [2003] 2 IR 1.
[483] [2003] 2 IR 1, 5.
[484] This formulation of the rule was taken from Cross and Wilkins, An Outline on the Law of Evidence (4th ed, 1975), p 102.
[485] Erdheim [1896] 2 QB 260, 270. Further see Phipson on Evidence (19th ed, 2018), Ch 28.
[486] [1914] AC 545.

facts were that a small boy accused Christie, in the presence of the boy's mother and a police officer, of having indecently assaulted him. It was held that although the accused denied the charge, the accusations by the boy might be proved by his mother and the police officer. The case does not mean that a mere statement in the presence of a party is evidence of the facts stated. What makes such a statement admissible is the accused's reaction to the statement and as to whether it is suggestive of rejection or a possible acceptance of the truth. In consequence, the decision in the case was that the reaction of an accused to what is said in his presence may or may not amount to acceptance, and therefore to an admission. This interpretation of the case is rarely alluded to. In *Ulster Bank v O'Brien & Others*[487] the rule was subject to analysis by the Supreme Court. If challenged, the admissibility of a statement made in the presence of the accused, or, as in that case, a letter sent by a financial institution to a debtor, depends upon the circumstances to adjudge if a failure to respond amounts to an admission. Charleton J stated:

> Thus, analysing whether a failure to respond in the face of an accusation can amount to a declaration against interest must depend upon a myriad of factors. What follows cannot be definitive but merely indicative: an analysis of the nature of the relationship between the parties is essential; the circumstances under which an allegation is made must be taken into account, what is solemn, being different from what is social and from what is jocular or mischievous; the nature of what is claimed may amount, on the one hand, to a bare allegation or, on the other, to an apparently definitive statement backed-up by documentary proof; but finally, the test must be that a failure to respond, in circumstances when a denial would clearly be required, would amount in terms of the conduct of reasonable people to an admission.[488]

Since the accused is a party to the prosecution, statements made by him or her that tend to prove involvement in the crime are admissible in evidence. Thus, the hearsay rule is not breached by the victim of a crime describing what the accused said when engaging in, or in the aftermath of, sexual violence. Nor is it a breach of the hearsay rule for a witness to describe either the methodology of the accused in perpetrating a fraud or the apparently false reasons given for excusing the conduct in issue.

Exceptions listed

The hearsay evidence rule and the exceptions by which declarations of a party not called may be admitted in evidence were explored by the Supreme Court in *Cullen v Clarke*.[489] The plaintiff claimed statutory compensation for injury. To succeed in his claim of total incapacity, it was necessary to show that he had been unable to obtain employment in consequence of the injury. The plaintiff proposed to give evidence of the reaction of prospective employers to him by proving what they had said to him when they refused him work. This was ruled out by the trial judge as evidence. The Supreme Court held that statements by a prospective employer as to why they would not employ a workman were not evidence of the reasons then stated by them. He could give evidence of refusals of employment and that employment was available. From that, the trial judge could draw an inference of incapacity. With caution, a court could hear of an unrehearsed refusal of employment. Kingsmill Moore J analysed the nature of the hearsay rule. It does not necessarily exclude statements made by another person not called to testify, provided the fact that such words were stated is relevant to an issue:[490]

> In view of some of the arguments addressed to the court, it is necessary to emphasise that there is no general rule of evidence to the effect that a witness may not testify as to the words spoken by a person who is not produced as a witness. There is a general rule, subject to

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[487] [2015] IESC 96.
[488] ibid [21].
[489] [1963] IR 368.
[490] [1963] IR 368, 378.

> many exceptions, that evidence of the speaking of such words is inadmissible to prove the truth of the facts which they assert; the reasons being that the truth of the words cannot be tested by cross-examination and has not the sanctity of the oath. This is the rule known as the rule against hearsay.

The first exception noted is that the speaking of words by another person may in itself be a fact:

> First: The utterance of the words may itself be a relevant fact, quite apart from the truth or falsity of anything asserted by the words spoken. To prove, by the evidence of a witness who heard the words, that they were spoken, is direct evidence, and in no way encroaches on the general rule against hearsay. In the present case the refusal of an employer to engage the workman is a relevant fact. A workman could give evidence that, on asking the employer for a job the employer said, "No".

The judge then touched on the *res gestae* exception, where spontaneous utterances interwoven with an action described by the witness are intrinsic to the testimony:

> Second: Where a fact or transaction is in issue declarations which accompany or explain the fact or transaction are generally admitted under the somewhat vague principle that they form part of the res gestae. If the employer had said, "No, but ask me again in a week's time", the statement would be admissible as being really an intrinsic part of the act, showing that the refusal was not absolute and unqualified, but might yield to altered circumstances. Again, insofar as the evidence of the words spoken is offered merely to explain or qualify the nature of the act, there is no breach of the hearsay rule.

The third exception is as to statements made by a person when engaged in an action and stating the reason for pursuing that action:

> Third: The statements accompanying the act may be offered as showing the mind of the actor at the time of the doing of the act. Here there is a breach of the hearsay rule, insofar as reliance is placed on the truth of the words uttered, a truth which is not sanctified by an oath or capable of being tested by cross-examination. But here resort can be had to another well established practice, sometimes regarded as falling within the res gestae extension, sometimes as an exception to the hearsay rule. "When the motive or reason of a person for doing an act, or the intention with which he does it, is relevant to the issue, his statement made at the time of doing of the act is evidence of his motive, reason, or intention" (*Law of Hearsay Evidence* – Trengarthen at p 55). "Whenever the bodily or mental feelings of a person are material to be proved, the usual expression of such feelings made at or about the time in question may be given in evidence. If they were the natural language of affection, whether of body or mind, they furnish original and satisfactory evidence of its existence, and the question whether they were real or feigned is for the jury to determine" (*Phipson's Law of Evidence*, Eighth Edition, 1942, at p 71). "As to intention and motive. When the question of intention arises in regard to an act done, it may ... be proved either by declarations made at the time of the act or when the latter is of a continuous nature ... by declarations at any time during its currency" (*Ibid* at p 72).

The fourth exception concerns more remote declarations as to statements made intrinsic to an action or which accompany that action. To be admissible, such utterances should be a spontaneous and unrehearsed expression of contemporary feelings, which reveal rather than declare a condition of the mind:

> Fourth: As to the admissibility of declarations as to states of mind, where such declarations are made prior to or subsequent to an act and unconnected therewith, the authorities are not uniform, but the modern tendency is to admit such declarations '... wherever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions, there you may prove what he said, because that is the only means by which you can find out

> what his intentions were' (*Sugden v St Leonards* LR 1PD 154 per Mellish LJ at p 251). 'It is well established in English jurisprudence, in accordance with the dictates of commonsense, that the words and acts of a person are admissible as evidence of his state of mind. Indeed, they are the only possible evidence on such an issue. It was urged at the Bar that although the acts of the deceased might be put in evidence, his words might not. I fail to understand the distinction. Speaking is as much an act as doing. It must be born in mind that there is nothing in the admission of such evidence which clashes with the rooted objection in our jurisprudence to the admission of hearsay evidence. The testimony of the witnesses is to the act, ie to the deceased speaking these words, and it is the speaking of the words which is the matter put in evidence and which possesses evidential value. The evidence is, therefore, not in any respect open to the objection that it is secondary or hearsay evidence' (*Lloyd v Powell Duffryn Steam Coal Company Limited* [1914] AC 733 per Lord Moulton, at p 757). The remarks of the Lord Justice, insofar as they hold that the admission of evidence of words spoken by a person who is not a witness in order to prove the state of his mind is not a transgression to the general hearsay rule must, I think, be confined to cases where such words are the spontaneous and unrehearsed expression of contemporary feelings, words which reveal rather than declare a condition of the mind. A man's statement as to what are his motives, intention, or other state of mind may be rehearsed, and may be false, and to admit such a statement as evidence of the true condition of his mind is contrary to the general hearsay rule and can only be allowed as an exception to that rule ... If reliance is placed on the truth of what is stated by a person not called as a witness it is hearsay evidence, admissible only if it falls within one of the exceptions to the rule excluding hearsay. Here, and in *Cowell's Case* 33 BWCC 275, the reasons and motives of a prospective employer were clearly relevant facts; and statements as to those reasons, certainly if made contemporaneously with the refusal to employ him, would, although hearsay, be admissible as coming within the exception already stated. But such statements, though admissible, must be acted on with caution; for the statements may be false. An employer, for instance, might refuse to employ a man because of gross disfigurement or because he was a foreigner, but he would not be likely to assign these reasons. He would be more likely to say that he had no job available.

In *Myers v Director of Public Prosecutions*,[491] the House of Lords ruled that exceptions to the hearsay rule could not be expanded on the basis that the evidence sought to be given is peculiarly reliable or is the best available. Here, the Supreme Court has stated that this ruling does not apply and that it remains possible to expand the exceptions to the hearsay rule on the basis of inherent reliability.[492] There has been little sign that the principles as to the inadmissibility of hearsay evidence inherited in 1922 are subject to change on the basis of reliability. However, it seems to remain possible.

In this respect, it is important to not apply the hearsay rule unless there is a statement outside of immediate testimony about a fact not provable by the witness. In *Bank of Ireland v Fergus*[493] the defendant guaranteed the loans of a company in which he was intimately involved. He claimed that the records of the bank, statements sent on a monthly basis and similar, were hearsay. By a majority, the Supreme Court held that these constituted declarations by the parties touching on their financial affairs, and thus if necessary contrary to interest, and hence admissible:

> In any trading relationship of this kind, involving a major bank with many employees and a development company with several directors and administrators, people will come and go. The purpose of records is to show where matters stood at the particular time when a record was made. In communicating with each other as to the state of those records, these were made common as between the guarantor, the company and the bank. The plain reality

[491] [1965] AC 1001.
[492] *Ulster Bank v O'Brien* [2015] IESC 96 [9].
[493] [2019] IESC 19.

> of this case is that there was no denial of those records, so shared, at the time. Certainly, the records have to be proven whether the defendant is there or not. The point is that transactions to which a party was engaged are provable without resort to any legislation. A person defending a case, having claimed a defence and succeeded in obtaining a plenary hearing, has to engage with the evidence. Further, when it came to the hearing of this case in the High Court there was no evidence adduced that there were no such loans.[494]

Original evidence

The first exception identified by Kingsmill Moore J allows for the admission of original evidence. Where the fact that someone made a statement is, in itself, a fact of importance, the evidence may be introduced as original evidence. Evidence is not hearsay where the purpose of introducing the evidence is not to establish the truth of what is contained in the statement. Original evidence is admissible when it is proposed to establish by that evidence that a statement, as a matter of fact, was made by a party. In defamation proceedings, the publications of the defendant are not introduced as truth of their content, but as proof of the dissemination of allegations which damage the plaintiff in the eyes of right-thinking members of the community. Where an accused pleads that he acted under duress, the acts and declarations of those pressurising him are allowed into evidence not as proof of the facts stated: "we will kill you if you don't allow us to copy the key to the safe", but because the speaking of those words and the actions accompanying them are important in determining their effect on the accused's mind, and whether the defence is made out.[495] Where the accused is charged with breaches of banking regulations, what is said by regulatory officials in the financial sector is admissible to prove that the accused was told that if he followed a certain course, the actions would be lawful.[496] Similarly, if the fact in issue in a case concerning the handling of stolen goods is whether the accused knew or believed that the goods were stolen, the accused is entitled to give evidence as to a conversation he had with the person who supplied him the goods. If the evidence is that the accused got the goods from a person who said to him that they were available at a very low price because he had obtained them from a friend who was in serious debt and in desperate need of cash, such a declaration does not prove that the goods were not stolen, or otherwise unlawfully obtained. Instead, such a declaration is of importance in relation to a fact in issue, which is whether or not the accused believed that the goods were not stolen or unlawfully obtained and the grounds upon which such a belief was based.[497]

Finally, where an allegation of recent fabrication is made against a witness, his prior consistent statement may be proved because the making of that statement then becomes important to the issue of whether the accused has recently invented that relevant portion of the evidence.[498]

Res gestae

The second, third and fourth principles identified by Kingsmill Moore J in *Cullen v Clarke* are, in criminal cases at least, admissible only if they come within the rule allowing for the reception of hearsay statements in the context of the *res gestae* exception. In criminal cases the reception of this evidence is on a more limited principle than on the second, third and fourth exceptions identified in that case. Sometimes there can be a coincidence with the reception of original evidence.

In *Ratten*[499] the accused had been convicted of murdering his wife with a firearm. His defence was that the gun went off accidentally in the process of being cleaned. Shortly before the proven time

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494 ibid [9]-[16].
495 *The People (DPP) v Gleeson* [2018] IESC 53; *Subramaniam v Public Prosecutor* [1956] 1 WLR 965.
496 *The People (DPP) v Casey* [2019] IESC 7.
497 *Willis* [1960] 1 All ER 331.
498 *Oyesiku* (1971) 56 Cr App R 240; *Benjamin* (1913) 8 Cr App R 146; *Fox v General Medical Council* [1960] 3 All ER 225; see also *Coll* (1889) 24 LR Ir 522.
499 [1972] AC 378.

of death, a woman had called from the house of the accused, in which only he and his wife were present, asking for the police in a frightened hysterical voice. The accused had given evidence that he had only made one telephone call during the relevant period, which was to call an ambulance on his gun going off accidentally. The Privy Council might have ruled the evidence admissible on the basis that the fact of the woman's phone call being made was in issue, evidence as to that fact contradicted the evidence of the accused. The evidence was also admissible as proof of the frightened condition of the deceased as part of the *res gestae*. In *Bedingfield*[500] the accused was charged with murdering a woman with whom he had been living, by slashing her throat. His defence was that the deceased had cut her own throat. It was held admissible in evidence for a witness who saw the deceased coming out of the couple's house and clutching her throat to testify that she had said: "see what Bedingfield has done to me". A similar ruling was made in *The People (AG) v Crosbie*[501] as to what the victim of a stabbing said: "He has a knife, he stabbed me." This was held "part of the criminal act for which the accused were being tried or … because it formed part of the *res gestae*."[502] Similarly, in *Fowkes*[503] the accused was known as "the Butcher". He was charged with murder. The son of the deceased gave evidence that when he, his deceased father and a police officer were sitting in a room, a face appeared at the window. Shortly after, a fatal shot was fired through the window which killed his father. His evidence was that he thought that the face which had appeared was that of the accused. He was further allowed to testify, as was the police officer, that when the face appeared, he had shouted "there's Butcher". While these utterances were contemporaneous, an almost contemporaneous statement may be admitted as part of the circumstances. In *The People (DPP) v Lonergan*,[504] on the victim staggering out of a house he said "the bastard stabbed me", a statement referable to his brother who was chased from the scene. Some 15 minutes later, as attempts were made to staunch the victim's blood loss, he said: "the bastard stabbed me, my own brother stabbed me." While the lapse of time was a factor, the opportunity for fabrication was absent.

The rule appears to be confined to an emotional event in issue and requires the declaration to be contemporaneous, or quite contemporaneous with it. Such a declaration is admissible in criminal cases as evidence of the facts stated, provided it was made in such conditions of involvement in the occurrence of the crime so as to exclude the possibility of concoction or distortion to the advantage of the maker or disadvantage of the accused.[505]

Other Exceptions

Other exceptions to the hearsay rule may be noted. These include statements in a public document. Here the logic is that since a public record may be checked, statements in it are unlikely to remain uncorrected if false. Also admissible are statements by deceased persons who are close to death as to the cause of their death. The *Lonergan* case could have been decided on this basis. Such statements are admissible because of the realisation of imminence of death is a sufficient occasion of solemnity equivalent to the administration of an oath.[506] For example, in *FitzPatrick*[507] the ultimate victim was assaulted and severely beaten on the evening of 19 February. He managed to reach his home and on the following day a sergeant came to see him. A doctor and a priest were then sent for and he was removed to hospital. There he remained until his death over a month later on 20 March. On 27 February he made a statement naming the accused as his assailant. The deceased had declared, at the commencement of the statement, that he believed that he was going to die, that he was without hope of recovery and that the fear of death was before him and that he

[500] (1879) 14 Cox CC 341.
[501] [1966] IR 490.
[502] [1966] IR 490, 496.
[503] The Times, 8 March 1856; 14 Digest (Rep) 415.
[504] [2009] 4 IR 175.
[505] *Ratten* [1972] AC 378, 389 per Lord Wilberforce.
[506] *Mooney* (1851) 5 Cox CC 318; *Jenkins* (1869) LR 1 CCR 187; *Pike* (1829) 3 C & P 598.
[507] (1912) 46 ILTR 173.

was willing to make a truthful statement. These matters were put in evidence as questions and answers and objection was taken to their admissibility either in that form or as tainting the subsequent statement which, it was alleged, was also elicited by questions. Palles CB rejected that contention, regarding it as a settled rule of practice that the fact that a declaration was based on answers to questions went to the weight of the declaration, but never to the admissibility of the evidence. Such a document should be admitted under the dying declaration rule.[508]

Other exceptions to the hearsay rule include declarations against proprietary pecuniary interest, declarations as to dissent or relationship, declarations as to public rights, statements appropriately recorded in a public document,[509] declarations by testators as to the contents of their wills after they have been made, and declarations made in the course of duty. Sandes formulates the latter rule thus: "statements, written or oral, made by a person now deceased, in the ordinary course of the discharge of his duty with no apparent interest to misrepresent and provided they were contemporaneous with the act to which they relate" are admissible in evidence.[510] There was no exception to the hearsay rule relating to business records. The exception noted by Sandes, however, surely incorporated elements of the exception in the sense that business records are made to accurately represent events, such as production, to which they relate. The problem with rules of common law, however, is that these exceptions relate to a simpler society where people were more sedentary. Hence, the rule was that the record was only admissible if the maker was dead. In modern life, records are made in an anonymous fashion by multiple persons. Hence, business records pose a problem. In civil litigation, this is dealt with by ignoring the hearsay rule. In criminal cases, the rule as to the admissibility of records has been reformed.

Section 16 Criminal Justice Act 2006

A further exception introduced by section 16 of the Criminal Justice Act 2006 allows for the admissibility of a prior written statement where a witness contradicts his or her expected testimony. That section is considered in the chapter X of this work dealing with witness examination.

Business Records

One might expect that records of the serial numbers of motor vehicles engines, of camera lenses or the dispatch numbers on boxes of shoes or other goods might be regarded as so inherently reliable as to be subject to such an exception. Virtually the only way of identifying a mass produced item would be by reference to such a number. Where, for example, the accused was found in possession of android phones, the possibility arises that he or she might have bought them, however large the number, from a range of suppliers at some time in the past. Where, however, the dispatch numbers on the devices are identical to those proven to have been stolen from a Chinese manufacturer one month previously, a case against the accused of larceny or handling begins to be formulated. Where the identification marks are engine or chassis numbers registered to the licensed owner of a motor car in a public record, the public record exception to the rule against hearsay assists. Not so, in relation to ordinary business records. In *The People (DPP) v Prunty*[511] the Court of Criminal Appeal went so far as to hold that an official of the Department of Posts and Telegraphs was not entitled, in a kidnapping case, to give evidence that he had looked up the relevant internal, as opposed to public, record to discover that a particular telephone number was assigned to a particular public phone box. The relevance of the evidence was that such a number had been traced in a call to the house of the victim's family and that the accused was seen standing in the phone box to which the telephone number was assigned at the time when the call was made.[512]

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[508] See also *Perry* [1909] 2 KB 697; *Waugh* [1950] AC 203; and *Sandes* pp 132-133.
[509] *Sturla v Freccia* (1880) 5 App Cas 623.
[510] *Sandes* pp 132; see further *Sandes* pp 130-134, and Cole, Irish Cases on Evidence (2nd ed, Dublin 1992) pp 82-94.
[511] [1986] ILRM 716.
[512] A re-trial was ordered and the accused was again convicted notwithstanding the absence of this evidence.

Copies

It used to be the case that if original documents were not produced, a sufficient explanation for their not being proffered to the court had to be given before such copies were admissible in evidence. This was changed by s 30 of the Criminal Evidence Act 1992 which provides:

(1) Where information contained in a document is admissible in evidence in criminal proceedings, the information may be given in evidence, whether or not the document is still in existence, by producing a copy of the document, or of the material part of it, authenticated in such manner as the court may approve.

(2) It is immaterial for the purposes of subsection (1) how many removes there are between the copy and the original, or by what means (which may include facsimile transmission) the copy produced or any intermediate copy was made.

(3) In subsection (1) "document" includes a film, sound recording or video recording.

The purpose of the Criminal Evidence Act 1992 is to allow business records to be admissible in criminal trials. It enlarges the scope of the exceptions to the rule against hearsay, while preserving all other exceptions.[513] It does not affect privileges and nor does the legislation alter compellability.[514] Simply because a document is being supplied, or a videotape or record of an examination of an article or dead body, does not exclude an attack being made on the credibility of the absent witness or the making of a comparison with a prior or subsequent inconsistent statement.[515]

In essence, information contained in a document is admissible as a statutory exception to the rule against hearsay provided it was compiled in the ordinary course of business by a person who had, or might reasonably be supposed to have had, personal knowledge of the matters dealt with, and, where it is kept on a computer, has been reproduced in the course of the normal operation of that computer.[516] While this requires evidence of the system, it surely suffices that a person who is aware of the system of recording information within the business at the time when it was recorded can testify as to a system which complies with the section. Under s 6 of the 1992 Act a certificate may be substituted for a witness producing as fact information in a document, and giving evidence of system, provided the averment set out in that section can be made. A certificate under s 6 must be served not later than 21 days prior to the commencement of the trial. The defence is then entitled, not less than seven days before the commencement of the trial, to object to the same. Furthermore, even outside these time limits, the defence may object to s 5 evidence on the grounds of reliability, authenticity and the risk that the defence may be unable to controvert the evidence by reason of the maker of the document not being called. Section 8(3) provides that in estimating the weight, if any, to be attached to information given in evidence under that part of the Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise. Under s 8, allegations as to the credibility of the maker of the document can be made in the same way as if the person had been called to give evidence.

While the provisions of the 1992 Act seem complex, the legislative purpose is to allow the admission of records of businesses, charities and local and national democratic bodies into evidence. A business is not confined to an enterprise for profit, as s 4 includes "any trade, profession or occupation carried on for reward, or otherwise". This extends not only to the records of a dentist or a shoe manufacturer in Ireland but to all enterprises, political bodies and charities outside the State. Documentary evidence is admissible as proof of the facts stated where these were "compiled in the ordinary course", from information supplied by a person who is either

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513 Criminal Evidence Act 1992, s 2(2).
514 Section 5(3).
515 Section 9.
516 Section 5.

identifiable or not who either "had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with". The supply of data may be direct or indirect in accordance with the "ordinary course of" how the enterprise carries on its business. Where information is reproduced from electronic or other non-legible signals, that reproduction should be in the "normal operation" of the computer or other data system.[517] A document is widely defined as including maps, plans, graphs, drawings, photographs and a reproduction of same from computer language or other non-legible form, including but not limited to microfilm, microfiche, magnetic tape or disk, but is ample enough to include computer and cloud storage. Core to the definition is retrieval from hard copy or from non-legible form.

In order not to create such a wide definition as would allow for the statements of unavailable witnesses to be admitted, s 5 of the 1992 Act excludes information "compiled for the purposes or in contemplation" of civil or criminal proceedings, a criminal investigation or disciplinary inquiry. That exception does not apply where the information is compiled before a District Court judge, or a deposition before a judge was not practicable, or where the victim has died or is outside the State. In the latter case, modern technology would surely allow a video link to be provided. From criminal investigations, however, s 5(4)(b) enables the admission of police directions, where relevant, or maps, plans, drawings or photographs and "any explanatory material in or accompanying" same. Similarly enabled as evidence are matters that may be broadly described as not relating to evidence of analysis or opinion but of transmission. Hence, despite the absence of a witness, documents that record "the receipt, handling, transmission or storage of anything" by the Forensic Science Laboratory are admissible. Nonetheless, the legislation goes further and enables the admission of not only "the receipt, handling, [or] transmission" of an article but also the "examination or analysis of anything". Should, for example, a forensic pathologist or doctor examining a body at the scene of a crime become unavailable, then the 1992 Act describes as admissible if conducted in the ordinary way "a record by a registered medical practitioner of an examination of a living or dead person."

In deciding on the admissibility and weight of documentary evidence, under section 8 of the 1992 Act, a court has regard to "the interests of justice", with particular regard to the reliability of the information, its authenticity in terms of documentary provenance and whether there is any risk that the admission of such evidence "will result in unfairness to the accused", having particular regard to whether it is "likely to be possible" to controvert the information where the person who supplied it does not give oral evidence at trial.

Section 11 of the 1992 Act is strictly unnecessary since it provides for the admission of evidence of a resolution by either House of the Oireachtas through an official copy, which was the position at common law. The business of administration and government involves the compilation of records in the ordinary way. Such records are specifically included within the definition section of the 1992 Act together with cognate international organisations and the European Union. While the modern means of establishing descent is through DNA testing, nonetheless the legislation provides that where "a document purports to be a birth certificate issued in pursuance of the Births and Deaths Registration Acts, 1863 to 1987", it is admissible as evidence of relationship; that is that the persons named as the mother and father are the parents.[518]

Mechanical Evidence

A machine is not a person. As such, the rule excluding hearsay has no applicability. Machines are instruments of objective recording or calculation and not of deceit. When one uses a computer, the fact of that use is invariably recorded by virtue of the programming of that computer. If, in order to access a particular file on a computer, one needs to use a call sign, then the fact that the

[517] Criminal Evidence Act 1992, section 5.
[518] Section 5(5).

computer records that call sign as having been used on a particular day, at a particular time, in order to call up certain information, is no more than a fact electronically recorded. If the call sign is one assigned to the accused, it may be evidence that the accused called up that information on that day or at that time. If the call sign is widely distributed it may prove nothing. Similarly, an internet user will be given a call sign for billing purposes. The accessing of certain information, for example in relation to how DNA comparison evidence works, if recorded against an accused on a date subsequent to the rape and murder of the victim, is admissible against him provided it is made relevant to the resolution of the facts in issue.

Since the leading case of *The Statue of Liberty*[519] the courts have attempted to take cognisance of the fact that mechanical means now replace human effort. Whereas formerly matters of fact may have been recorded by a clerk with a pen, more commonly, contemporary recording takes place through the express or inadvertent accessing of computers which control many aspects of commercial transactions. These include the transfer of moneys between banks, the making of domestic and international telephone calls and the tape-recording of deals between international money brokers.

Real evidence

In essence, the hearsay rule has no application to real evidence. Real evidence is evidence in the form of physical objects, such as knives, clothing and photographs, which are introduced in evidence as exhibits. Since the court sees the evidence for itself and does not, therefore, have to rely on the interpretation of witnesses, no question of hearsay can arise. For example, the court sees a gun or a knife and forms the conclusion, perhaps with the assistance of a ballistics expert, that it is a lethal weapon. The court sees a photograph of a dead body and is told that it is the deceased. The blood spatters in the room or the fact that a cloth was found downstairs which was newly washed, may tell their own tale. Apart from the rule that records produced mechanically[520] may be admitted, this rule has also been applied to electronically recorded material.[521] It has been held that these are real evidence where the information recorded was perceived by the machine for itself. Video tape recordings,[522] and most recently computerised recordings,[523] have also been held to constitute real evidence where there is no human input into their content. Essentially, the law considers that where a record is made automatically by a computer, it does not record a statement made by a human being, which would be hearsay, but creates a statement itself. In effect, the record which is created mirrors the fact in question and as such becomes an observable fact which can be examined by the court at first hand; in the same way as any other real or physical evidence. No question of hearsay, therefore, arises and the evidence is admissible.

Recordings

The usefulness of this rule of evidence to computerised records is limited in that it does not extend to the conventional business or administrative records compiled by a computer operator since such a record is created with human input. In consequence, the Criminal Evidence Act 1992 was passed to deal with this situation, in the same way as it deals with the situation of a clerk recording a fact by pen in a ledger. Nevertheless, apart from situations where a human being intervenes by recording information on a computer, and where the prosecution needs that information, as opposed to the mere fact that something was recorded, a large number of everyday situations operate in the context of automatic machines. Most city centres are now covered at least in part by video cameras. Telephone machines, railway ticket dispensing machines, automated teller machines, machines which use electronic eyes and other types of machine record information without human intervention. The machines are set by a human being. It is therefore necessary to

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519 [1968] 2 All ER 195.
520 The Statue of Liberty [1968] 2 All ER 195.
521 *Castle v Cross* [1985] 1 All ER 87.
522 For example see: *Kajala v Noble* (1982) 75 Cr App R 149; *Taylor v Chief Constable of Cheshire Police* [1987] 1 All ER 225.
523 *Spiby* (1990) 91 Cr App R 186.

call a person to say how they set the machine, or a person who is familiar with the habitual operation of the machine, to say how the machine works. Thereafter the evidence that the machine records by itself becomes admissible. To give an example, a robber walks into a bank and is recorded on video tape; the evidence is admissible because the video records what happened. A machine in a hotel records the number and length and duration of each incoming and outgoing phone call; that evidence is admissible because the machine merely observes what happens and records the information.

Computers

The English courts have accepted a second type of real evidence created by a computer; where the computer is used merely as a calculator.[524] This has a very limited application to cases where the computer is used solely to process information and not to store it. This is probably not real evidence at all. What happens in these cases is that the evidence is given by the witness who uses the computer and he is allowed to refer to the computer record to refresh his memory. It is not the record that is admissible, as such, but the evidence of the person who uses the computer and observed the result of its calculations.[525]

Tapper suggests a very high standard of proof of the authenticity of a computerised record:

> Similarly, in a case involving evidence derived from computers, it might be necessary to prove the procedures for collecting the data, those governing their checking and entry into the computer, any further manipulation, checking and storage, the security of the computer from the time the data were entered until the time they were removed to secondary storage, the means and security of such storage, and the process of removal, and subsequent custody until presentation to the court.[526]

It is submitted that the foregoing would undermine the exception of real evidence and is not consistent with the manner in which that evidence has been admitted in Irish courts.[527] Similarly, decisions in the English courts indicate that computer records are admissible with less thorough proofs than those set out by Tapper. In *Castle v Cross*,[528] the court accepted that the presumption *omnia praesumuntur rite esse acta,* that mechanical instruments were in order at the material time, applied to an instrument notwithstanding that it was not one of common knowledge. In the case of *Minors*, Watkins LJ trenchantly stated:

> The failure of a computer, or a software programme, may occasionally result in a total failure to supply the required information, or in the supply of unintelligible or obviously wrong information. It will be a comparatively rare case where the computer supplies wrong and intelligible information, which pertinently answers the questions posed. Nevertheless, such cases could occur. In the light of these considerations trial judges, who are called upon to decide whether the foundation requirements of section 69 have been fulfilled ought perhaps to examine critically a suggestion that any prior malfunction of the computer, or software, has any relevance to the reliability of the particular computer record tendered in evidence.[529]

In *Governor of Pentonville Prison*, the matter was put even more bluntly:

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524 *Wood* (1983) 76 Cr App R 23.

525 *Sophocleous v Ringer* [1987] Crim LR 422 and the commentary thereon.

526 Colin Tapper, Computer Law (4th ed, Longman 1989), p 370. See also Kelleher and Murray, Information Technology Law in Ireland (2nd ed, Bloomsbury 2007).

527 Among the decisions made at trial include *The People (DPP) v Ward* in the Special Criminal Court in November 1998. There the court accepted evidence from a witness who described how mobile phones communicated with one another, from another expert who described how a computer would record the date, time, length of such communication and the callers by mobile phone number, and that of another expert who described the manner in which the billing computer worked. Of necessity, the billing computer also recorded that relevant information for billing purposes.

528 [1985] 1 All ER 87.

529 *Minors* (1989) 89 Cr App R 102, 108.

> Where a lengthy computer printout contains no internal evidence of malfunction and is retained, for example, by a bank or stockbroker as part of its records, it may be legitimate to infer that the computer which made the record was functioning correctly.[530]

During argument in the case of *The People (DPP) v Ward*[531] Barr J suggested that a requirement that the prosecution call the computer programmer, or indeed the person who wrote the computer software used, was both unreasonable and not in conformity with the law. Ordinary evidence of the working of the computer by persons who operated it at the relevant time established the exception whereby facts recorded by the computer became admissible in evidence. It is submitted that this ruling conforms to common law authority and is correct.

Section 22 of the Electronic Commerce Act 2000 provides:

> In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to deny the admissibility in evidence of—
>
> (a) an electronic communication, an electronic form of a document, an electronic contract, or writing in electronic form—
>
> (i) on the sole ground that it is an electronic communication, an electronic form of a document, an electronic contract, or writing in electronic form, or
>
> (ii) if it is the best evidence that the person or public body adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form,
>
> or
>
> (b) an electronic signature—
>
> (i) on the sole ground that the signature is in electronic form, or is not an advanced electronic signature, or is not based on a qualified certificate, or is not based on a qualified certificate issued by an accredited certification service provider, or is not created by a secure signature creation device, or
>
> (ii) if it is the best evidence that the person or public body adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.

As has been outlined, records generated by computer systems without any human action can be admissible as real evidence, but evidence must be first given in relation to the functioning and operation of the relevant computer system, for example, mobile phone bills or a print out of results following a breath test. In *Cochrane*,[532] it was held by the Court of Appeal that before the judge can decide whether computer printouts are admissible, whether as real evidence or as hearsay, it is necessary to call appropriate authoritative evidence to describe the function and operation of the computer. In *The People (DPP) v Murphy*[533] it was reiterated that "[t]he fact that a recording is produced mechanically without human intervention makes no difference to its general admissibility in evidence." Section 5(1) of the Criminal Evidence Act 1992 provides that information contained in a document shall be admissible in any criminal proceedings as evidence of any fact therein of which direct oral evidence would be admissible if the information:-

> (a) was compiled in the ordinary course of a business,
>
> (b) was supplied by a person (whether or not he so compiled it and is identifiable) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with, and

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530 Per Lloyd LJ in *Governor of Pentonville Prison; ex p Osman* [1990] 1 WLR 277, 306.
531 Special Criminal Court, 27 November 1998.
532 (1993) Crim LR 48.
533 [2005] 2 IR 125 [78]. See also *The People (DPP) v Meehan* [2006] 3 IR 468, 480.

> (c) in the case of information in non-legible form that has been reproduced in permanent legible form, was reproduced in the course of the normal operation of the reproduction system concerned.

This is subject to s 5(2) which provides: "Subsection (1) shall apply whether the information was supplied directly or indirectly but, if it was supplied indirectly, only if each person (whether or not he is identifiable) through whom it was supplied received it in the ordinary course of a business."

In *Spiby*,[534] the printout from a computerised machine was used to monitor telephone calls. It automatically recorded information such as the numbers to which the calls were made and the duration of the calls. This was admitted as real evidence. It was held that where information is recorded by mechanical means without human intervention, then the record made by the machine is admissible. *The Governor of Brixton Prison, Ex p Levin*[535] concerned an accused and the issue of whether he had used a computer to gain unauthorised access to fund transfer services of a bank in order to make fraudulent transfers of funds from accounts of clients of the bank to accounts which he controlled. The bank transfer requests were automatically processed and transaction records were copied to the computer's historical records. A printout of these records was held by the House of Lords to be admissible to prove the transfers of funds. Lord Hoffman stated: "They do not assert that such transfers took place. They record the transfers … [t]he evidential status of the printouts is no different from that of a photocopy of a forged cheque."[536]

In *PPS v Duddy,*[537] a breath certificate was admissible as real evidence because it "represented the automatic calculations of a machine from the actual breath" of the accused and because it was "to be presumed that the intoximeter was working correctly."[538]
The most recent decision of the Supreme Court to consider real evidence is the decision in *The People (DPP) v A McD*[539]. The Court reviewed the previous authorities and confirmed that as a matter of principle the actual footage recorded by a CCTV camera is to be classified as real evidence rather than hearsay. It followed that evidence as to the operation and functionality of the recording system was not required to establish that the evidence was not hearsay unless the specific circumstances of the case put that matter in issue. However, CCTV evidence adduced as real evidence did not enjoy any evidential presumption and nor should a court take judicial notice of it. Rather, CCTV had to be proved in an appropriate manner and to the required standard by establishing the provenance and authenticity of the footage and accounting for its history from the moment of its recording until its production in court so as to exclude the possibility of interference. In addition, it was necessary that the recording was intelligible and of sufficient quality, was relevant and had probative value.

In *Director of Public Prosecutions v Moran*[540] the Court of Appeal held that a Facebook conversation could be adduced as real evidence:

> … the certificate of Ms Mifsud stated that the records were created and stored by a reliable and trustworthy computer system providing accurate results and that the information contained is automatically created and accurately captured from user-generated online communication within the operation of Facebook's business. It is a record that is automatically generated and the certificate authoritatively described the function and

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534 (1990) 91 Cr App R 186.
535 [1997] AC 741.
536 [1997] AC 741, 746.
537 [2009] NI 19 [29].
538 See further on this point *PPS v McGowan* [2009] NI 1 [20].
539 [2016] 3 IR 123.
540 [2018] IECA 176.

> operation of the system. In our judgment these properly certified Facebook records were admissible as real evidence.[541]

Confessions[542]

Two theories have dominated the principles behind the admission of confession statements in criminal cases. There are those who believe that the commission of serious crime is an unsupportable burden on the soul and that the perpetrator of a serious offence merely needs the opportunity to unburden their psyche; one which is provided by arrest and interview and that therefore any resulting confession is likely to be reliable. The great American jurist John Henry Wigmore, in A Treatise on the Anglo-American System of Evidence in Trials at Common Law, Including the Statutes and Judicial Decisions of all Jurisdictions of the United States and Canada,[543] considered any idea "that confessions should be guarded against and discouraged is not a benefit to the innocent, but a detriment." He was of the clear view that an innocent person should be enabled by a mere question from the police to make an explanation at the earliest moment and that this would be "often the best means for him of securing a speedy vindication." Wigmore, as regards the guilty, thought that every "guilty person is almost always ready and desirous to confess, as soon as he is detected and arrested." He speaks of the "nervous pressure of guilt" and proceeds to describe it as being "enormous; the load of the deed done is heavy; the fear of detection fills the consciousness; and when detection comes the pressure is relieved; and the deep sense of relief makes confession a satisfaction."[544] Certainly, in many circumstances an innocent person may readily dispel suspicion through explanation. But suspicion can also point wrongly towards the innocent.[545] Experience of the kind of vicious assaults and murders committed by adherence to absolute values, those who are ensnared in ideology, and which are productive of inhuman responses towards opponents, suggests that in this area of criminal conduct such a view is perhaps naive.[546] There, the burden of guilt is either much less burdensome or is entirely absent. When it comes to dealing with those involved in criminal gangs, experience has also shown that loyalty to the group and surrender of authority to a leader will strongly militate against persons relieving themselves of the burden of guilt, although perhaps less strongly. On the other hand, modern psychological research by such pioneers as Gisli Gudjonsson has demonstrated that some people can be particularly suggestible and consequently can yield to interrogative methods that unyieldingly attempt to place the burden of a crime upon a suspect.[547] For centuries, there has been judicial caution in the admission of confessions. This is not simply because most statements by arrested persons admitting to a crime have historically been regarded with circumspection due to having been taken in what could be described as the confines of a secret process within a police station without any safeguards in place, but by reason of the very pressure which arrest itself brings to bear on a suspect. As Hayes J put the matter in *Johnson*:

> It is manifest to everyone's experience that, from the moment a person feels himself in custody on a criminal charge, his mental condition undergoes a very remarkable change,

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[541] ibid [39].

[542] See generally O'Mahony, 'The Ethics of Police Interrogation and the Garda Síochána' (1996) 6 ICLJ 46; McGuckian, 'Recent Developments in the Law Governing the Admissibility of Confessions in Ireland' (1999) 9 ICLJ 8; White, 'The Confessional State: Police Interrogation in the Irish Republic' (2000) 10 (1) ICLJ 17 and (2000) 10 (2) ICLJ 2; McGuickan, 'Confessions and the Constitution' (2004) 26 DULJ 272; Daly, 'Does the Buck Stop Here: An Examination of Pre-Trial Legal Advice in Light of O'Brien v DPP' (2006) 13 DULJ 345; Sweeney, 'The Questioning of Criminal Suspects in Ireland' (2015) 25(2) ICLJ 37; Grace, 'You have the Right to a Lawyer—An Empirical Study' (2017) 27(2) ICLJ 50; Sweeney, 'Solicitors in Garda Stations: In or Out?' (2017) 27(4) ICLJ 129.

[543] (3rd edition, Boston, 1940), [866].

[544] ibid, [851].

[545] The Disappearance of Madeleine McCann (Netflix, 2019).

[546] Generally see Charleton, Lies in a Mirror: An Essay on Evil and Deceit (Dublin, 2006).

[547] Gisli H Gudjonsson, The Psychology of Interrogations and Confessions (London, 2003).

> and he naturally becomes much more accessible to every influence that addresses itself either to his hopes or fears.[548]

In *The People (DPP) v Doyle*,[549] the majority judgment of Charleton J suggested that:[550]

> The ultimate test as to whether a statement was made in consequence of an inducement or whether it was "the natural emanation of a rational intellect and free will" has been demonstrated as the appropriate test as to whether at a particular time any particular statement was or was not voluntary.

In consequence of traditional cautious approaches to confessions, the admissibility of evidence that another has admitted to involvement in a crime is subject to multiple rules. While all of these have their origin in safeguarding against coerced admissions to criminal conduct, two trends are apparent. Firstly, the process of taking a confession in police custody has become markedly more transparent over the course of recent decades. What was once the word of several police officers against an accused became over time a written record which a suspect had at least an opportunity to approve. This has now been transformed into an audiovisual record of all interviews of which both the trial judge and the jury can form their own opinion. Additionally, following such pioneering analyses as the Ó Briain Report,[551] those detained in Garda stations are subject to sensible safeguards related to information about their rights, breaks in the process of questioning and having an officer in charge of the custody independent of the investigation team.[552] Charleton J, giving the majority judgment in *Doyle*[553] has described this process of incremental change as beneficial and warned that confession statements should be subject to them:

> With each development of the law, the process by which a confession is taken from a suspect has become more amenable to exact examination. It is important not to slip back into the attitude of a prior era where all a court had was the somewhat weighted contest between the testimony of multiple police officers and the denial of the suspect. The modern system is far from the situation where juries could determine the reliability of the prosecution case only through attempting to gaze through a glass darkly at what may have secretly happened to a person under pressure in a police station. Since we have moved through legislation and judicial scrutiny into an era of transparency, nothing less than the methods through which there is now accountability is acceptable. As times changed so did the challenges posed by accused to the admissibility in evidence of confession statements. There was a time, within the last decades, when a common argument advanced against the admission of a confession statement was that the statement was a so-called planted verbal; in other words that the accused had said nothing or said something innocuous but that the interviewing officers had made up an admission of guilt. There was also a time before that, but within living memory, when the issue as to admissibility tended to focus on allegations of brutality or of secretly hiding an arrested suspect away from legal advice and from the calming attentions of visits from those nearest to them. In the time following that, they were followed by allegations of unremitting pressure. One by one, these kinds of allegation have disappeared. This is because safeguards have been put in place. They are to be kept in place.

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548 (1864) LR 2 CCR 15, 24.
549 [2018] 1 IR 1.
550 ibid, 153.
551 Committee to Recommend Certain Safeguards For Persons In Custody and For Members Of An Garda Síochána (Dublin: Stationery Office, 1978).
552 Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987 (SI No 119/1987).
553 [2018] 1 IR 1, 142.

In the same case, O'Donnell J, commenting on the dissenting judgment of McKechnie J which would have ruled the accused's confession inadmissible, addressed the accretion over time of disparate rules directed towards safeguarding the reliability of a confession and protecting the accused. These, he said, should not be applied piecemeal since at the heart of any scrutiny as to the admissibility of a confession should be the overall circumstances of fairness in which it was taken:

> I also accept that the function of an appellate court is to provide a real and searching scrutiny of the reasoning of trial judges. However, if it is permissible to draw together a number of fragments from interviews spread over time and then collected together in a portion of a submission, in order to discount the findings of a trial judge who not only heard and observed witnesses (which we did not) and who viewed the tapes of the full interviews (which again we did not, and were not invited to), and further make inferences as to the content of communications between client and solicitor, then little if anything would remain of the important division of functions between trial courts and appellate courts. I also consider that the law relating to inducements referred to by McKechnie J. should be reconsidered in the context of a general review of the law relating to detention and questioning in the light of a number of developments already discussed. Should it really be the case that any comment however "slight and trivial," can be treated as an inducement and result in the exclusion of a statement that is recorded and available to the trial court, voluntary, and made with the benefit of legal advice? It is obvious that developments in the law in this area are not always consistent, and at times point in different directions. It is surely important to recognise on the one hand that the law now provides for extended periods of detention and that there are now a variety of complex statutory provisions that permit the gardaí to pose questions on the basis that inferences may be drawn from a failure or refusal to respond, and on the other hand, that detention is subject to a high degree of regulation and, importantly, that all interviews are now recorded. This is a world unrecognisable to anyone familiar with criminal law and procedure when the rules on inducements were developed. It is desirable in my view that stock should be taken of all the developments in the law and technology, and fresh consideration given to what constitutional fairness or public policy requires in that context at each stage of the process.[554]

Support for this approach came from the judgment on admissibility of the trial judge, where Sheehan J stated that the interviewing gardaí "were at all times professional and courteous and involved no oppression." In terms of substance, Sheehan J also ruled in favour of admissibility on the basis that the accused "was in full control of himself throughout the interviews" and that "he made the admissions that he did because he chose to do so." On appeal to the European Court of Human Rights, the issue was whether a solicitor should have accompanied the accused throughout the interviews. The Strasbourg court ruled that "the primary concern of the domestic courts at trial stage and on appeal must be the overall fairness of the criminal proceedings". While the court disagreed with the majority Supreme Court ruling as to the presence of a lawyer during interviews, the decision was that, while it failed to recognise that the right of an accused to have access to a lawyer extended to having that lawyer physically present during police interviews,

> In the circumstances of the present case, notwithstanding the very strict scrutiny that must be applied where, as here, there are no compelling reasons to justify a restriction of the accused's right of access to a lawyer, when considered as a whole the overall fairness of the trial was not irretrievably prejudiced.[555]

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[554] ibid, 26.
[555] Application no 51979/17, judgment of 23 May 2019 [102].

What each rule has in common is the ascertainment of reliability, since a confession is of itself enough to convict the accused. It is right to be on guard for, as Alexander Solzhenitsyn remarked in Gulag Archipelago,[556] "the actual boundaries of human equilibrium are very narrow, and it is not really necessary to use a rack or hot coals to drive the average human being out of his mind."

A substantial proportion of the major cases which come before Irish courts allege the guilt of the accused on the crime charged at least partially on the basis of a confession. Confessions are varied in tone and in volume from a laconic acceptance of the truth of the charge to a cathartic self-accusation. A confession is any admission of the accused tending to show guilt. It extends from a brief verbal admission to the lengthy signed statement of the events of the crime such as occurred in *The People (DPP) v Quilligan and O'Reilly*.[557] There is no distinction between a full confession and an incriminating admission.[558] To be admissible in evidence, the trial judge must be satisfied that a confession was a free and voluntary emanation of the accused's mind and not obtained from him by a threat or inducement or by oppressive questioning or through unfair circumstances. The burden of proof is on the prosecution to establish beyond reasonable doubt that a confession was not obtained in a manner which would render it inadmissible. However, there is an obligation on the accused to identify, at least in outline form, the nature of the contest which he raises against the admissibility of an alleged confession statement. As with any other aspect of the adversarial contest that characterises a criminal trial, the accused may put allegations to those who were witness to his or her confession, but statements by counsel are not evidence unless adopted by the witness. There is a burden of adducing evidence on the accused but not of proof that the confession statement was inadmissible.

The admissibility of a confession is a matter of law for the trial judge in the absence of the jury. Even if admitted in evidence before the jury, the accused is entitled to challenge the weight that the jury might ascribe to the admission by asking, in essence, the same questions as to voluntariness all over again.[559] If the issue raised is as to whether a confession was not made by the accused, but was instead invented by the gardaí, the so-called "planted verbal", this is an issue of fact for the jury.[560] The modern practice is for the trial judge to first rule on this issue as a matter of law related to fairness. It can be that a case is run on the basis that a combination of oppression and inducements left the accused in a state where he is unable to recall definitively what he said, if anything. In such circumstances, what is in essence a plea of alternative facts is allowed to be run.[561] In the current era of audiovisual recording of police interviews, instances of vague complaint coupled with a claimed lack of memory have been largely confined to history.

It is necessary to establish that the involuntary nature of the confession emanated from the threat, inducement or oppression in question. The burden of proof remains with the prosecution and if it is unable to disprove beyond reasonable doubt the causal effect of same, any reasonable doubt must be exercised in favour of the accused by excluding the confession.

Voluntariness

A confession may not be admitted for the consideration of the jury if the prosecution, on being challenged, failed to prove that it was a voluntary statement in the sense that it was not obtained from the accused either by fear of prejudice or hope of advantage, excited or held out by a person

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[556] (London, 1973), p 99.

[557] The reports of that case are (No 1) [1986] IR 495; [1987] ILRM 606; (No 2) [1989] IR 46; (No 3) [1993] 2 IR 305. There waw also a fourth hearing in the Supreme Court which is not reported. For an account of the confession in this case see Charleton, 'Confessions – An Overview of the Law' Dlí Winter 1991, 39.

[558] *Customs and Excise Commissioners v Harz and Power* [1967] AC 760.

[559] *The People (AG) v Ainscough [*1960] IR 136.

[560] *Ajodha* [1982] AC 204.

[561] This was the ruling of the Special Criminal Court in The People (DPP) v Ward, the ultimate judgment of which was delivered on 27 November 1998, though the accused was definite that he had said nothing.

in authority.[562] The legal test can be condensed into two questions: was something said or done which in law would render the statement involuntary? If the answer to this question is yes, then the second question is: did the confession result from what was said or done? The only legal test to determine the admissibility of a confession is whether any action or words on the part of the gardaí, or other party in authority such as Customs or the Criminal Assets Bureau, caused a confession through offering or exciting hope of advantage or fear of prejudice.[563] A statement which is not voluntary is never admissible in evidence against the accused.[564] A good statement on the test was given by Lord Morris in *Ping Lin*[565] as follows:

> In considering whether the statement of an accused was brought about by hope or fear the judge will have to ascertain all the facts concerning the alleged and so called inducements. If it is said to have consisted in something said by a person conducting an interview then the facts must be ascertained as to what was said and what were the circumstances and what was said must be given in a common sense way the meaning which it could rationally be understood to have by the person to whom it was said ... was it as a result of something said or done by a person in authority that an accused was caused or led to make a statement. Did he make it because he was caused to fear he would be prejudiced if he did not, or because he was caused to hope that he would have advantage if he did? The prosecution must show that this statement did not owe its origin to this cause.

In *Doyle*, Charleton J outlined the fundamental nature of the caution that judges should exercise as to voluntariness thus:[566]

> Voluntariness is a matter for the judge alone in the absence of the jury while reliability is a matter for the jury where the confession is admitted into evidence. In the context of all of the evidence and its interrelationship, the jury will decide if the prosecution have proved their case. There is a constant guard by the judiciary against coerced confessions because that kind of unreliable admission may possibly be mistakenly seen by the jury as the acceptance of the validity of the entire prosecution case. A genuine admission of guilt to discreditable conduct is, on the other hand, so contrary to human vanity that where circumstances suggest that it is the product of a free will, there may be the highest degree of trust reposed in it. On its own, an admission of guilt is enough to convict. As was put by Nares J and Eyre B as early as 1783 in R v Warickshall 1 Leach 263, 168 ER 234:
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> > A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is submitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt that no credit ought to be given to it; and therefore it is rejected.
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> Cave J put the fundamental test of voluntariness thus in R v Thompson [1893] 2 QB 12:
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> > By … law … to be admissible, a confession must be free and voluntary. If it proceeds from remorse and a desire to make reparation for the crime, it is admissible. If it flows from hope or fear, excited by a person in authority, it is inadmissible. On this point the authorities are unanimous.

The vast majority of cases centre on the issue of fact as to whether the prosecution can prove beyond reasonable doubt that the accused was not offered early release from the garda station or

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[562] *Ibrahim* [1914] AC 599, 609.
[563] See Cole, pp 61-69.
[564] *The People (AG) v Cummins* [1972] IR 312.
[565] [1976] AC 574.
[566] [2018] 1 IR 1, 138-139.

some other form of inducement or some threat as to disadvantage should there be no cooperation according to police standards. While there can be a distinction between an inducement based upon a spiritual advantage, to "tell the truth for the good of your soul", as opposed to a material advantage, "if you tell the truth we will not oppose bail", the former inducements are not so much in evidence in recent years. However, an appeal to the humanity of the prisoner is not an inducement and has perhaps replaced religious exhortations in our return to the age of druids. In the *Doyle* case, Sheehan J analysed the origin of the change which caused the accused to confess thus:

> The Court also holds that Barry Doyle first began to engage with Detective Garda [A] in a limited way, essentially as a result of Detective Garda [A]'s appeal to Barry Doyle's humanity. This engagement was built on by Detective Sergeant [B] and Detective Garda [C] and ultimately the accused told the Gardaí about his involvement in the death of [the victim].[567]

It can be that the accused is told that a court will look favourably on a confession and so reduce sentence. As to whether that is an inducement requires a close analysis of the circumstances as to whether what was involved was a promise of leniency or the provision of information.[568] A mere statement of accurate fact as to the possible attitude of a future court is not necessarily an inducement. In *Ping Lin*[569] the alleged inducement amounted to the accused being told: "If you show the judge that you have helped the police to catch bigger drug people, I am sure he will bear it in mind when he sentences you". The accused may be regarded as hoping for an advantage, but this statement was all that was offered to him when he appealed to the police for help. All that had been done was the imparting to him of factually correct information. This is not an illegal inducement.

There have been a number of cases in which a confession has been found to be inadmissible due to threats or inducements on the part of police. In the case of *AG v Cleary,*[570] the accused was charged with killing her child shortly after the birth. While being questioned, a garda suggested that a medical examination be conducted from which it could be ascertained whether she recently had a baby and whether the baby had been born alive. Following the mention of a medical examination, the accused confessed. The Court of Criminal Appeal held that she had only confessed because she believed that her guilt would be discovered, the threat of medical examination by gardaí rendering her confession involuntary and therefore inadmissible. Threats to family members of a suspect by a person in authority can constitute an inducement. In *The People (DPP) v Boylan,*[571] the accused alleged that there was a "very grave threat" made of going to his home and "making life unpleasant for his wife and family." In *Northam*,[572] the accused, while awaiting trial for burglary offences, was questioned about a further such offence. He asked a police officer if he could have this offence taken into consideration at the pending trial, who said this would be done. The accused confessed. However, he was subsequently tried separately for that offence. The conviction was set aside on the basis that the police officer's reply to the accused's question constituted an inducement. In *Zaveka*,[573] the accused made an inculpatory statement after asking a police officer if he would get bail after making the statement, to which the police officer had said yes. This was held to constitute an inducement. In *Hoey,*[574] the accused was arrested on a charge of possession of a firearm. The interrogating Garda asked him whether he would "have to

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567 Quoted in the judgment of Charleton J, [2018] 1 IR 1, 129.
568 See further: *AG v Cleary* (1934) 1 Frewen 14; *Smith* [1959] 2 QB 35*; Commissioners v Customs and Excise v Harz* [1967] 1 AC 760; *Richards* [1967] 1 All ER 829; Northam [1967] 52 Cr App R 97; The *People (DPP) v Hoey* [1987] IR 637; and *The People (DPP) v Geoghegan* (unreported, 18 November 2003).
569 [1976] AC 574.
570 (1934) 1 Frewen 14.
571 [1991] 1 IR 477 at 480**.**
572 [1967] 52 Cr App R 97.
573 [1970] All ER 413.
574 *The People (DPP) v Hoey* [1987] IR 637.

get some member to go to your family and find out from them if anybody at [the accused's address]" was "going to take responsibility for" the firearm being in the house. Walsh J held, in determining what constituted an inducement, that the intention or motive of the person making the statement was irrelevant. Instead the test was the "effect [the inducement] was calculated to produce upon the person to whom it was made and not the subjective test of what was intended or even hoped for by the person who made it".[575]

Causation

The inducement or the oppression must cause the confession. Oppressive conduct towards a prisoner is wrong, but what the court focuses on is what effect if any such conduct may have had on the arrested person in terms of raising a reasonable doubt as to the voluntariness of the confession. The prosecution may succeed in establishing beyond all reasonable doubt that the case made by the accused in relation to one inducement, or incident of oppression, offered to him in a garda station should be rejected, but fail in relation to some other fact. What often arises in practice, therefore, is the question as to whether the lapse of time between the inducement and the confession leads to the necessary causation factor being absent. Whether the issue is voluntariness or oppression the causation rules are the same: did the inducement lead to the confession; did the oppressive conduct bear on the prisoner so as to result in the confession? This issue arose in *The People (DPP) v Pringle*.[576] On the second day of his detention under s 30 of the Offences Against the State Act 1939 the accused responded to garda questioning by telling them that he had been advised to say nothing. The gardaí brought a close friend of his, Eva Curtin, to the station. She was questioned in his presence and he was asked to comment on her answers. He said nothing. In the early hours of the next morning he was informed that things "looked bad" as far as Mrs Curtin was concerned; that she had got sick in the barracks and that she might be called as a witness or charged as an accessory. He was further told that the way out would be for him to give an account of his movements on the day of the murder; if he did so "the whole matter of Eva being, at worst, charged, or, at least, having to give evidence would not arise". Instead of immediately acting upon this inducement, the accused consulted with his solicitor and slept. The threat was not revived and the accused gave evidence that a consultation with his solicitor had relieved his mind with regard to the implications of the implied involvement of Eva Curtin. Thereafter a confession was made. The Court of Criminal Appeal later upheld the following judgment of the Special Criminal Court:

> The court is however satisfied beyond reasonable doubt that the effect of such threat or inducement on the accused was dissipated as a result of his interview with his solicitor in the early hours of the following morning as evidenced by his statement to Detective Sergeant Dunne and Detective Sergeant Tuohy and I quote, 'I was worried about Eva – he said there is nothing I can do about her. He said that she cannot be made to give evidence', and was not revived by Inspector Madigan's subsequent reference to Mrs Curtin on the morning of the 21st of July, 1980.[577]

The law underpinning the foregoing ruling has consistently been upheld by, and applied in, the Superior Courts. In *The People (DPP) v Buckley*,[578] Finlay CJ stated the rule in terms of a warning to the trial judge that he should have regard to the possibility that a past illegal inducement might still be operating on the mind of the accused at a later time:[579]

> It is submitted on behalf of the applicant that by reason of the fact that the applicant had already, on two separate occasions, made incriminatory statements to other members of the

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[575] ibid, 649.
[576] (1981) 2 Frewen 57.
[577] (1981) 2 Frewen 57, 85. See also *The People (DPP) v Lynch* [1982] IR 64; and The *People (AG) v Galvin* [1964] IR 325.
[578] [1990] 1 IR 14.
[579] ibid, 16.

> Garda Síochána, in circumstances which have been ruled inadmissible by the trial court, that this must be taken to have coloured the making of the subsequent statements, notwithstanding the intervening caution, and in particular, that he must no longer be considered to have had a free will in relation to whether or not he would admit guilt at the time of making these statements ... [W]here an accused person makes a statement which is incriminatory in nature and have previously been induced to make a statement either by promise, threat or oppression, also incriminatory in nature, which is by that fact rendered inadmissible, that the court must in respect of the later statement, even though no immediate circumstances of oppression, threat or inducement surround it, have regard to the possibility that the threat or inducement remains so as to affect the free will of the party concerned and, therefore, the voluntary nature of the statement. The court is, however, satisfied that very different considerations apply and arise in a case where a previous admission of guilt has been made which is rendered inadmissible, not by virtue of any oppressive circumstances, nor by the holding out of any inducement or threat, but rather by the exercise by the court of a discretion concerning a breach of the Judge's Rules.

In *The People (DPP) v McCann*[580] the applicant began to make a confession in the presence of his solicitor. Halfway through the confession he was informed that his period of detention had expired and he was free to leave. He left, but then returned a couple of minutes later and recommenced the confession with the same parties present in the room. The Court of Criminal Appeal held that the confession had been correctly admitted into evidence by the trial judge. The only breach of the Judges' Rules which was alleged was the one that forbids the questioning of a suspect without a caution being first administered. However, in this case the applicant had asked the sergeant to lead with questions, and the trial judge had correctly held that there was no breach of the rules. The accused had enjoyed liberal access to advice from two leading criminal defence solicitors during his detention. The Court cited the following test from Phipson on Evidence as to what constitutes an inducement:[581]

(i) were the words used by the person or persons in authority, objectively viewed, capable of amounting to a threat or promise?

(ii) did the accused subjectively understand them as such?

(iii) was his confession in fact the result of the threat or promise?

On the facts in the *McCann* case there had been no inducement offered to the applicant. Whilst on occasions in making the admissions he had been tearful, distressed and shaking; such symptoms were consistent with the reaction of a person who was recollecting the dreadful deeds that had been done (in this case the deliberate burning to death of the applicant's wife and child). Whilst the applicant had been given liberal access to his brothers during his detention, the trial judge held that his brothers "were not police tools or agents" and the Court of Criminal Appeal was satisfied that they could not be described as persons in authority, as they were not "engaged in the arrest, detention, examination or prosecution of the accused or someone acting on behalf of the prosecution." This test was approved in *The People (DPP) v Doyle*,[582] where the issue was the continuing effect of a reference by an interviewing officer to trouble for the girlfriend of the accused. The Supreme Court upheld the ruling of the trial judge that the cooperative attitude of the accused and the resulting confession statement did not result from any prior worry planted in the mind of the accused. Charleton J stated:

> It is to be noted that at the trial, the defence claimed that Barry Doyle was oppressed into making the confession. The defence also said that the confession was made in consequence of

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[580] [1998] 4 IR 397.
[581] ibid, 411; Phipson on Evidence (13th ed, 1982) [2.20].
[582] [2018] 1 IR 1, see judgments of McKechnie and Charleton JJ.

an inducement. Despite the subjective nature of the effect of the test on a prisoner, as elucidated by the Court of Criminal Appeal in McCann, the evidence most prominent in the notable absence of evidence from the accused was that of the video recordings. Sheehan J after viewing some 20 hours of these, found as a fact that Barry Doyle "appeared to be physically and mentally strong throughout." Furthermore, the trial judge regarded his interactions with the gardaí as a matter of choice. His background was also of importance in this analysis: what he worked at and the conditions that he was prepared to put up with in his day-to-day life. All of this is relevant as well to the mental toughness that faced the questions posed as to his involvement in the context of the safeguards as to legal counsel, custody supervision, visits, rest and complete recording of interviews. Ultimately, the question is as to the motivation of an arrested person for making the statement. On the criminal standard of proof, in other words rejecting the possibility that there was an operative inducement at the time of the confession, Sheehan J held that it was not in consequence of the references to his former girlfriend and mother of his child. Instead, the trial judge held that the statement emanated from remorse. The primary finding of fact here was that the statement was taken in the context of the gradual unfolding of the evidence against him by gardaí acting in a professional and courteous way and that the statement resulted from remorse at what he did and not from any inducement.[583]

Primacy of facts

In *Doyle*, the Supreme Court also commented on the primacy of the facts as found by the trial judge. The majority judgment emphasises the role of the trial judge and the respect due on appeal to the assessment at first instance of live witnesses in the context of a hearing. Charleton J stated:

The primacy of the trial judge as the assessor of fact is emphasised in many other judgments; see for instance *The People (DPP) v Shaw* [1982] IR 1. It may be argued that with the ready availability of video recordings in the course of police interviews, that this role has changed and that somehow an appellate court has been put in as good a position as the trial judge. This is not so. The boundaries to an appeal remain the same in criminal cases as the jurisdiction exercised in civil matters; Hay v O'Grady [1992] 1 IR 210. Furthermore, the cases cited in the foregoing paragraph were the basis of the decision by Sheehan J to admit this confession as voluntary. He heard the gardaí giving evidence and heard and saw their reaction to cross-examination. It might also have helped him to hear from the accused and from his then solicitor but decisions as to the maintaining or withholding of privilege are matters for the accused, as is the decision as to who is to give evidence. Such decisions are made, no doubt, for good reason. On appeal, a judge cannot be in as good a position to decide facts and, as a matter of law, is not. Despite video-recordings of interviews, an appellate court has available merely the text of the cross-examination of garda witnesses as to the allegations of the accused. Those will be searched as to the instructions behind questions where, as in this case, the accused chooses not to give evidence. In the Shaw and Madden cases, the issue on appeal regarding the voluntariness of the confessions in dispute was resolved by reference to the availability of evidence upon which such findings could be made. Indeed, the second and oft-quoted principle enunciated by McCarthy J at 217 in *Hay v O'Grady* has not been argued on this appeal to be either incorrect or inapplicable:

> If the findings of fact made by the trial judge are supported by credible evidence, this Court is bound by those findings, however voluminous and, apparently, weighty the testimony against them. The truth is not the monopoly of any majority.[584]

[583] [2018] 1 IR 1 at 149. And see in the European Court of Human Rights, *Doyle v Ireland (*Application no. 51979/17*)* 23 May 2019.
[584] [2018] 1 IR 1, 145-146.

O'Donnell J in the same case spoke of the need of an appellate court to "provide a real and searching scrutiny of the reasoning of trial judges." But he spoke strongly against the usurpation of the role of the trial judge as to fact. In particular by the process of drawing:

> together a number of fragments from interviews spread over time and then collected together in a portion of a submission, in order to discount the findings of a trial judge who not only heard and observed witnesses (which we did not) and who viewed the tapes of the full interviews (which again we did not, and were not invited to), and further make inferences as to the content of communications between client and solicitor, then little if anything would remain of the important division of functions between trial courts and appellate courts.[585]

Oppression

Apart from an inducement, a confession must be excluded if it is obtained by oppression. More subtle forms of manipulation than physical beatings are complained of in the current climate.[586] A custody record is kept by a garda independent of the interrogators and its purpose is to establish the pattern of questioning, eating, sleeping, legal and medical attention during a period of detention. Still better is how the prisoner looks and sounds on audiovisual record and the assessment in court of the witnesses by the trial judge. The standard definition of oppression was formulated by Sachs J in *Priestly*[587] as follows:

> To my mind the word in the context of the principles under consideration imports something which tends to sap or has sapped, that free will which must exist before a confession is voluntary ... whether or not there is oppression in an individual case depends on many elements. I am not going to go into all of them. They include the length of time of any individual period of questioning, whether the accused has been given proper refreshment or not, and the characteristics of the person who makes the statement. What may be oppressive as regards a child, or someone inexperienced in the ways of the world, may turn out not to be oppressive when one finds that the accused is of tough character and experienced in the way of the world.

Lord McDermott, in a lecture, defined oppression in the following terms which have since been accepted by the Court of Criminal Appeal: "Questioning which by its nature, duration or other attendant circumstances (including defective custody) excites hopes (such as the hope of release) or fears, or so affects the mind of the subject that his will crumbles and he speaks when otherwise he would have remained silent."[588]

The cases of *The People (DPP) v Breathnach*[589] and *Pringle* are worth contrasting. Breathnach had been almost constantly interrogated for forty hours following his arrest; he had been denied access to legal advisers and to friends, and his confession was made after he had been awakened from a few hours of much needed sleep and brought down at 4.00 am for further interrogation into the passageway of the Bridewell Garda Station in Dublin. The Court of Criminal Appeal reversed the ruling of the Special Criminal Court and excluded the confession. In the case of *Pringle*[590] the judgment of the Court of Criminal Appeal established the current pattern of minute attention to the actual facts of action, interaction and reaction to various steps as recorded in the custody record and in evidence. In admitting the confession, particular emphasis was laid by the Court of Criminal

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585 [2018] 1 IR 1, see judgment of O'Donnell J, 26.

586 For an example see: *The People (DPP) v Lynch* [1982] IR 64; *The People (DPP) v Kelly* [1983] IR 1; *The People (DPP) v Ward*, Special Criminal Court, unreported, 27 November 1998; *C v DPP*, Court of Criminal Appeal, unreported, 31 July 2001; *The People (DPP) v Bishop* [2005] IECCA 2; *The People (DPP) v Gallagher* [2007] 2 IR 246*; The People (DPP) v Ryan* [2011] IECCA 6.

587 [1965] 51 Cr App R 1, and see the commentary at [1966] Crim LR 507. This was approved by the High Court in *The People (DPP) v Patterson and ors* [1979] 113 ILTR 6, and the Court of Criminal Appeal in *The People (DPP) v PA* [2008] IECCA 21.

588 Adopted by the Court of Appeal in *Prager* [1972] 1 All ER 1114 and approved by the Court of Criminal Appeal in *The People (DPP) v McNally and Breathnac*h (1981) 2 Frewen 43 and *The People (DPP) v Pringle* (1981) 2 Frewen 57.

589 (1981) 2 Frewen 43.

590 (1981) 2 Frewen 57.

Appeal on the nature of the accused's work and what the court of trial had found to be the toughness of his character. Under the definition of oppression as previously defined, the test of its occurrence is subjective. It depends not only on the degree of burdensome conduct by the questioners, but also on the character of the person under interrogation and his specific reaction to what was done to him:

> In this case the accused was a man of forty two years of age, in good health, who had for some time prior to his arrest had been a fisherman in the Galway area. He was apparently an experienced man of the world not unused to conditions of physical hardship. It was clearly open to the Court of trial to hold that the will of such a man would not have been undermined by the interviews he had experienced and by lack of sleep and that he spoke the inculpatory words when otherwise he would have remained silent.[591]

If, as appears to be the case, the subjective nature of the test is to be applied to the accused, the court will be required to judge his reaction to the circumstances in respect of which they may have a reasonable doubt. In most cases this may require the evidence of the accused. In perhaps a few other cases the nature of the prosecution case may be such that the court is able to conclude that the circumstances would oppress any individual of reasonable fortitude. In *Doyle*,[592] the accused did not give evidence at the trial within which Sheehan J admitted his confession into evidence before the jury. The Supreme Court upheld the ruling on oppression by Sheehan J as the trial judge based on the professional and proper conduct of the interviews and the correctness of the analysis which drew a distinction as to the subjective reaction of different people to particular circumstances:

> Regarding oppression, the Court has been guided primarily by the McNally and Pringle judgments. The Court also bears in mind the decision of the Supreme Court in the Shaw case. I will deal first with the question of legal access…
>
> In considering the question of oppression the Court observed Barry Doyle in video recordings over a period of in excess of 20 hours and holds that he appeared to be physically and mentally strong throughout. He engaged with the Gardaí when he chose to do so and refused to answer questions when he did not wish to do so. The Court notes that he had worked for a construction company as a block layer and played Gaelic football. The Court also notes that at the time of his arrest he was living in basic accommodation in Limerick wearing a bulletproof vest. The Court also notes that a few months earlier when asked by a member of An Garda Síochána where he had been the previous night he responded by saying 'F – off'.[593]

While some commentators may express concern as to the subjective nature of the test being used almost as a matter of discretion in alleged oppression cases, the reality is that cases are fact-specific. What would overwhelm a child, who is required under legislation to have an appropriate adult present,[594] would be an entirely different matter from the point of view of a combat veteran or an educated person.

What may also amount to oppression is debilitating trickery by the police. Hence, suggesting to a vulnerable accused that his or her fingerprints were found at the scene of a crime, when they were not, may so undermine equanimity as to render a confession less than voluntary.[595]

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591 Per O'Higgins CJ at 82. For the subsequent history of the case see *The People (DPP) v Pringle* (No 2) [1997] 2 IR 225.
592 [2018] 1 IR 1.
593 ibid quoted in the judgment of Charleton J [8].
594 Section 61 of the Children Act 2001.
595 This is perhaps because the Constitution demands standards of fairness in the investigation of crime *The People (DPP) v Shaw* [1982] IR 1, see the judgment of Griffin J.

Substance abuse

Where the allegation is that the accused was suffering from some special burden which made the conduct of the interrogators more oppressive in the circumstances, this fact should be considered in the equation. The allegation might include a claim that the accused was suffering from a drug withdrawal or an alcohol problem and that, in the result, his will crumbled more readily than would that of a person without such burdens. If the confession is unreliable because the accused is not rationally exercising his free will in making it, then it should be excluded.[596] In *Crampton*[597] police officers interviewed a heroin addict, who it subsequently transpired was suffering from withdrawal symptoms. The police relied on their own judgment to determine whether to interview the applicant and agreed that they would not have interviewed him had they known he was withdrawing. The trial judge's decision to admit the admissions made by the applicant was upheld by the English Court of Appeal. The question of whether a drug addict was fit to be interviewed in the sense that his answers could be relied on was a matter for those present at the time. Stuart-Smith LJ concluded:

> It is then for the judge at the trial within the trial to decide whether the assessment of those present at the time was correct. The mere fact that someone is withdrawing, and, may have a motive for making a confession, does not mean that the confession is necessarily unreliable.

In *The People (AG) v Sherlock*,[598] the accused when brought to the garda station had been drinking and was possibly under the influence of drugs. He slept and was ill and made inculpatory statements. The accused argued that he was in such a physical and mental state that he did not know what he was doing when he made the statements. The Court of Criminal Appeal rejected this contention, finding that the statements were voluntary:

> The fact that his debilitated condition may have either prompted him or not restrained him from making his statements which incriminated himself either because of carelessness for his own safety or perhaps because of feelings of remorse does not make the statements involuntary. There may be elements in the circumstances surrounding the making of such statements which might cause a jury to consider whether having regard to these circumstances the statements could be accepted as being true but that is not the consideration which the learned trial Judge had to rule upon on the question of admissibility.[599]

In *C v DPP*,[600] the admissibility of the accused's statements was challenged on the basis that when they were made, he had slept for one hour over a period of 30 hours and had consumed a significant amount of alcohol in the early hours of the morning at the party at which the alleged sexual offence occurred. The Court of Criminal Appeal refused leave to appeal, the trial judge having found as a matter of fact that the accused was coherent at all times in the garda station when the relevant statements were made.

The Requirement of Fairness

While considering the controversy over what rule would be applied in dealing with evidence obtained either illegally or in breach of the accused's constitutional rights, Griffin J, giving the majority judgment, subsequently overruled, delivered the following pronouncement *obiter* in *The People (DPP) v Shaw*:[601]

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[596] *Goldenberg* [1988] Crim LR 678, 88 Cr App R 285.
[597] (1991) 92 Cr App R 369.
[598] (1975) 1 Frewen 383.
[599] ibid, 391.
[600] Court of Criminal Appeal, unreported, 31 July 2001.
[601] [1982] IR 1, 61.

> [B]ecause ... our Constitution postulates the observance of basic or fundamental fairness of procedures, the judge presiding at a criminal trial should be astute to see that, although a statement may be technically voluntary, it should nevertheless be excluded if, by reason of the manner or the circumstances in which it was obtained, it falls below the required standard of fairness. The reason for exclusion here is not so much the risk of an erroneous conviction as the recognition that the minimum or essential standard must be observed in the administration of justice.[602]

That passage has been approved many times in rulings in the Central Criminal Courts. Its meaning may seem mysterious and its continued life as an independent principle floating on a sea of detailed rules anomalous. This requires further exploration. An example of its application is *The People (DPP) v Ward*.[603] There a finding by the trial court, which was the Special Criminal Court, that the accused's mother and girlfriend had been brought to see him without his request led to the exclusion of alleged verbal admissions made by him on the ground that these visits constituted an unfair procedure deliberately engineered by the gardaí to put pressure on him. Thus, even short of finding oppression, a confession may be excluded if the circumstances of taking it fall below fundamental standards of fairness. The difficulty with the rule is the problem of precision and prediction. Possibly the *Ward* case may be regarded as an outlier. More importantly, considerable emphasis has been put in past cases on the analysis of circumstances of detention. Issues as to suggestibility, planting facts into the mind of the prisoner and the recitation of every fact known to investigators so that the accused may repeat these in a confession statement may be of importance also. In the fact-dependent circumstances which involve the analysis of a confession statement, there may be worse circumstances than breaches of custody rules. What Griffin J was talking about in *Shaw* was surely the kind of unfairness that Gudjonsson points out in the deliberate telling of lies to a prisoner, as to DNA from the body of the victim or fingerprints at the scene of the crime, which can break a person's will. Such conduct, even if not technically oppressive, is the kind of gross unfairness which can undermine human autonomy. Again, it is the presence of audiovisual recording which guards against such abuse. Interviewing officers may make mistakes and would not be doing their job if not putting relevant facts to an accused, but conduct can render a confession suspect, at least, if its object and effect is to deprive the prisoner of his or her reserves of will. It is to be hoped that the judgment of Warren CJ in *Miranda v State of Arizona*[604] as to police methods, which led to the United States Supreme Court ruling in favour of the presence of a lawyer during interrogations, would not be repeated here. Warren CJ stated that brutality and coercion while "undoubtedly the exception now … are sufficiently widespread to be the object of concern." As of the date of that decision, 1966, the modern practice of "in-custody interrogation is psychologically rather than physically oriented." He quoted from then current manuals for the instruction of police, instancing instructions designed to create an atmosphere which "suggests the invincibility of the forces of the law", positing the "guilt of the subject … as a fact", undermining those under interrogation by reference to the unhappy childhood or unsuccessful love life of the suspect, casting blame "on the victim or on society", as being "tactics … designed to put the subject in a psychological state where his story is but an elaboration of what the police already know – that he is guilty." Other techniques instanced by the majority judgment of the US Supreme Court included the creation of "an oppressive atmosphere of dogged persistence"; "interrogating steadily and without relent, leaving the subject no prospect of surcease"; continuing an interrogation "for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination" and the Mutt and Jeff act of good-cop bad-cop. Another technique from that era that would surely come within the strictures against constitutional unfairness outlined

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602 It should be noted that this passage was used by the majority judgment of the Supreme Court in *The People (DPP) v Healy* [1990] 2 IR 73 to postulate a constitutional right of access in a detained person to a solicitor, whether requested by him or on his behalf.

603 Special Criminal Court, unreported, 27 November 1998.

604 (1966) 384 US 436.

by Griffin J in *Shaw* included placing a suspect on a line-up in relation to a variety of unconnected offences and making a show of fictitious witnesses identifying him for a host of random crimes, so that it becomes a relief to confess to the crime for which he has been arrested. In each of the joined cases in *Miranda*, Warren CJ refers to each of the defendants as having been "thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures." In one of the cases, he says, "did the officers undertake to afford appropriate safeguards at the outset of the interrogation to ensure that the statements were truly the product of free choice."

Corroboration and External facts

Any sensible adjudication of the weight to be attached to a confession statement by a jury should include the analysis of supportive facts. In the early 1990s, a recurring argument in criminal trials was whether a confession to gardaí should be presented to a jury only if accompanied by a corroboration warning. What was sought was a warning that an uncorroborated confession was as dangerous as the evidence of an accomplice; someone who had participated in the very crime in respect of which such a witness was testifying against the accused. That issue was eventually resolved by the Supreme Court in *The People (DPP) v Quilligan and O'Reilly (No 3)*.[605] In that case, an unsupported but extremely detailed confession to a brutal murder of an elderly man in County Cork, and the effective ruination of his brother's life through beating and terror, resulted in a clarification of the proper direction which a trial judge should give a jury, without requiring any specific form of words. In the judgment of Finlay CJ for the majority, the role of the jury in analysing the confession in the context of the allegations made by the accused tending to demonstrate involuntariness, and of other evidence that may suggest involuntariness, was emphasised:

> Where, as has occurred in this case, the issue with regard to the admissibility of statements turns largely on allegations of threats, assault, inducement or harassment, or of what is described as the ″planting″ of statements, then, the function of the jury is, I am satisfied, as follows.
>
> It must be clearly directed by the trial judge to have regard to all the evidence which is before it, including all the evidence suggesting that the statement has been obtained by any of the unlawful methods which I have mentioned above for the purpose of ascertaining whether they are satisfied beyond a reasonable doubt that the confession or incriminating statement made by the accused is true and is a sufficient proof of his guilt.[606]

McCarthy J also emphasised that the jury should look at external facts to determine whether any admission of guilt was to be accepted as reliable. He stated:

> There is no difficulty as to the direction as to corroboration itself – this may be found in a variety of other evidence, including, as in this case, the fact that a significant detail in the admission was born out by subsequent discovery at the instance of the person in detention. Corroboration does not depend upon the evidence of other gardaí, one should look elsewhere. … [Once a statement has been admitted by the trial judge into evidence, that], however, does not in any sense preclude the jury, when evaluating the admission, from looking for support or corroborative evidence in a material particular from outside the admission itself.[607]

In *Doyle*,[608] Charleton J underlined the importance of a confession statement being analysed as to weight in the light of the other building blocks of fact accepted by the jury:

> Fundamental to any analysis of fact is to consider which facts are obvious, or as a matter of plain reality beyond argument, and then to consider the disputed facts in the light of all of the other relevant evidence. While the corroboration warning requirement for statements of

[605] [1993] 2 IR 305.
[606] ibid, 333.
[607] ibid, 344.
[608] [2018] 1 IR 1, 135.

> admission in custody has never been introduced as a rule of Irish law, and while the time when this point arose was one where the safeguards required by law were much less, it has always been significant in relying on a confession whether what an accused said fitted in harmony with other known facts and whether other evidence linked the accused to the commission of the crime. That analysis is central to the decision as to whether the prosecution case has been proven. Hence it is important, in looking at Barry Doyle's admissions, to analyse whether evidence on the ground backs up what he said as to his involvement in the crime. A confession statement which is materially contradicted by the reality of facts to which it refers is one thing; a confession statement that is supported in its narrative by the reality of what occurred is another. Where a confession details facts which are unknown but later investigated and found to be correct, a serious indication is given of inherent reliability.

Section 10 of the Criminal Procedure Act 1993 introduced a limited form of exhortation which trial judges should engage where a confession statement is unsupported by other evidence. This provides:

> (1) Where at a trial of a person on indictment evidence is given of a confession made by that person and that evidence is not corroborated, the judge shall advise the jury to have due regard to the absence of corroboration.
>
> (2) It shall not be necessary for a judge to use any particular form of words under this section.

Corroboration is analysed elsewhere in this volume.[609] Essentially, it is something external to the suspect evidence which tends to show the involvement of the accused in the crime. Hence, it would be of little practical benefit if the accused in commencing a confession statement were to say that he was "thirty years of age and living at" a particular address. The external proof of this is of no assistance in demonstrating the reliability of the confession. It would be for the trial judge only to warn the jury if that trial judge finds that there is no evidence external to the confession which tends to implicate the accused in the commission of the crime.[610] This essentially is the position adopted by the Supreme Court in *The People (DPP) v Power*[611] and this is considered in chapter 2.

The Judges' Rules

The Judges' Rules, inherited on independence have not, unlike in the United Kingdom, been subject to further refinement or restatement in Ireland. Since the advent of audiovisual recording the Judges' Rules have assumed a much lesser importance. Nonetheless the standard warning is constantly given, even though modified according to modern circumstances in other jurisdictions. These rules still constitute the basic guide to police conduct:

1. When a police officer is endeavouring to discover the author of a crime there is no objection to his putting questions in respect thereof to any person or persons, whether accused or not, from whom he thinks that useful information may be obtained.
2. Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such a person before asking him any questions, or any further questions as the case may be.
3. Persons in custody should not be questioned without the usual caution being first administered.

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[609] Chapter 2.
[610] See further *The People (DPP) v Connolly* [2003] 2 IR 1, *The People (DPP) v Brazil*, Court of Criminal Appeal, unreported, 22 March 2002, *The People (DPP) v O'Neill*, Court of Criminal Appeal, unreported, 28 January 2002 and *The People (DPP) v Murphy* [2005] 2 IR 125.
[611] [2020] IESC 13.

4. If the prisoner wishes to volunteer any statement, the usual caution should be administered. It is desirable that the last two words of such caution should be omitted, and that the caution should end with the words 'to be given in evidence'.
5. The caution to be administered to a prisoner when he is formally charged should therefore be in the following words: 'Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence'. Care should be taken to avoid the suggestion that his answers can only be used in evidence against him, as this may prevent an innocent person making a statement which might assist to clear him of the charge.
6. A statement made by a prisoner before there is time to caution him is not rendered inadmissible in evidence merely because no caution has been given, but in such a case he should be cautioned as soon as possible.
7. A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing ambiguity in what he has actually said. For instance, if he has mentioned an hour without saying whether it was morning or evening, or has given a day of the week and day of the month which do not agree, or has not made it clear to that individual of what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.
8. When two or more persons are charged with the same offence and their statements are taken separately, the police should not read these statements to the other persons charged, but each of such persons should be given by the police a copy of such statements and nothing should be said or done by the police to invite a reply. If the person charged desires to make a statement in reply the usual caution should be administered.
9. Any statement made in accordance with the above rules should, whenever possible, be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish.

The gardaí can ask anybody any questions in the investigation of a crime. If, however, the questioned person is in custody, or the officer is intent on charging him, he should first be cautioned. If there is no time to caution him before he says anything, it should be done as soon as possible thereafter and the earlier statement written down and read over to the accused to be altered, added to or verified as he chooses. When a person is making a statement, he should not be interrupted save for the purpose of clearing up ambiguities. Statements should be taken down in writing so that the accused can comment as to accuracy while what he or she has said is still fresh in his or her mind. If the accused responds to questions then modern practice establishes that there is nothing objectionable about the questions and answers being recorded in writing. If the questioning, however, becomes oppressive, it may be excluded on that ground. When arrested, the accused may be given an opportunity to comment on the case that may be made against him by the gardaí. That can be an aspect of fair dealing. In *The People (DPP) v Lawless*[612] McCarthy J commented as follows:

> The mere production of an exhibit, indeed of the critical incriminating articles found in or about the premises where the accused was arrested, whilst awaiting arrangements to bring him before a court or a judicial officer is in no way a breach of that duty; it might forcefully be suggested that it would be unfair to the accused not to produce these incriminating articles to him at the earliest possible opportunity.[613]

Rule 8 was introduced to overcome the abuse of the decision in *Christie*.[614] What is said in the presence of the accused may be admitted against him at his trial as an exception to the rule against

612 (1985) 3 Frewen 30.
613 ibid, 34.
614 [1914] AC 545.

hearsay. This exception cannot, it is submitted, be taken to allow for the admissibility of prejudicial, but non-probative material, put verbally to the accused by the gardaí during interrogations, to which the accused makes no response. Prior to the introduction of Rule 8, the police in England, having obtained the confession of an accomplice, would read over the entire of that statement to the accused. This, it was argued, rendered the statement admissible in evidence against the accused. It is proper instead to simply put the statement before the accused so that he himself can read it and, if he wishes to do so, then decide to volunteer a statement as to his own involvement, if any. Rule 8 is not broken if, in respect of an illiterate person, the gardaí do no more than tell him that they have a statement from another person implicating him in the crime.[615]

A breach of the Judge's Rules will not be excused lightly. The manner in which the rules are applied was explained by O'Higgins CJ giving the judgment of the Court of Criminal Appeal in *The People (DPP) v Farrell*[616] as follows:

> The Judges' Rules are not rules of law. They are rules for the guidance of persons taking statements. However, they have stood up to the test of time and will be departed from at peril. In very rare cases, such as *R v Mills and Lemmon* [1947] KB 297 a statement taken in breach may be admitted in evidence but only in very exceptional circumstances. Where however, there is a breach of the Judges' Rules, such as a failure to make a written record of the alleged confession, or a failure to invite the accused to accept or reject the statements, each of such breaches calls for adequate explanation. The breaches and the explanations (if any) together with the entire circumstances of the case are matters to be taken into consideration by the trial judge before exercising his judicial discretion as to whether or not he will admit such statement in evidence.

This passage from *O'Farrell* has been cited with approval in a number of cases.[617]

Right to Silence

There is no distinction to be drawn between a confession which is involuntary by reason of compulsion by the executive, by the legislature or, it is submitted, by the judiciary.[618] In *Sweeney v Ireland,*[619] at issue was a High Court declaration of unconstitutionality of section 9(1)(b) of the Offences Against the State (Amendment) Act 1998, which imposes an obligation on those who are aware of evidence about certain defined and very serious crimes to come forward and help the authorities, in that case, a murder. Baker J found that this provision infringed the right to silence and the certainty principle, imposing obligations which were "impermissibly vague but nonetheless were subject to penal sanction." Section 9(1)(b) in part provides:

> (1) A person shall be guilty of an offence if he or she has information which he or she knows or believes might be of material assistance in—
>
> (a) preventing the commission by any other person of a serious offence, or
>
> (b) securing the apprehension, prosecution or conviction of any other person for a serious offence

615 *The People (DPP) v Burke and O'Leary* (1986) 3 Frewen 92.
616 [1978] IR 13. And see *The People (DPP) v Kavanagh* (1989) 3 Frewen 343.
617 See *The People (DPP) v McNally* (1981) 2 Frewen 43, *The People (DPP) v Towson* [1978] ILRM 122; *The People (DPP) v Ebbs* [2001] 1 IR 778 and *The People (DPP) v Buck* [2014] IECCA 45.
618 *Re National Irish Bank Ltd (No 1)* [1999] 3 IR 145.
619 [2019] IESC 39.

> and fails without reasonable excuse to disclose that information as soon as it is practicable to a member of the Garda Síochána.

A serious offence is defined under s 8 as one "for which a person of full age and capacity and not previously convicted may, under or by virtue of any enactment, be punished by imprisonment for a term of 5 years or by a more severe penalty" and which "involves loss of human life, serious personal injury (other than injury that constitutes an offence of a sexual nature), false imprisonment or serious loss of or damage to property or a serious risk of any such loss, injury, imprisonment or damage". In *Sweeney,* Charleton J stated that on the facts of the case:[620]

> [F]irstly, … it is now an agreed fact that at all times Michael Sweeney was warned by the gardaí that he was not obliged to say anything unless he wished to do so. Secondly, he said absolutely nothing; incriminating or exculpatory or otherwise. Furthermore, he is not being prosecuted for not saying anything in a police context. He is being prosecuted for awareness of this murder and not assisting the authorities in accordance with the statutory definition. There is nothing in the legislation which would enable any aspect of any such interview to be used in evidence against an accused person. … section 9(1)(b) of the 1998 Act could in no rational way be construed as enabling a conviction merely because a person when officially questioned remained silent.

The Supreme Court decision also highlighted the distinction between that case and section 9(1)(b), and the facts in *Heaney and McGuinness v Ireland,*[621] which concerned individuals arrested in the aftermath of a terrorist incident which resulted in the death of a man and five British soldiers. Under section 52 of the Offences Against the State Act 1939, it was an offence for a suspect to fail to give an account of his or her movements. This section was described by Charleton J as "entirely different" to the provision at issue in *Sweeney*:[622]

> Those giving an account of their movements under section 52 were not exempted, as in [section 9(1)(b)], from answering should such an account incriminate themselves as to the commission of the murders. Here, specifically, what is at issue is not what the suspect did or did not do by way of participation in a crime or what he or she witnessed in the course of committing a different crime. Instead, the section is about what was done by another. Participation by the accused in the crime means that the section does not apply.

The Supreme Court ultimately overturned the High Court declaration of unconstitutionality, stating as follows:[623]

> Section 9(1)(b) of the Offences Against the State (Amendment) Act 1998 applies only to those who have information about the commission of a serious offence. … Where a serious crime, in this case murder, has been committed, those who have relevant information are obliged by the section to come forward and to communicate with the gardaí.

Nothing in the elements of the offence under section 9(1)(b) was found to be "beyond clear exposition" or in any way unclear as to its "inherent obligations". Thus the provision did "not

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620 ibid [76].
621 [1994] 3 IR 593 and [1996] 1 IR 580.
622 [2019] IESC 39 [69].
623 ibid [86].

consequently infringe the constitutional prohibition against vagueness."[624] Charleton J concluded:[625]

> Section 9(1)(b) of the 1998 Act protects the right to silence of any person who does not wish to speak about their own involvement in a crime. The section protects the right to silence where to speak would incriminate that person. It does not change the principle that unless a participant wishes to speak of their own volition, the law should not compel them to self-incriminate as to their commission of a crime.

At issue in *In re National Irish Bank*[626] was suspicion of commercial fraud through bank interest overcharging. Barrington J stated that there was a constitutional guarantee and a "right not to have involuntary confessions accepted in evidence at a criminal trial", a right "reinforced by the general provisions of Article 40.3 of the Constitution", guaranteeing respect for the personal rights of the citizen and protection from any "unjust attack" on such rights.[627] Barrington J concluded that section 18 of the Companies Act 1990 could not be interpreted so as to enable confessions to be admissible where they were compelled from an accused who was threatened that the failure to give information would in itself be a criminal offence. Section 10 of the 1990 Act provided that where inspectors were appointed by the relevant Minister to look into the affairs of a corporate entity, such inspectors had the power to require company officers and others to both answer questions and to produce relevant data. Under the same section, answers given were expressly provided by section 18 as being admissible in evidence in any subsequent civil or criminal litigation. Barrington J stated:[628]

> The judgment in this case follows the decision in *Heaney v. Ireland* [1996] 1 I.R. 580, insofar as that case decided that there may be circumstances in which the right of the citizen to remain silent may have to yield to the right of the State authorities to obtain information. It is not inconsistent with the decision *Rock v. Ireland* [1997] 3 I.R. 484, that there may be circumstances in which a court is entitled to draw fair inferences from the accused having remained silent when he could have spoken. It follows *The People (Attorney General) v. Cummins* [1972] I.R. 312, insofar as that case decided that for a confession to be admissible in a criminal trial it must be voluntary.
>
> In the course of submissions the question arose of what would be the position of evidence discovered by the inspectors as a result of information uncovered by them following the exercise by them of their powers under s. 10. It is proper therefore to make clear that what is objectionable under Article 38 of the Constitution is compelling a person to confess and then convicting him on the basis of his compelled confession. The courts have always accepted that evidence obtained on foot of a legal search warrant is admissible. So also is objective evidence obtained by legal compulsion under, for example, the drink driving laws. The inspectors have the power to demand answers under section 10. These answers are in no way tainted and further information which the inspectors may discover as a result of these answers is not tainted either. The case of *The People (Attorney General) v. O'Brien* [1965] I.R. 142, which deals with evidence obtained in breach of the accused's constitutional rights has no bearing on the present case. In the final analysis however, it will be for the trial judge to decide whether, in all the circumstances of the case, it would be just or fair to

[624] ibid [87].
[625] ibid [88].
[626] [1999] 3 IR 145.
[627] ibid, 187.
[628] ibid, 188.

admit any particular piece of evidence, including any evidence obtained as a result or in consequence of the compelled confession.

Custody regulations outline

This section gives an outline of the main provisions of the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987. A custody record must be kept in respect of all persons in custody recording the date, time and place of arrest, identity of the arresting member, time of arrival at the station and nature of the offence, as well as any relevant details relating to the physical or mental condition of the arrested person.[629] An arrested person must be informed "without delay" by the member in charge "in ordinary language" of the offence in respect of which they are being arrested and of the fact that they are entitled to consult a solicitor.[630] Persons in custody are to be protected against "ill-treatment of any kind or the threat of ill-treatment" against themselves or family members or "any other person connected with him".[631] There is also a right of access to medical assistance where requested by a detained person. In such a case, the member in charge must make arrangements for a doctor to attend at the station.[632]

Where an arrested person has asked for a solicitor or has asked that a particular person be informed that they are in custody, the member in charge must notify the solicitor or person named "as soon as practicable". If a particular named solicitor is not available, then the arrested person is to be given the opportunity to request another solicitor.[633] Reasonable access to a solicitor must be provided to an arrested person and they must be enabled to communicate privately with them.[634] No more than two members are allowed to question an arrested person at one time and no more than four members may be present at an interview, all of whom must identify themselves by name and rank. Interviews must be conducted in a "fair and humane manner". After four hours of interview, it must be "either terminated or adjourned for a reasonable time."[635] A record must be made of each interview either by the garda conducting it or by another garda present.[636] It must include details of the time the interview began and ended, any breaks taken, where the interview took place, along with the name and rank of all garda members present at the interview. The record must be signed by the member making it the record and should be taken while the interview is in progress, or as soon as possible thereafter.

Additional protections are in place in respect of children under the age of 18. Section 129 of the Criminal Justice Act 2006 further provides that children under 12 years of age cannot be arrested and detained unless the offence is murder, manslaughter, rape, or aggravated sexual assault. Part 6 of the Children Act 2001 deals with the detention of children, and requires gardaí to act with due respect for the rights and dignity of the child.[637] It must be ensured that, as far as possible, child suspects are kept separate from adult suspects detained in the station at the same time, and that children are not detained in cells "unless there is no other secure accommodation available".[638] The child must be informed of the details of the crime for which they are being detained, of their entitlement to consult a solicitor, and of the fact that their parent or guardian has been notified. This is required to be done by the member in charge "as soon as practicable", with the attendance

[629] Regulations 6 and 7.
[630] Regulation 8.
[631] Section 20.
[632] Regulation 21(4).
[633] Regulation 9(2).
[634] Regulation 11.
[635] Regulation 12.
[636] Regulation 12(11).
[637] Section 55 of the Children Act 2001.
[638] Section 56.

of a parent or guardian then requested at the station.[639] Parents or guardians must be permitted to be present during any interviews with the child.[640] The Child and Family Agency must also be informed "where the member in charge … has reasonable cause to believe that [the child] may be in need of care or protection necessary".[641]

Treatment of persons in custody

Breaches of the Custody Regulations have been considered in a number of cases, from the point of view of section 7(3) of the Criminal Justice Act 1984 which provides:

> A failure on the part of any member of the Garda Síochána to observe any provision of the regulations shall not of itself render that person liable to any civil or criminal proceedings or itself affect the lawfulness of the custody of the detained person or the admissibility in evidence of any statement made by him.

In *The People (DPP) v Spratt*, O'Hanlon J stated:[642]

> The phrase 'of itself' is obviously an important one in the construction of the statutory provisions, and I interpret the subsection as meaning that non-observance of the regulations is not to bring about automatically the exclusion from evidence of all that was done and said while the accused person was in custody. It appears to be left to the court of trial to adjudicate in every case as to the impact the non-compliance with the regulations should have on the case for the prosecution.

This approach was agreed with by Kelly J in *The People (DPP) (Lenihan) v McGuire*,[643], stating that there must be "a causal link" between the "failure to comply" with the relevant regulation and "whatever prejudice" is being alleged that an accused suffered as a result. Thus, he stated that the following must be asked: "if a breach of the regulations has taken place, was the accused prejudiced thereby?[644]

In *The People (DPP) v Murphy*[645] the accused argued that his confession should have been inadmissible because it was not recorded in its entirety by gardaí, where prior to making the confession, he had had a "general chat" with the garda. The Court found that what was required was a "causal connection between the failure to comply with the relevant regulation and whatever prejudice is alleged to have been suffered by an accused" as nothing of relevance to the confession had failed to be recorded.[646]

The Court of Criminal Appeal held that the regulations did not allow a waiver by an arrested person in *The People (DPP) v O'Connell*.[647] The accused was questioned in excess of the four hour period set out by the Custody Regulations, and he had been informed that he was not obliged to continue but he had declined rests. In *The People (DPP) v Reddan & Hannon,*[648] the Court of Criminal Appeal confirmed that the regulations did not allow a waiver by an arrested person. Other breaches of the regulations had also occurred in this case, including a failure to make entries in the custody record, a failure to contact the accused's solicitor, and the accused had had no sleep while in custody. This contributed to the court's decision that the inculpatory statement made by the accused should not have been admitted in evidence. In *The People (DPP) v Casey*[649] there were

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639 Section 57.
640 Section 61.
641 Section 59.
642 [1995] 1 IR 585, 591.
643 [1996] 3 IR 586.
644 ibid, 596.
645 Court of Criminal Appeal, unreported, 12 July 2001.
646 ibid, 10.
647 [1995] 1 IR 244.
648 [1995] 3 IR 560.
649 [2004] IECCA 49.

breaches of the Judges' Rules and the Custody Regulations, however as the "substance" of the accused's rights had been "preserved", the Court of Criminal Appeal allowed the evidence.[650]

The recording of interviews is a core aspect of the Custody Regulations. Hardiman J in *The People (DPP) v Diver* emphasised the importance of accurate records being taken of interviews:[651]

> [T]he gardaí are not entitled to exercise total editorial control in recording what has been said. Nor are they entitled to cherry pick what is to be recorded. In this case, the omission of a series of denials is utterly unacceptable. It is not that the gardaí are required, when they are relying on written notes of an interview with an accused, to record what an interviewee has said verbatim. Regulation 12 requires that the record of the interview be 'as complete as practicable'. It must be a fair record of what was said and it is important to provide sufficient context to allow for an evaluation of what is said, especially where, as here, the accused was allegedly making ambiguous or inconclusive verbal statements and manifesting symptoms of distress. Audio visual recording is, of course, infinitely superior.

In *Diver,* two of five interviews with the accused were entirely unrecorded. Hardiman J rejected the explanation given for the failure to record those interviews. He stated:[652]

> I am of the opinion that the breaches of regulations in this case and in particular the total failure to record exculpatory statements and the failure to make any proper attempt to record the entire context of ambiguous statements which are nonetheless consistent with guilt, cannot be regarded as trivial or inconsequential. They are, on the contrary, grave, obvious and deliberate…. Written notes of what an accused says in custody provides a more reliable record of evidence to be tendered at a criminal trial than unaided recollection. This is not just in aid of the accused, but also in aid of the prosecution who are then in a position to tender more reliable evidence to the jury. More importantly, it is of benefit for the conduct of the trial as a whole, reducing areas of controversy and providing clearer evidence for the trial judge and the jury of what an accused has said to the gardaí. It should also reduce the time spent by trial judges in resolving issues, in the absence of the jury, concerning breaches of the relevant regulations.

In relation to the admissibility of confessions made by an accused in custody where there has been a breach of the obligation under the regulations to record all interviews, Hardiman J stated as follows:[653]

> [T]he task of the trial judge is to determine, whether in all the circumstances, the effect of the failure to observe the regulation has prejudiced the fairness of the trial of the accused other than by the fact of a breach of the regulations in themselves. The issue is not so much whether or not the breach of the regulations was of a 'trivial and inconsequential nature', although that is a factor to be taken into account, but whether the fairness of the trial of the accused would be prejudiced by the admission of statements made by him or her in respect of which the regulations were not followed. On a properly conducted trial or retrial it would be for the trial judge to determine the issue of admissibility on the criteria set out in this judgment. I wish to reiterate that the gardaí are not entitled to exercise editorial control over what is said. Nor are they entitled to cherry pick what is to be recorded. It is utterly unacceptable to omit denials. It is important to provide sufficient context to allow for an evaluation of what is said especially where, as here, the accused was allegedly making ambiguous or inconclusive verbal statements and manifesting symptoms of distress. All this is trite, because it has been said so often and it is said so often because gardaí have regularly avoided audio visual recording, made selective

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650 See also *The People (DPP) v Darcy*, Court of Criminal Appeal, unreported, 29 July 1997.
651 [2005] 3 IR 270, 279–280.
652 ibid, 279.
653 ibid, 280.

notes, and breached the clear and simple regulations for the treatment of persons in custody, apparently believing that such breaches will attract nothing worse than a judicial rebuke.

Mixed statements

Prior to the Criminal Justice Act 1984, an accused person had an entitlement to forego testifying on oath or affirmation, thus being liable in the ordinary way to cross-examination by the prosecution, but to instead make an unsworn statement from the dock.[654] Behind the abolition of the unsworn statement was the realisation that allowing testimony that was not subject to the scrutiny of questioning was unfair to victims of crime. The accused could simply give a narrative denying involvement in the crime, or blame the deceased for provocation or assault, or allege that a complainant in a sexual violence case had consented. There was no limit to what the accused might say and since it was merely a statement, ordinary rules of evidence could not apply.[655] Hence judges warned juries that while they could have regard to what the accused said, it was not evidence and was not said on oath and not tested.

The rationale behind the admission of confession statements as an exception to the rule against hearsay is the inherent likelihood that a person will not make a declaration against his or her own interest. The rational stated by Eyre CB as early as 1794 in the State Trial of R. v. Hardy,[656] remains the rational basis for the admission of a statement against interest: "Every man, if he were in a difficulty, or in the view to a difficulty, would make declarations for himself. These declarations if offered as evidence would be offered upon no ground which entitled them to credit."[657] In *The People (DPP) v Clarke*,[658] the Court of Criminal Appeal changed the rule, holding that self-serving statements to the police by accused persons were admissible in evidence. What this means is that an accused person while in custody may make a statement to the interviewing detectives, or have his attending solicitor draft such a statement, and know that this entirely exculpatory statement will have to be read as part of the prosecution case. In *McCormack v The People (DPP),*[659] the ability of an accused to give a self-serving statement specifically in the context of rape and sexual assault cases was further considered, outlining that in such cases, the accused may use garda interviews to "reiterate, for instance, that his encounter with the alleged victim was consensual."[660] Where that happens, however, this re-introduction into criminal trials of an unsworn statement by the accused is subject to a similar warning to the unsworn statement from the dock. The trial judge should tell the jury:

1. That such a statement is evidence, but that as evidence it is not to be regarded as being in the same category as evidence given on oath and subject to cross-examination; and
2. That, therefore, in assessing the weight of an unsworn statement, the jury should bear in mind that the facts asserted in the statement were not given on oath and were not tested by questioning.

While the tactic of the accused making self-serving statements, or having his or her attending solicitor draft a denial on his instructions, may be questioned on fairness grounds and on the soundness of the underlying reasoning, statutory intervention may be required to remove it. This new exception to the rule against hearsay applies whether the charge is sexual violence, fraud or any other. The only ground for admissibility is that the accused in the statement should say

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654 Criminal Justice Act 1984 section 23. And see *The People (DPP) v Byrne and Others* [1998] 2 IR 417 which refers to the last occasion on which the unsworn statement from the dock was deployed in a criminal trial in Ireland.
655 See Charleton and Byrne, Sexual Violence - Witnesses and Suspects, a Debating Document [2010] IJSJ 1.
656 (1794) 24 State Trials 199, 1093.
657 See D. Birch, The Sharp End of the Wedge: Use of Mixed Statements by the Defence‖ [1997] Crim LR 416.
658 [1994] IR 289.
659 [2008] 1 ILRM 49
660 [2008] 1 ILRM 49 [5].

something against interest. That could be one fact out of ten. Since, traditionally, confession and avoidance is not part of the common law system of criminal trials,[661] even that the accused admits knowing the victim could be the hook on which admissibility is decided. Such statements are called mixed statements. In Scotland, the common law rule was preserved and a statement by the accused is not admitted unless it amounts to a confession as opposed to a mixed statement or an entirely self-serving statement.[662]

The decision of the Court of Criminal Appeal in the *Clarke* case is derived from the ruling of The House of Lords in *Sharp*.[663] This considered self-serving statements by the accused, albeit in a different manner to our procedure, and upheld the approach adopted in the earlier case *Aziz*.[664] Lord Steyn, when asked by the prosecution to reject self-serving statements by an accused to the police as inadmissible in evidence, rejected that attempt noting that the earlier decision had been welcomed, rather than condemned, by academic commentators. Where a statement is in essence self-serving, it is perhaps anomalous to call it a mixed statement. In the case of sexual offences involving adult complainants, a statement from an accused person will broadly speaking either deny the act entirely, admit the act but assert that consent was present, or accept responsibility for the offence alleged. None of these can legitimately be called a 'mixed statement'. The first two are entirely self-serving, amounting to complete defences. The last amounts to a confession. In a homicide case, a person may admit the killing in an entirely self-serving way ("I killed him but he attacked me, so it was in self-defence") or admit the killing in only a partly self-serving way ("I killed him but he provoked me") so as to admit manslaughter. The latter of these can more comfortably be classed as a mixed statement. This dichotomy is readily explained by the fact that sexual conduct is not prima facie unlawful for adults whereas homicide is.

It is unfair to the victims and potential victims of crime that self-serving statements should simply be read to the jury without any explanation as to their potential infirmity. What is in consideration here is an inherently informal species of evidence. In *The People (DPP) v O'Reilly* [2009] IECCA 30, the Court of Criminal Appeal made this clear:

> The applicant had given a statement to the Gardaí, upon being arrested, which was exculpatory in nature. Such a statement is not given under oath and nor is it capable of being subjected to cross-examination before the jury. It is akin to an unsworn statement from the dock, a practice abolished by s. 23 of the Criminal Justice Act 1984. As this Court held in The People (DPP) v. John Clarke [1994] I.R. 289, such a statement is evidence in the real sense of the word, not only against the person who made it, but in his favour as to facts contained in it that may assist his case. A jury is not bound to accept any such facts as true. Instead they are to weigh them and consider them as evidence, bearing in mind that such evidence has not been subjected to the important scrutiny of cross-examination on behalf of the prosecution and has not been given on oath; The People (Attorney General) v. Crosby (1961) 1 Frewen 231.

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[661] But of course sections 21 and 22 of the Criminal Justice Act 1984 enable the trial process to be shortened through concessions as to fact made by the accused.

[662] Now for Scotland see s 262ZA of the Criminal Procedure (Scotland) Act 1995, inserted by s 109 of the Criminal Justice (Scotland) Act 2016, which came into effect in January 2018.

[663] [1988] 1 All ER 65.

[664] [1996] AC 41, and see *R v Duncan* [1981] 73 Cr. App. R. 395 and the approving comment thereon by Professor Smith in [1981] Crim LR 561.

The use of exculpatory statements by the accused as part of the prosecution case in sexual violence trials was subject to scrutiny by Charleton and Herlihy,[665] who comment:

> In Central Criminal Court in 2017, there were 95 incoming rape and serious sexual assault cases.[666] Of these, 21 did not proceed to trial, thus 74 cases remained. An exculpatory statement made by the accused to the effect that the complainant had consented was put before the jury in 23 cases. In only three of these 23 cases, the accused gave evidence and was cross-examined.[667]
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> In 2016, there were 96 such incoming cases. Of the 51 cases that proceeded to trial and had concluded at the time of writing, in 15 of these the accused gave evidence and was cross-examined.[668] An exculpatory statement made by the accused to the effect that the complainant had consented was put before the jury in 16 cases. In only five of these, the accused gave evidence and was cross-examined.

The following trenchant comment from this academic source on the use of this re-introduction of the unsworn statement from the accused may perhaps emphasise the utility of trial judges elucidating the status of such evidence:

> If you want to ask yourself, is this fair? It is easily tested. Can a legal system be regarded as searching for the truth if one side had to give live testimony but the other could just submit a self-serving statement and not be cross-examined?[669] Where the matter was reversed and the person saying that the accused raped her was able just to sign a statement which would be put before the jury without her live testimony, while the accused who denied rape would have to get into the witness box and answer intrusive questions, one would wonder where the search for the truth lay?
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> The procedure of admitting an unsworn statement and using it as evidence without cross-examination should by law come with a warning from the judge that it is unsworn and untested and that questions by barristers are not evidence. But, it is all very well for lawyers, who have tidy legal minds, or are supposed to have anyway, to draw these nice distinctions where men and women with no legal training are the people deciding on guilt or innocence.[670]

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[665] Charleton and Herlihy - Truth to be Told: Understanding Truth in the Age of Post-Truth Politics [2019] IJSJ Vol 3, 17.
[666] The statistics gathered relate to cases incoming to the Central Criminal Court which bear a 2016 or 2017 bill number.
[667] Statistics relating to cases with 2017 bill number obtained in November 2018 from Frieda McElhinney, registrar in the Central Criminal Court.
[668] Statistics relating to cases with 2017 bill number were gathered in December 2018 by the authors.
[669] Any such administrative procedure, of requiring oral testimony from one side but accepting only written statements from the other, would be condemned; see Hogan and Morgan, Administrative Law in Ireland, (4th ed, Dublin 2010) chapter 12.
[670] [2019] IJSJ. Vol 3, 17.

Chapter 4

Exclusion and Inclusion of Evidence[671]

From 1965 through to 1990, an inadvertent trespass by the executive on the constitutional rights of the accused would not automatically have resulted in the exclusion of evidence obtained in consequence. A balance had to be struck between the seriousness of any infringement of the rights of the suspect and the nature of the investigation being undertaken. Hence, inadvertence to an incorrect address on a search warrant, where the house was always that for which the operation was intended, might be excused where a serious crime was being investigated. It was a matter of judicial discretion. In 1990, the Supreme Court decided *The People (DPP) v Kenny*,[672] moving from a discretionary system for exclusion to an absolute rule whereby an intentional infringement of constitutional rights was defined as any non-automatous action by agents of the State, whether at the time they were aware of any defect or not. In consequence, the gardaí were required to operate under a system whereby any infringement of the constitutional rights of an accused person to the inviolability of his dwelling, his personal liberty, his privacy, or any of the other myriad of personal constitutional rights, would result in the exclusion of all evidence that was thereby garnered. In consequence, the fundamental focus of virtually every criminal trial on indictment in the State became an attempt by the accused to assert such rights and by the prosecution to justify the actions of the gardaí within the parameters of an express legal authority. In consequence, the rules of substantive criminal law were overlooked in favour of this process. It is no accident that since the abolition of the *Kenny* regime with the decision of the Supreme Court to overturn it in *The People (DPP) v JC*[673] in 2015, substantive and procedural criminal law has again come to the fore. This is at least partly in consequence of criminal trials being focused away from juries being deprived of relevant evidence on a basis that lacked any philosophical rigour.

History

Any rule whereby evidence was to be excluded because of the manner of its discovery first appeared in Irish law in *The People (AG) v O'Brien*.[674] The accused was indicted on various theft charges. At the trial the prosecution proposed to rely upon stolen goods which had been identified by their owners after having been found by the gardaí in the dwelling house of the accused at No 118 Captain's Road, Crumlin. This house was the property which the gardaí had all along proposed to enter. The search warrant, however, stated the accused's address as that of an adjoining street, "118, Cashel Road, Crumlin". In consequence, the search warrant was invalid and the police were trespassers in the accused's home. Consequently, they had violated the dwelling of the accused as guaranteed by Article 40.5 of the Constitution: "The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law." On inquiry by the court, it turned out that what was involved was not a scheme to avoid the law but a mere oversight. The court of trial, the Court of Criminal Appeal and the Supreme Court all accepted that the gardaí had done their best to comply with the law. Unanimously, the Supreme Court ruled in favour of admitting the evidence. It held that no argument could be advanced that this factual error amounted to a deliberate invasion of the accused's constitutional rights. Since the mistake had only been noticed after the search had been completed, it could not have been contended that their unauthorised

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671 See generally, Charleton, 'Improperly Obtained Evidence and the Constitution' (1980) Law Society Gazette 180; Daly, 'Exclusion of Evidence: *DPP (Walsh) v Cash* (2011) 15 International Journal Of Evidence And Proof 62; Daly, 'Unconstitutionally Obtained Evidence in Ireland: Protectionism, Deterrence and the Winds of Change' (2009) 19(2)ICLJ 40; Declan McGrath, 'The Exclusionary Rule in Respect of Unconstitutionally Obtained Evidence' (2004) 26(1) DULJ 108; Martin, 'The Rationale of the Exclusionary Rule Revisited' (1992) 2 ICLJ 1; Noonan, "Stare Decisis, Overruling, and Judicial Law Making: The Paradox of the JC Case" (2017) 57 Irish Jurist 119; Paul O'Connor, "The Admissibility of Unconstitutionally Obtained Evidence in Irish Law" (15)2 Irish Jurist 257.

672 [1990] 2 IR 110.

673 [2017] 1 IR 417.

674 [1965] IR 142.

presence on the accused's property took place in any deliberate disregard of the law. The Supreme Court stressed the community's interest that crime should be detected and punished, which principle was not to be defeated by an unintentional and accidental illegality. Kingsmill Moore J stated:

> A choice has to be made between two desirable ends which may be incompatible. It is desirable in the public interest that crime should be detected and punished. It is desirable that individuals should not be subjected to illegal or inquisitorial methods of investigation and that the State should not attempt to advance its end by utilising the fruits of such methods. It appears to me that in every case a determination has to be made by the trial judge as to whether the public interest is best served by the admission or by the exclusion of evidence of facts ascertained as a result of, and by means of, illegal action, and that the answer to the question depends on a consideration of all the circumstances. On the one hand the nature and extent of the illegality has to be taken into account. Was the illegal action intentional or unintentional, and, if intentional, was it as a result of an ad hoc decision or does it represent a settled or deliberate policy? Was the illegality one of a trivial or technical nature or was it a serious invasion of important rights, the recurrence of which would involve a real danger to necessary freedoms? Were there circumstances of urgency or emergency which provided an excuse for the action; Lord Goddard in *Kuruma's* case mentions as a ground for excluding relevant evidence that it was obtained by a trick and the Lord Justice General in *Lawrie's* case refers to an unfair trick. These seem to me to be more dubious grounds for exclusion. The police in the investigation of crime are not bound to show their hand too openly provided they act legally. I am disposed to lay emphasis not so much on the alleged fairness to the accused but on the public interest that law should be observed even in the investigation of crime. The nature of the crime being investigated may also have to be taken into account.[675]

Kingsmill Moore J, however, also agreed with the judgment of Walsh J that where the executive embarked upon the conscious and deliberate violation of an accused's constitutional rights that exclusion of the resulting evidence was required, unless there were extraordinary excusing circumstances. Walsh J stated:

> When the illegality amounts to infringement of a constitutional right the matter assumes a far greater importance than is the case when the illegality does not amount to such an infringement. The vindication and the protection of constitutional rights is a fundamental matter for all courts established under the Constitution. That duty cannot yield place to any other competing interest. In Article 40 the State has undertaken to defend and vindicate the inviolability of the dwelling of every citizen. The defence and vindication of the Constitution of the right of a citizen is a duty superior to that of trying such citizens for a criminal offence. The court is exercising the judicial power of government of the State must recognise the paramount position of constitutional rights and must uphold the objection of an accused person to the admissibility at his trial of evidence obtained or procured by the State, or its servants or agents, as a result of a deliberate or conscious violation of the constitutional rights of the accused person where no extraordinary excusing circumstances exit, such as the imminent destruction of vital evidence or the need to rescue a victim in peril. A suspect has no constitutional right to destroy or dispose of evidence or to imperil the victim. I would also place in the excusable category evidence obtained by a search incidental and contemporaneous with the lawful arrest although made without a valid search warrant.[676]

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[675] ibid, 160.
[676] ibid, 170.

The Rule as Applied

The principle of not excluding evidence which was obtained by an unwitting infringement of the Constitution was followed in many subsequent cases. In *The People (DPP) v Lawless*[677] the search warrant slightly varied from section 26(1)(a) of the Misuse of Drugs Act 1977 and further described the place to be searched as "60, Rathland Flats, Dublin 12" rather than the premises at "60, Rathland Road Flats" in the same district of Dublin. It was the latter which was in fact searched. McCarthy J for the court stated:

> The act of Detective Sergeant O'Malley and his colleagues in entering the premises was, of course, a deliberate act. The omission of the necessary statutory foundation for the issue of the search warrant was a pure oversight; there was no evidence of deliberate deceit or illegality, no policy to disregard the provisions of the Constitution or conduct searches without a warrant (see the observations of Kingsmill Moore J *The People (AG) v O'Brien* [1965] IR 14 at 161).[678]

Ignorance of the law did not constitute unawareness or lack of deliberation within the meaning of the rules.[679]

Kenny's case

For some years the question as to what degree of particularity of suspicion constituted sufficient grounds to lay before a judge of the District Court to seek a search warrant was unclear. On a reference on this issue to the Supreme Court by the Court of Criminal Appeal, in *The People (DPP) v Kenny*,[680] the Supreme Court used the opportunity to overturn the pre-existing law. Finlay CJ, speaking for the majority, justified a rule of exclusion at the expense of the pursuit of justice since, as this passage reads, the courts also had a role in the discipline of the police:

> As between two alternative rules or principles governing the exclusion of evidence obtained as a result of the invasion of the personal rights of a citizen, the Court has, it seems to me, an obligation to choose the principle which is likely to provide a stronger and more effective defence and vindication for the right concerned.
>
> To exclude only evidence obtained by a person who knows or ought reasonably to know that he is invading a constitutional right is to impose a negative deterrent. It is clearly effective to dissuade a policeman from acting in a manner which he knows is unconstitutional or from acting in a manner reckless as to whether his conduct is or is not constitutional.
>
> To apply, on the other hand, the absolute protection rule of exclusion whilst providing also that negative deterrent, incorporates as well a positive encouragement to those in authority over the crime prevention and detection services of the State to consider in detail the personal rights of the citizens as set out in the Constitution, and the effect of their powers of arrest, detention, search and questioning in relation to such rights.
>
> It seems to me to be an inescapable conclusion that a principle of exclusion which contains both negative and positive force is likely to protect constitutional rights in more instances than is a principle with negative consequences only.[681]

Finlay CJ admitted that an absolute exclusionary rule based on a mere mistake would impede the administration of justice:

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[677] [1985] 11 JIC 2801.
[678] ibid [2].
[679] *The People (DPP) v Walsh* [1980] IR 294.
[680] [1990] 2 IR 110.
[681] ibid, 133.

> The exclusion of evidence on the basis that it results from unconstitutional conduct, like every other exclusionary rule, suffers from the marked disadvantage that it constitutes a potential limitation of the capacity of the courts to arrive at the truth and so most effectively to administer justice.
>
> I appreciate the anomalies which may occur by reason of the application of the absolute protection rule to criminal cases.
>
> The detection of crime and the conviction of guilty persons, no matter how important they may be in relation to the ordering of society, cannot, however, in my view, outweigh the unambiguously expressed constitutional obligation "as far as practicable to defend and vindicate the personal rights of the citizen".[682]

Finlay CJ stated that in the case under appeal he "would accept that neither of the two gardaí concerned had any knowledge that they were invading the constitutional rights of the accused" and furthermore had acted in "obtaining and executing a search warrant in a manner" which had "been customary over a long period". Overturning the prior law that actions could not be regarded as deliberate without advertence to the defect, upon which the suspect later sought to rely, Finlay CJ ruled that what mattered was that the house had been entered deliberately.

As against that analysis, it is often overlooked that Irish law had taken a strong view against using court procedures as a measure of police discipline. In *The People (AG) v McGrath*,[683] fingerprints had been taken by a prison officer from the accused, without a warrant but apparently not with his consent in any real sense. The Divisional Court would not countenance that the manner of taking evidence could affect its admissibility in court. Davitt P quoted Wigmore:

> The judicial rules of evidence were never meant to be an indirect process of punishment. It is not only anomalous to distort them to that end but it is improper (in the absence of express statute) to enlarge the fixed penalty of the law that of fine or imprisonment, by adding to it the forfeiture of some civil right through loss of the means of proving it. The illegality is by no means condoned; it is merely ignored. For those reasons it has long been established that the admissibility of evidence is not affected by the illegality of the means through which the party has been unable to obtain the evidence.[684]

Practical effect

The practical consequence of the *Kenny* case, however, was that evidence obtained in breach of the accused's constitutional rights, howsoever occurring, and howsoever slight, must automatically be excluded from the consideration of the jury. This was a development of the *O'Brien* case that was not within the contemplation of the text of the report. Furthermore, the application of the rule had consequences which were unintended. What had not perhaps been foreseen in the original formulation in *O' Brien* was that the assertion of constitutional rights would increase exponentially. In 1965, few countries considered infringement of privacy to be tortious and nor was it contemplated that such an amorphous concept, undefined as to its boundaries and application, could generate a constitutionally protected right. While the special protection of where somebody lived had express constitutional protection, that definite boundary was to be replaced by concepts of privacy which were to have wide-ranging consequences. [685] The Court of Criminal Appeal, for instance, seems tacitly to have agreed that where a woman is temporarily renting a hotel room for

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[682] ibid, 134.

[683] (1965) 99 ILTR 59.

[684] ibid, 71.

See John Henry Wigmore, A treatise on the Anglo-American System of Evidence in Trials at Common Law (2nd ed, Little, Brown & Co1923) Vol IV, sections 2183-2184.

[685] See further *Kennedy v Ireland* [1987] IR 587 and Hogan & Whyte, Kelly: The Irish Constitution (3rd ed, Butterworth 1994), pp 676-770.

the night that same is her dwelling for the purposes of Article 40.5 of the Constitution, or that perhaps the only people entitled to intrude upon her privacy there were those making up the bed or cleaning the bathroom but not those searching for cocaine.[686] Perhaps the gravamen of this decision is that such an entry and search constituted a violation of a right to privacy which was left undefined in the judgment. If privacy is the touchstone, the circumstances which remain whereby an illegality may be perpetrated against an accused person which will not amount to a violation of one or other of his constitutional rights are hard to identify. After all, in one's absence, or even in one's presence, there is not a lot of privacy in a hotel bedroom.

An example of the application of the rule is to be found in *Curtin v The Clerk of Dáil Éireann.*[687] There, the issue before the court was the validity of the procedures decided on by the Oireachtas for the purpose of undertaking the impeachment of a serving judge of the Circuit Court whose house had been searched under a warrant which, at the time of the search, had just expired by efflux of time. No one noticed this and, had they, it would have been more than probable that another warrant would have been obtained. The exploration of the computer taken in that search led to a charge being preferred against a serving judge of possession of images of child pornography. The trial ended when the trial judge ruled, as he was bound to do by *Kenny's* case, that the evidence taken in consequence of the search amounted to a deliberate and conscious violation of the accused's constitutional right to the inviolability of his dwelling under Article 40.5 of the Constitution. The expiration of the warrant, at a time shortly before the search had taken place, was a simple error on the part of the garda officer leading the investigation and there was no evidence to suggest that it was adverted to in any way prior to the accused's house being entered.

Revision of the rule

In *Director of Public Prosecutions (Walsh) v Cash*,[688] a case was stated for the High Court as to the valid retention of fingerprint evidence which the prosecution sought to use as proof of an offence. The High Court used the opportunity to point out the potential consequences of a rule of automatic exclusion, Charleton J stating:

> Any system of the exclusion of improperly obtained evidence must be implemented on the basis of a balancing of interests. The two most fundamental competing interests, in that regard, are those of society and the accused. I would also place the rights of the victim in the balance. I note, in writing this judgment, that the third anniversary of the March, 2004 train bombings in Madrid is being marked. That atrocity led to the death of 191 commuters making their way to work and was inspired, apparently, because of the involvement of Spain in a foreign policy with which an international terrorist organisation did not agree. It is entirely conceivable, were the same thing to occur in Ireland, that vital evidence that might lead to the conviction of the perpetrators might have been uncovered through the infringement of someone's privacy as they spoke on a telephone or as a result of a comparison of DNA samples which the prosecution could not strictly prove were obtained by consent or through the proper exercise of statutory powers. The original test, as propounded by the Supreme Court in *O'Brien's* case would have allowed for a balancing of the rights of parties. In particular, the gravity of the offence and the nature of the infringement by the State authorities would have been taken into account. The current rule, as set forth by the Supreme Court in *Kenny's* case, automatically requires the exclusion of any evidence obtained through a mistake which had the accidental, and therefore unintended, result of infringing any constitutional right of one individual, namely the accused. The entire rational of the original Supreme Court decision in *O'Brien's* case is undermined by *Kenny's* case. The principle that extraordinary excusing circumstances can

686 *The People (DPP) v* Yamanoah [1994] 1 IR 565.
687 [2006] IESC 14.
688 [2008] 1 ILRM 433; [2007] IEHC 108.

> allow for the admission of evidence obtained in breach of a constitutional right can no longer be applied. It is an impossibility to make a mistake while, at the same time, acting to rescue a victim in peril or prevent the destruction of vital evidence. The whole rationale for a balanced rule with exceptions, set out in *O'Brien's* case, has been replaced.[689]

Earlier in that judgment, reference had been made to the Canadian Charter of Rights and Freedoms, Article 8 of which declares "the right to be secure against unreasonable search or seizure." While this is an absolute rule, when it comes to the exclusion of evidence a much more onerous test was set out which established an approach similar to the Supreme Court's decision in the *JC* case. Article 24 provides:

> (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

The decision in JC[690]

While the High Court had enabled an appeal in *Cash* to the Supreme Court, that court did not feel the necessity to revisit the exclusionary rule, confining its ruling to the proper processes in relation to taking and using fingerprints.[691] The issue was inescapably before the court, however, in *JC*.[692] By a four to three majority the Supreme Court overturned *Kenny*, reverting the law close to what it had been in *O'Brien*. The logic of the decision is to be found in the analysis of O'Donnell J, who concurred with the new formulation of the test as to illegally obtained evidence formulated by Clarke J. O'Donnell J considered it appropriate to deal only with the area of search warrants, though he recognised that his judgment could be applicable in cases involving unlawful arrest or detention, though he preferred "to withhold definitive determination of that issue" until a relevant case was before the Supreme Court. The effect of the decision is, however, of general application. O'Donnell J pointed to "flaws" in *O'Brien*, stating that, firstly, the approach of Walsh J was limited to deliberate and conscious breaches of constitutional rights and, secondly, if culpability was required, it was arguable that capturing only deliberate breaches was insufficient. He also pointed out that the constitutional justification for the "extraordinary excusing circumstance" proviso was unclear. He noted that there are constitutionally provided limits on rights and that where an action falls within such a limitation it does not constitute a breach. The Constitution, he said, contains its own balance and once a right guaranteed by the Constitution is breached, "the normal constitutional response, is a requirement to vindicate [that] right." Thus, O'Donnell J held that the justification offered for the exception of extraordinary excusing circumstances in *O'Brien* "while having rhetorical appeal" was not convincing. In light of the law in other common law countries and the academic commentary, O'Donnell J drew the following conclusions. First, he said that the near absolute exclusion rule in *Kenny* was "the most extreme position adopted in the common law world". Second, he said that "the exceptions allowed for in *Kenny* have little or no scope for practical application particularly in the case of warrants". He made the point that *Kenny* presented itself as "superficially balanced", while in practice it always resulted in the exclusion of evidence.

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689 ibid, [65].

690 See generally Robert Noonan, 'Stare decisis, overruling, and judicial law-making: the paradox of the JC case' (2017) 57(57) 119 0143; Yvonne Daly, 'Unconstitutionally Obtained Evidence in Ireland: Protectionism, Deterrence and the Winds of Change' (2009) 19(2) ICLJ 40.

691 See *DPP (at the suit of Detective Garda Barry Walsh) v John Cash* [2010] IESC 1, [2010] 1 IR 609.

692 [2017] 1 IR 417

Third, he noted that *Kenny* effected a very dramatic recalibration of the law, while purporting to maintain consistency with the decision in *O'Brien*. Finally, whether viewed as a near absolute rule, or as a rule subject to limited exceptions, the reasoning in *Kenny* was not sufficient to justify either conclusion. In his judgment the inexorable logic was that any rule of exclusion should also exclude evidence obtained in reckless or grossly negligent disregard of the Constitution. He regarded the essential question as being at what point a trial falls short of being a trial "in due course of law" because of the manner in which the evidence was obtained. Concurring with the test proposed by Clarke J, he thus preferred a more nuanced position which would allow for evidence to be admitted in cases of a technical and excusable breach, but would exclude it where it was obtained as a result of a deliberate, in the sense of advertent and wilful, breach of the Constitution.

In the analysis of MacMenamin J, as supporting the majority, O'Donnell and Clarke JJ had correctly analysed *Kenny*. He concluded that a consequence of the adoption and application of the exclusionary rule, as it had been developed in *Kenny*, was disproportionate as it applies as much in cases of trivial and unintended infringements as in more serious cases. He stated that the phrase "deliberate and conscious" should not encompass steps properly taken on foot of Acts of the Oireachtas in a genuine and grounded belief as to their legality. MacMenamin J stated that the test adopted by the majority in *Kenny* was "significantly higher than that to be found elsewhere in the common law world." As reformulated by the majority, the reversion of the test to the time before *Kenny* "redresses the balance so as to encompass community interests, while ensuring that egregious breaches of a suspect's rights and police misconduct are checked."

The test for exclusion

The test in which the majority concurred was set out in the judgment of Clarke J thus:

> (i) The onus rests on the prosecution to establish the admissibility of all evidence. The test which follows is concerned with objections to the admissibility of evidence where the objection relates solely to the circumstances in which the evidence was gathered and does not concern the integrity or probative value of the evidence concerned;
>
> (ii) Where objection is taken to the admissibility of evidence on the grounds that it was taken in circumstances of unconstitutionality, the onus remains on the prosecution to establish either:-
>
> > (a) that the evidence was not gathered in circumstances of unconstitutionality; or
> >
> > (b) that, if it was, it remains appropriate for the Court to nonetheless admit the evidence.
>
> The onus in seeking to justify the admission of evidence taken in unconstitutional circumstances places on the prosecution an obligation to explain the basis on which it is said that the evidence should, nonetheless, be admitted and also to establish any facts necessary to justify such basis;
>
> (iii) Any facts relied on by the prosecution to establish any of the matters referred to at (ii) must be established beyond reasonable doubt;
>
> (iv) Where evidence is taken in deliberate and conscious violation of constitutional rights then the evidence should be excluded save in those exceptional circumstances considered in the existing jurisprudence. In this context deliberate and conscious refers to knowledge of the unconstitutionality of the taking of the relevant evidence rather than applying to the acts concerned. The assessment as to whether evidence was taken in deliberate and conscious violation of constitutional rights requires an analysis of the conduct or state of mind not only of the individual who actually gathered the evidence concerned but also any other senior official or officials within the investigating or enforcement authority

> concerned who is involved either in that decision or in decisions of that type generally or in putting in place policies concerning evidence gathering of the type concerned;
>
> (v) Where evidence is taken in circumstances of unconstitutionality but where the prosecution establishes that same was not conscious and deliberate in the sense previously appearing, then a presumption against the admission of the relevant evidence arises. Such evidence should be admitted where the prosecution establishes that the evidence was obtained in circumstances where any breach of rights was due to inadvertence or derives from subsequent legal developments;
>
> (vi) Evidence which is obtained or gathered in circumstances where same could not have been constitutionally obtained or gathered should not be admitted even if those involved in the relevant evidence gathering were unaware due to inadvertence of the absence of authority.[693]

Where there is no lawful means of gathering evidence

In considering these principles, it is perhaps best to attempt refinement by moving from the last paragraph. Where it is impossible to legally obtain evidence, the prosecution have no warrant from the *JC* case in overriding the constitution. Thus, the first consideration is that there must exist some lawful path to the gathering of evidence. If there is no lawful path, then to bypass the law in a way which infringes such rights as that of privacy or liberty, means that the resulting evidence can never be admitted. An example of an extreme kind would be torture. We do not live in an age of trial by combat or trial by ordeal. Circumstances can present temptation at a high level of enticement. Were young women to be kidnapped by a criminal gang, in the context of serial killings being suspected, it would never be lawful to simply take a suspect into custody, without suspicion and without using an arrest power, and to then torture him with a view to uncovering a path to rescue the victims. The test propounded by Clarke J for the majority rules that out, whereas the original decision in *O'Brien* speaks of the need to rescue a victim in peril as an extraordinary excusing circumstance justifying the admission of evidence notwithstanding a conscious and deliberate violation of the accused's rights. However, it cannot be within the scope of constitutionally mandated powers to infringe the right to liberty and to violate the bodily integrity of a suspect. To take a less extreme example, privacy rights are engaged by telephone conversations. A tap on a line can lawfully be authorised by a designated High Court judge, but to stay with the example given, time presses and lives are at stake. Immediately intercepting the line may save life. An application may be made later. There is a lawful mechanism and hence that kind of evidence may be admitted. It would be prudent, however, to attempt all lawful steps by way of authorisation or legal warrant as soon as possible thereafter. It has not been the practice, in any event, to introduce wiretap evidence in our jurisdiction. In other countries, particularly the United States of America, it may be the very core of a prosecution case as to what conspirators in a criminal enterprise have said to each other. Here, the introduction of metadata, following authorisation, as to the time of calls, the attribution of communications devices to individuals, the length of calls and the movement physically from one telecommunications mast to another as a series of communications are effected can be very useful. The case of *The People (DPP) v Meehan* illustrates this as there the use of mobile phones showed a pattern of travel among those involved to the place where a murder took place and as to who was communicating with whom.[694]

Duty of prosecution

Where there is any issue with the lawful gathering of evidence, it is for the prosecution to lead evidence of compliance with the law and that must be demonstrated to the criminal standard of proof. Where there has been a glitch in compliance with the law, then as part of that proof the

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693 ibid, [871].

694 [2006] IECCA 104; [2006] 3 IR 468. See also *Dwyer v Commissioner of An Garda Síochána* [2018] IEHC 685; [2020] IESC 4.

prosecution must lead whatever relevant evidence which will elucidate the circumstances whereby the investigating authorities may have fallen into error. It may not be enough to produce the unfortunate officer who blundered, for instance, into a house inadvertent to the description on the warrant being different, 19 as opposed to 19A for instance. Rather, if the leader of the investigation had a part in the obtaining of the warrant, or of directing that it be obtained in a particular form, that officer will also be a necessary witness.

What is deliberate and conscious

A major change from the *Kenny* case is in the recalibration back to the understanding based on *O'Brien* as to what a deliberate and conscious violation of constitutional rights is. It is not, as in *Kenny* that an investigating garda entered a dwelling deliberately, in the sense criminal lawyers would understand as non-automatous, that is his or her mind acting with his or her body, but instead concerns what was in the mind of that officer as to legal authorisation, and where relevant his or her superiors. What is key is the knowledge of the unconstitutionality. It is not whether the action in question was advertent, since inadvertence in entering a house or obtaining a warrant was always likely to be the act of rational and thinking people. Where the breach of the constitution derives from inadvertence, the evidence should be admitted. Another circumstance, likely to arise only very rarely, is where the law as it was understood at the time was followed advertently, but subsequent rulings of the courts means that whatever legal compliance was then thought to suffice, has been found wanting.

The decision in *JC* was followed by the Court of Appeal in *DPP v Markus Kirwan.*[695] This case involved a fatal stabbing perpetrated by the accused and three others in the car park of an apartment complex. The accused was arrested on foot of a warrant and subsequently convicted of murder by a unanimous jury. He appealed his conviction to the Court of Appeal, claiming that his arrest and detention was unlawful, and that the fruits of the detention, including his identification by a police officer on foot of CCTV footage, should not have been admitted in evidence. The respondent asserted that the provenance of every piece of CCTV evidence could be proved. In following the decision in *JC,* Birmingham J dismissed the appeal, noting that there was a high constitutional value attached to ensuring that all potentially relevant evidence was available to the jury. The Court reasoned as follows:

> In this case, to use the language of Clarke J. in *J. C.,* there was a high constitutional value to be attached to ensuring that all potentially relevant evidence, including the visual identification evidence arising from the identification parade conducted while Mr. Kirwan was in custody following on his arrest, was available to the jury. In following a long established practice, at worst the Gardaí could be said to have been inadvertent. Indeed, many would feel that to describe their actions as inadvertent would be harsh in the extreme. However taking the view of matters most favourable to the defence and so categorising the actions of the gardaí, there is still no basis for excluding the evidence of what occurred at the garda station.[696]

The case of *Murphy v CAB*[697] concerned a quantity of cash that was seized on foot of a statutory provision that was later held to be unconstitutional (see the discussion on *Damache* below). O'Malley J succinctly explained the current position on this area of law in the following terms:

> In JC this Court overturned the decision in DPP v Kenny, finding that it had implicitly (and wrongly) overturned O'Brien and had erred in imposing an absolute rule. However, the approach of the Court in O'Brien was not considered satisfactory by the majority for the reasons set out in their judgments. A new formulation of the test for the exclusion of

[695] [2015] IECA 228.
[696] ibid, [24].
[697] [2018] IESC 12.

evidence was established, more stringent than that adopted by the majority in O'Brien but not as absolute as the rule laid down in Kenny.[698]

Illegality[699]

Illegality not amounting to a constitutional right violation

Where the infringement of the right of the accused is merely an illegality, then it is to be dealt with according to the balancing principles enunciated by Kingsmill Moore J in *O'Brien* whereby the seriousness of the crime under investigation is balanced against the gravity of the infringement. Such a balancing exercise can allow for the admission of evidence. The law was not subsequently developed. That is not surprising since with the expansion of rights under the Constitution and their application to everyday situations, mere illegalities are hard to find. What is typically involved in criminal investigation is either the entry into a premises, or the taking of articles for evidence, or the exercise of arrest and custody over a suspect, or the intrusion into telecommunications traffic. In all such instances, constitutional rights have been asserted on behalf of the accused almost without challenge by the prosecution. Hence, the mere illegality answer to a claim by the accused of breach of constitutional rights has effectively faded from view.

What has remained of importance, however, is that the accused is not entitled to assert the infringement of the rights of another person. What may be an extraordinary excusing circumstance within the meaning of the *O'Brien* judgment now seems to be bypassed in the *JC* analysis of the Supreme Court. Finally, there has never existed a doctrine in Irish law whereby evidence is traced backwards in the hope that somewhere along the line some form of illegality against someone or other was part of the chain that led to its discovery.

Assertion of rights

The accused is entitled only to assert his or her own rights in aid of an argument as to exclusion and not those of any other person. An example is *The People (DPP) v Lawless*.[700] There, a garda search of a flat resulted in the discovery of 17 paper packs of heroin. As previously indicated, due to a slight error in the address, the search warrant was defective. The accused, however, did not live in this flat, but the evidence was that he was merely waiting there for the return of his brother from a nearby flat. The Court of Criminal Appeal held that as he could not assert any right to the inviolability of a dwelling which was not his, he could not plead the exclusionary rule as against the State.[701]

Further, a breach of the accused's constitutional rights must be perpetrated by the servants or agents of the State. In the United States it has been held that if the evidence has been obtained by a private detective and later surrendered through the federal prosecutor, that the rule does not apply.[702] The status of such a ruling is uncertain in Irish law. What might reasonably be asserted, however, is that as with the international scandal of rendition from one country to another for the purpose of obtaining evidence by torture, that sub-contracting of tasks by State authorities cannot bypass the fundamental rule around which the decision in *JC* pivots requiring some legal path to the evidence.

Excuse

Under the *O'Brien* ruling, evidence obtained in breach of the Constitution may be admitted if it was obtained out of the need to rescue a victim in peril, or the need to rescue vital evidence. The extent to which this has survived the *JC* decision is yet to be analysed. If there is no legal path,

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698 ibid, [51].

699 Aisling Twomey, 'Poisonous fruit from a poisonous tree: reforming the exclusionary rule for Ireland' (2012) 30 ILT 288; Ale Samuels, 'Illegally obtained evidence: In or Out' (2003) 67(5) Journal of Criminal Law 411.

700 (1985) 3 Frewen 30.

701 See also *Wong Sun v US* (1963) 371 US 471; *Jones v US* (1960) 362 US 257.

702 *Burdow v McDowell* (1931) 256 US 465.

however, to the discovery of evidence, and where what has happened infringes the constitutional rights of the accused, the majority judgment appears to rule out extra-legal measures even in aid of the imminent destruction of the human rights of another. What may be the former law is illustrated by *The People (DPP) v Shaw*.[703] There, the accused was detained for three days and extensively questioned. The accused was suspected of being involved in the abduction and murder of two young women, who had disappeared only four days prior to the arrest of the accused. The purpose of the gardaí to discover if one of the victims might still be alive was accepted by the trial judge as being the motive of the gardaí in continuing to detain the accused illegally. The Supreme Court ruled that in seeking to save the life of that person, at the cost of discounting the right to liberty of the accused, the gardaí had endeavoured to protect the more important of two conflicting rights under the Constitution and, in consequence, had not acted unlawfully in continuing to detain the accused without bringing him before a court at the first reasonable opportunity. Perhaps it could be now argued that there was a path to the detention, namely the extension by a court of the original detention, and that hence there would be constitutional means to the same end. If that were so, it is hard to see why resort would not be had to such a legal measure. In *Lawless*,[704] the gardaí, in unknowing possession of a defective search warrant entered the flat in which the accused was staying somewhat earlier than they otherwise would have, by reason of a person rushing up internal stairs towards a toilet. In fact, heroin flushed down the lavatory was retrieved by another officer who had his hand in the sewer pipe outside. This would have been public property and hence no rights of the accused would have been infringed by that action. Nonetheless the prosecution wanted to put before the jury the actions of the accused as they saw the events unfold within the flat. The Court of Criminal Appeal commented that the need to prevent the imminent destruction of vital evidence would have excused such an unlawful entry.[705]

Fruits

The courts have not coherently applied any doctrine of causation to infringements of rights leading to the discovery of evidence. No principle has emerged whereby everything directly or tangentially consequential on a breach must be expunged from the trial record. In fact, the opposite is the case with only the evidence directly resulting from the breach being in issue as to exclusion. Not every piece of evidence that may be found in consequence a breach of constitutional rights of the accused will be excluded in evidence. The United States, however, has developed a remoteness doctrine. In *The People (DPP) v Cooney*[706] the accused was inadvertently detained, due to a mistake of law, in a garda station. During a period of unlawful detention he was identified in an identification parade by a number of witnesses. That evidence was excluded by the trial judge, Costello J. The trial judge further ruled, however, that the dock identification of the accused, made by the same witnesses at his trial, was properly admissible in evidence against him. It was argued before the Supreme Court that since the dock identification would not have taken place, but for the existence of the earlier garda station identifications, that all of the evidence should be excluded, resulting in the acquittal of the accused. The Supreme Court declined to accept this, stating that the rule as to the exclusion of unconstitutionally obtained evidence was directed only towards such evidence as had been obtained in breach of the accused's constitutional rights and not at the exclusion of any other evidence which was obtained when no right of the accused was being infringed.

Where, however, the court finds a scheme to abuse the process of the court by deliberately setting in train a scheme for the violation of constitutional rights, it is possible that the court will end that process by, as the nature of the case demands, the exclusion of evidence or the refusing of the relief sought.[707] Where what is involved is a scheme to set right the inadvertent earlier violation of

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703 [1982] IR 1.
704 (1985) 3 Frewen 30.
705 See also *Palumbo v US* (1984) 53 LW 3329.
706 [1997] 3 IR 205.
707 *The State (Trimbole) v The Governor of Mountjoy Prison* [1985] IR 550.

a citizen's constitutional rights that argument would not apply.[708] In the *Cash* case, the High Court commented briefly in terms which indicate that the courts should examine how close a connection there is with the illegality alleged. Charleton J stated:

> In *R. v. Shaheed*, [2002] 2 N.Z.L.R. 377 the New Zealand Court of Appeal reviewed the law relating to the exclusion of illegally obtained evidence from many countries, including Ireland and the United States. It is of interest to note that the rule from the United States may now be less strict than when Ireland first imported it in the *O'Brien* case. Not all fruits of an illegality are to be excluded. Nor does there seem to a burden cast upon the prosecution to prove that every manoeuvre made in the course of the investigation of an offence was strictly in accordance with law. Rather, unlawful searches and seizures are targeted, as the Fourth Amendment requires but, evidence unlawfully obtained may be dissipated, as to the legal effects, by collateral inquiries. The following passage in the judgment of Blanchard J. at p. 399 of the report makes this clear:
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> > "In Stone v. Powell, [428 U.S. 465 (1976)] the Supreme Court emphasised the high costs of enforcing the rule to exclude reliable and trustworthy evidence, even when violations had been technical or in good faith. It suggested that such use of the rule might well generate disrespect for the law and the administration of justice:
> >
> > 'Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system.' (page 490).
>
> United States Courts have accordingly to some extent in recent decades backed away from a very strict application of the rule although it still holds sway generally. It is established that evidence obtained following a wrongful search and seizure may be able to be used in a criminal trial if the prosecution has shown sufficient attenuation of the link between police misconduct and the obtaining of the evidence; there is no "but for" rule (*Brown v. Illinois* 422 US 590 (1975); *Wong Sun v. United States* 371 US 471 (1963)). In deciding whether exclusion is appropriate in a particular case the Supreme Court has applied a "dissipation of the taint" concept. This expression, first used by Frankfurter J. in *Nardone v. United States* 308 US 338 (1939), "attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost." (*Browne v Illinois* at p.609).[709]

This point was the subject of further comments in the Supreme Court decision in *S v Minister for Justice,*[710] where the Court considered what has come to be known in American jurisprudence as the 'fruit of the poisonous tree.' Here, the court clarified that

> there is no exclusion of evidence in consequence of any accidental or unthinking illegality even in the context of a civil trial. Any such rule as to the exclusion of the "fruit of the poisonous tree", as Frankfurter J termed the products of illegal searches and seizures in Nardone v United States 308 US 338 (1939), applied only as a discipline against the law being broken in the investigation of crimes.[711]

This issue was considered by the Court of Criminal Appeal in *The People (DPP) v Jagutis.*[712] Clarke J stated that:

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[708] *Hegarty v The Governor of Limerick Prison* [1998] 1 IR 413. And see, arising out of the same case and applying the same rule – *Duncan v The Governor of Mountjoy Prison* [1998] 1 IR 434; *Colley v The Governor of Portlaoise Prison* [1998] 1 IR 443 and, in the Supreme Court, *Quinlivan v The Governor of Portlaoise Prison* [1998] 1 IR 456.

[709] [2008] 1 ILRM 433; [2007] IEHC 108, [53].

[710] [2019] IESC 32.

[711] ibid, [5].

[712] [2013] 2 IR 250.

> It is appropriate to pause to emphasise that the use of the term "discretion" in this context does not imply that the Court can do as it pleases…In truth what the law requires is that, in deciding whether to admit or exclude evidence obtained on foot of the execution of a defective warrant, the court is required to take into account a broad range of circumstances before determining whether, on balance, the evidence should be admitted or excluded. The role of the court is, therefore, non-automatic. It does not automatically follow from a determination that a warrant is defective that evidence obtained on foot of the execution of the warrant is either to be admitted or to be excluded.[713]

This statement was later endorsed by the Supreme Court in *DPP v Avadenei*.[714] It is worthy of note that in the United States, Justice Thomas recently stated the law on this question in that jurisdiction to be as follows:

> Under the Court's precedents, the exclusionary rule encompasses both the "primary evidence obtained as a direct result of an illegal search or seizure" and, relevant here, "evidence later discovered and found to be derivative of an illegality," the so-called " 'fruit of the poisonous tree.' " Segura v. United States,468 U. S. 796,804 (1984). But the significant costs of this rule have led us to deem it "applicable only . . . where its deterrence benefits outweigh its substantial social costs." Hudson v. Michigan,547 U. S. 586,591 (2006) (internal quotation marks omitted). "Suppression of evidence . . . has always been our last resort, not our first impulse." Ibid.[715]

In that judgment, the Supreme Court of the United States helpfully outlined three exceptions to the exclusionary rule that have been identified:

> First, the independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source. See Murray v. United States,487 U. S. 533,537 (1988). Second, the inevitable discovery doctrine allows for the admission of evidence that would have been discovered even without the unconstitutional source. See Nix v. Williams,467 U. S. 431–444 (1984). Third, and at issue here, is the attenuation doctrine: Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that "the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." Hudson, supra, at 593.[716]

Legal power

Specifically, the ruling in *JC* excludes actions by the authorities for which there is no constitutional basis. While almost every conceivable aspect of investigation powers within the realm of civilized conduct is authorised in some way by law, it remains important to identify a legal basis for action where the prosecution is put on proof of the circumstances of an alleged infringement of the accused's rights. In order not to infringe on the constitutional right to liberty, privacy or dwelling rights of the accused, the executive, in the person of the gardaí, the customs authorities or Criminal Assets Bureau must be given a specific statutory or common law power to act. If their actions fall outside such powers, the exclusionary rule may classify their actions as "that which could not have been constitutionally obtained or gathered". In consequence, to lawfully arrest a person, and to lawfully detain him for the purpose of questioning, such actions must expressly come within the terms of some common law power or statute granting same. To search a person's home requires the existence and use in good faith of the appropriate search warrant power. But, to act so that there is no power at all to do what is in issue is a more problematic situation.

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[713] ibid, [22].
[714] [2018] 3 IR 215, [80].
[715] *Utah v Strieff*, 579 US (2016).
[716] ibid.

Wrongly claiming a constitutional right

Within the context of the defence of entrapment, treated separately in this volume, situations may exist where an agent of the authorities works from inside a criminal conspiracy. Serious consideration should be given to the extent to which constitutional entitlements to privacy might extend outside lawful confidential communications in circumstances where the expectation of being left alone is reasonable. Not every communication is private. The assertion of privacy as a constitutional right depends upon analysis of time and place and circumstances and purpose. It is a private matter for people to share affection physically though that can become a public display, depending on their choice. It is a private circumstance where people discuss family affairs by deliberately choosing circumstances where they are not to be overheard. It may be difficult to assert, without affront to the standards of reasonable people, that by planning a murder, or other crime, a gang of criminals are acting under circumstances of privacy protected by the constitution. Certainly, they expect confidence from those party to such discussions but an element of legal protection of the circumstances is also required. Perhaps the deployment of agents in espionage may raise an issue as to legality, but the invocation of the constitution in circumstances where violence, drug dealing, theft, arson, or other crimes are being planned or executed strikes at the constitutional order itself. The purpose of the Constitution, as stated in the Preamble, is to seek "to promote the common good" and to attain "true social order". Care needs to be exercised by courts as to the applicability, as opposed to the mere assertion, of constitutional rights. This was the subject of a comment by Charleton J in the *Cash* case in the High Court:

> In Canada, greater experience with the perils attendant on relying on informers has led to the application of detailed rules to this situation which are set out in *R. v. Debot* [1989] 2 S.C.R. 1140. The Supreme Court of Canada considered in that decision when it was proper to rely on the word of an informer in an arrest. In that case, a reliable informer had told the police that the appellant, together with two other people, was going to a meeting to complete an illegal drug deal. This information had been obtained by the informer in conversation with one of the persons who was to be party to the deal. Acting on the information, the constable felt that he had reasonable and probable grounds, the relevant test in Canada, to believe that the appellant, was mixed up in this affair, and had a drug on him. He proceeded with a search as authorized by the relevant criminal statute. The Supreme Court indicated that the police may take action on the word of an informer where certain minimum standards are met. These include whether the information is compelling; is sufficiently specific; is obtained from a reliable source; is based on a source that has real knowledge of the information; and may, to a degree, if time allows, be verified; see pp. 1143-1144. The idea of informers is worth mentioning in this context as, of their nature, they are either a participant in criminal activity or are closely associated with those who are. If an informer is acting as an agent of the State, any illegal actions can be ascribed to his or her police controller; yet, their evidence has never been blocked for that reason. Even less has it been rejected because information from a dubious source, as regards its legality, has been seen as corrupting an entire investigation. Nor has it been held, in this context, that a spy reporting from within a criminal organization is infringing anyone's constitutional right to privacy.[717]

What may bring a police agent within a gang in the first place is the existence of information that may suggest that infiltration is the only productive way of crime prevention and evidence gathering. Possibly, in adjudication on whether any such step was taken within the realm of law in the first place, resort will be had by the courts to the existence of reasonable suspicion. Since that concept

[717] [2008] 1 ILRM 433; [2007] IEHC 108, [11].

is also the foundational principle whereby the search of premises, the arrest of suspects and other legal measures are lawfully to be taken, the concept requires separate treatment.

Reasonable suspicion

Where a statute specifies that a judge must reasonably suspect that evidence in relation to the commission of the offence is to be found on the premises (or whatever the relevant statutory formula is in relation to whatever authorisation is sought) it is insufficient that the garda applying for the warrant or other authority has such suspicion. The judge, or where that continues to be possible under s 29 of the Offences Against the State Act 1939, the superintendent, must also have that suspicion on the basis of sufficient material before him or her.[718] When peace commissioners were regarded as capable of such functions, if challenged, the peace commissioner must be called to prove that he himself was activated by such a reasonable suspicion and not merely that he was satisfied that the garda, or other member of the executive, applying for the warrant, so suspected.[719] The statutory powers must also be constitutionally compliant.

General requirement of reasonableness

What is considered here is the level of mental certainty required to exercise a power where the standard set is the invariable one of reasonable suspicion. Where that formulation is absent, as in s 30 of the Offences Against the State Act, the courts have inevitably implied the requirement of acting against the rights of a suspect, as to liberty or security of dwelling, only on a basis that can be fundamentally justified by reason. In that regard, it must be remembered that administrative actions which fly in the face of fundamental reason and common sense are regarded in public law as unlawful. [720] Hence, there is a general standard whereby statutory powers of search or arrest or other investigative measures are to be exercised on reasonable suspicion. The standard of suspicion required is that which would cause the judge, or the superintendent, as reasonable people to suspect that the statutory formula applied to the premises in respect of which they issued the warrant.[721] The District Court is a court of record and it is therefore not necessary to call the judge to give evidence as to what was in his mind.[722] Where, however, a non-judicial authority such as a police officer or a peace commissioner is applied to and issues a warrant or other authorisation, then, if that warrant is challenged by the defence, that issuing authority must be called to prove the state of mind.[723] Similarly, where a superintendent issues a warrant under s 29 of the Offences Against the State Act 1939, or where a chief superintendent extends the period of detention of an accused person under s 30 of the same Act, then if such search or detention is challenged by the accused those officers must be called in evidence to prove the state of their minds.[724]

Fundamental principle

The entire point of all of the decisions on extension of detention, or of issuing a warrant, or of a judge acting similarly is this. Firstly, all powers are predicated on the basis of reasonable suspicion, in the case of arrest, or of reasonable grounds for believing, in the case of extension of detention or that a warrant should be granted, that a situation exists; whether that be that goods are on a premises or that further investigation is necessary and that the accused is needed in that regard. It depends on the statutory formula but having a reason or reasons is what is fundamental. Arbitrary exercise of powers that impinge on the inviolability of the dwelling under Article 40.5 or of liberty under Article 40.4.1 of the Constitution is not permitted. By having a reasonableness standard, this

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718 *The People (DPP) v Kenny* [1990] 2 IR 110.

719 *The People (DPP) v Owens*, Supreme Court, unrep, 16 February 1999.

720 See Hogan and Morgan, Administrative Law in Ireland (5th edn, Round Hall 2019*); The State (Keegan) v Stardust Compensation Tribunal* [1986] 1 IR 642; *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39; *Meadows v Minister for Justice Equality and Law Reform* [2010] 2 IR 710.

721 *The People (DPP) v Kenny* [1990] IR 294; *The People (DPP) v Yamanoah* [1994] 1 IR 565.

722 The Courts Act 1971, s 13.

723 *The People (DPP) v Owens*, Supreme Court, unrep, 16 February 1999.

724 *The People (DPP) v Byrne* [1987] IR 363.

means that those exercising such powers are bound by what is thought-through. Hence, reason to act, which is not proof of guilt and which is not either a mere hunch, is the touchstone whereby such powers are exercised. Secondly, on the varied case decisions in this area, it is insufficient for the officer seeking the warrant to have a reasonable suspicion, or the officer seeking a detention, or the exercise of some other power. While that officer may have such a suspicion based on hearsay, or what another person has told him or her, that officer must communicate reason to act under the various statutes to the judge or to the superior officer. Merely making an averment that he or she has such a suspicion is insufficient for the judge or superior officer to act on it. In short, that judge or superior officer must be informed of enough to justify the reasonable exercise of whatever the statutory power is.

Nature of reasonable suspicion

It is a constitutional imperative on every action of the executive that it must not embark on an action which infringes the rights of a citizen acting on beliefs or in circumstances which fly in the face of fundamental reason and common sense.[725] It is, however, also a commonplace statutory formulation that the exercise of executive powers which trespass on the citizen's constitutional rights may only be made where a "reasonable suspicion" exists. A reasonable suspicion is one founded on some ground which, if subsequently challenged, will show that the person arresting, issuing the warrant or extending the detention of the accused acted reasonably.[726] A reasonable suspicion can be based on hearsay evidence, the discovery of a false alibi,[727] or information offered by an informer who is adjudged reliable.[728] A suspicion communicated to a garda by a superior can be sufficient to constitute a reasonable suspicion.[729] In *CRH plc v Competition and Consumer Protection Commission*,[730] Charleton J summarised the law on reasonable suspicion thus:

> In terms of the ordinary construction of the powers of search, a warrant is issuable by the District Court on reasonable suspicion that "evidence of, or relating to" an offence under the 2002 Act "is to be found in any place"; thereafter the officers of the Commission have a month to "enter and search the place" and to "exercise all or any of the powers conferred on an authorised officer under this section." A reasonable suspicion is one founded on some ground which, if subsequently challenged, will show that the person arresting, issuing the warrant or extending the detention of the accused acted reasonably; see Glanville Williams, "Arrest for Felony at Common Law" [1954] Crim LR 408. A reasonable suspicion can be based on hearsay evidence or the discovery of a false alibi; *Hussein v Chong Fook Kam* [1970] AC 942: or on information offered by an informer who is adjudged reliable; *Lister v Perryman* [1870] LR 4 HL 521, *Isaacs v Brand* (1817) 2 Stark 167, *The People (DPP) v Reddan* [1995] 3 IR 560. A suspicion communicated to a garda by a superior can be sufficient to constitute a reasonable suspicion, as may a suspicion communicated from one official to another, which is enough to leave that other individual in a state of reasonably suspecting; *The People (DPP) v McCaffrey* [1986] ILRM 687. The fact that a suspect is later acquitted does not mean that there was not a reasonable suspicion to ground either an arrest or a search. It is accepted by the European Court of Human Rights that "the existence of a reasonable suspicion is to be assessed at the time of issuing the search warrant"; *Robathin v Austria* [2012] ECHR 30457/06 at para. 46. Having information before a judge of the District Court whereby he or she may reasonably suspect the potential presence of information on a premises founds the warrant. The standard being applied

[725] *The State (Keegan) v The Stardust Compensation* Tribunal [1986] IR 642; [1987] ILRM 202.
[726] See Williams [1954] Crim LR 408.
[727] *Hussein v Chong Fook Cam* [1970] AC 942; [1969] 3 All ER 1626; [1970] 2 WLR 441.
[728] *Lister v Perryman* [1970] LR 4 HL 521; *Isaacs v Brand* (1817) 2 Stark 167; *The People (DPP) v Reddin and Butler* [1995] 3 IR 560.
[729] *The People (DPP) v McCaffrey* [1986] ILRM 687.
[730] [2017] IESC 34.

> here is such as might be familiar from civil or criminal practice. But issuing a search warrant is not to be confounded with any analogy with the criminal trial process. That is not the task. Facts are not being found: facts are being gathered. It necessarily follows that what is involved is an exercise in the pursuit of what is potential, essentially an exercise which may yield no information or limited information. It is of the nature of a criminal enquiry that a warrant may authorise an intrusion into someone's privacy to little or no effect. This is of the nature of what is required in the course of information gathering and a negative result does not upset the validity of what was done if, after the event, information that may serve towards displacing the presumption of innocence happens not to have been gleaned. The power to issue the search warrant, therefore, does not in this instance inform the nature of the powers that may be exercised pursuant to it.[731]

In the *Cash* case, the same judge offered this analysis, which as to the fundamentals donot differ from the foregoing:

> Reasonable cause for arrest equates with the concept of reasonable suspicion. In that regard, a reasonable suspicion is one founded on some ground which, if subsequently challenged, will show that the person arresting the suspect acted reasonably in suspecting them. A suspicion communicated by one garda to another can be sufficient to constitute a reasonable suspicion, provided there is sufficient particularity provided as to why that suspicion should be held; *The People (D.P.P.) v. McCaffrey* [1986] I.L.R.M. 687. Information offered by an informer who was adjudged reliable can be sufficient to ground an arrest; *Lister v. Perryman* [1870] L.R. 4 H.L. 521, *The People (D.P.P.) v. Reddin and Butler* [1995] 3 I.R. 560.[732]

Since what is involved in searching a dwelling or other premises, in arresting a suspect, in detaining that suspect or in extending the initial statutory period of detention for questioning, or in electronic interception, involves the infringement of rights otherwise guaranteed by the Constitution, those of liberty or privacy in some aspect, it is also central that statutory formulations as to application should comply with constitutional principles.

Damache[733]

In the Supreme Court decision of *DPP v Damache,*[734] the constitutionality of statutory powers over accused persons received extensive consideration. The facts involved an alleged conspiracy to murder a Swedish cartoonist who had depicted the Islamic prophet Mohammad with the body of a dog, an unclean animal in Sharia law. Suspecting that the appellant was involved, a police officer involved in the investigation issued a search warrant for the appellant's dwelling pursuant to s 29 of the 1939 Act as it was then in force. This provision, having been amended by section 5 of the Criminal Law Act 1976, allowed for officers not below the rank of superintendent to issue a search warrant, constituting an exception to the general practice of warrants being issued by individuals in authority outside the Garda Síochána, such as peace commissioners and district judges. Concerns regarding this section had been identified by the report of the Morris Tribunal, where it was stated that there existed a danger "that a warrant would be issued automatically and without proper investigation of the matter by the superintendent to whom the application is made if he or she is heading the investigation."[735] In the Supreme Court judgment in *Damache,* Denham CJ noted

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731 ibid, [22].

732 [2008] 1 ILRM 433; [2007] IEHC 108, [11].

733 Conor Casey, '*Damache v Director of Public Prosecutions'* (2014) 32(9) ILT 133; Francis Kieran 'Implications of *Damache v DPP* and its Progeny' (2012) 22(4) ICLR 116.

734 [2012] IESC 11; [2012] IESC 2 IR 266.

735 Tribunal of Inquiry into Complaints into Certain Gardaí in the Donegal Division, Report on the Arrest and Detention of Seven Persons at Burnfoot, County Donegal on 23 May 1998 and the Investigation Relating to Same (2006), [6.22].

that "the issuing of a search warrant is an administrative act, but it must be exercised judicially."[736] The court held that warrants must be issued by an independent person, and they must be satisfied on receiving sworn information that there are reasonable grounds for a search.[737] In the rare cases where a member of the gardaí is permitted to issue a warrant, there is the additional requirement of urgency where such an action may infringe a constitutionally-protected right.[738] In the case at hand, the court found that the warrant had been issued by a member of the Garda investigating team who was not independent to the investigation, and that there had been a forcible entry into the appellant's dwelling, in breach of article 40.5 of the Constitution.[739] On foot of s 29 being struck down as unconstitutional, a new formulation of section 29 was inserted to the 1939 Act by means of the Criminal Justice (Search Warrants) Act 2012. This section now permits a member of the Gardaí not below the rank of superintendent to issue a warrant provided that they are not "in charge of, or involved in, that investigation"[740] and where the officer is satisfied that the warrant is necessary for the proper investigation of a relevant offence[741] and where the level of urgency makes it impracticable to apply to a district judge.[742]

Extending detention

Extending detention, whether done by a court or by another authorised person, such as a chief superintendent not involved with the investigation, must also be done reasonably. In *The People (DPP) v O'Shea* the Court of Criminal Appeal held that:

> A chief superintendent in approaching the question as to whether or not he will make an extension order pursuant to section 30 of the Act of 1939 is entitled to, and indeed must in common sense, rely upon the information and opinions of his subordinate officers with regard to matters which have given them suspicion as to the commission of an offence by a person who is being detained and as to the progress of the investigation of the crime in respect of which that suspicion exists and of the continuance of that suspicion, having regard to the investigation that has so far taken place.[743]

In extending a detention a chief superintendent must act reasonably, as must a court exercising any similar power. It is sufficient if the court or other authorised power is reasonably satisfied that the accused has not been truthful and that further interrogation is necessary.[744] Putting that another way, even where the accused has been truthful, ostensibly such as by making a confession, it is the duty of investigating authorities to fact check in so far as possible. Hence, extension of detention is reasonably to be granted where an investigation involving the suspect has not concluded. See also the powers under s 50 of the Criminal Justice Act 2007. Section 10 of the Offences Against the State Amendment Act 1998 substituted subsection 4 of this provision, allowing for a member of the gardaí not below the rank of superintendent to apply to a judge of the district court to extend the period of detention by not more than 24 hours if the judge is satisfied that the detention is necessary for the proper investigation of the offence and that the investigation is being conducted diligently and expeditiously.[745] In extending the period of detention the superintendent must suspect the accused of the crime for which he was arrested,[746] and this must be either expressly stated by the chief superintendent or be capable of being inferred from the factual

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[736] [2012] IESC 2; [2012] IR 266, 274.
[737] ibid, 278.
[738] ibid, 278.
[739] ibid, 285.
[740] Criminal Justice (Search Warrants) Act 2012, s 29(12).
[741] ibid, s 29(4)(a).
[742] ibid, s 29(4)(b).
[743] (1989) 3 Frewen 203, 208.
[744] *The People (DPP) v O'Shea* (1989) 3 Frewen 203.
[745] Offences Against the State Act 1939, s 4; s 4A.
[746] *The People (DPP) v Quilligan and O'Reilly* (No 1) [1986] IR 495; [1987] ILRM 606.

evidence.[747] In relation to the scope of this provision and its relationship to other provisions of a similar nature, Fennelly J stated the following in *The People (DPP) v MC*:[748]

> This is not a case of a single body of legislation dealing with one subject. The Oireachtas has legislated separately for the detention of persons suspected of having committed different types of offences. While there are many similarities, there are also differences. Each of the provisions deals with a different type of offence; each provides separately for a period or periods of detention, some similar, some different; in the case of s. 30 of the Act of 1939, the opinion of the arresting garda alone is sufficient to justify both arrest and detention, whereas, in the case of the other three provisions, the opinion of the member in charge is required; officers of different rank, whether inspector, superintendent or chief superintendent are required to either to authorise or extend the period. It does not appear to me that the principle of interpretation of provisions *in pari materia* applies. The Oireachtas did not enact a single piece of legislation dealing with detention of suspects. It legislated separately for detention on suspicion of having committed different types of offence.[749]

It is now necessary to consider the legal justifications at common law and the statutory formulae whereby arrests may lawfully be effected and other powers exercised for the purpose of gathering evidence for trial.

Arrest[750]

There is no general power to arrest for crime. Ability to arrest legally came, firstly, from common law. Peace officers, in modern terms police, had wider powers of arrest but citizens too could arrest but only, according to the then classification, where a very serious crime had actually been committed.[751] Courts also have powers of compulsion, in effect a form of arrest, and of production of documents, a species of search. Since a court is entitled to the evidence of all who have relevant testimony to offer,[752] courts are empowered at common law to compel the attendance of witnesses. Courts with jurisdiction can require the attendance of a criminal suspect through issuing a warrant of arrest.[753] In addition, there are a multitude of statutory powers. Up to the Criminal Law Act 1997 a garda could arrest on reasonably suspecting that a felony had occurred and on reasonable suspicion that the arrestee had committed it. As noted in Chapter 1, the distinction between felonies and misdemeanours was abolished by the Criminal Law Act 1997. This legislation, instead, provides for powers of arrest and powers of entry to effect an arrest in respect of arrestable offences. In effect, the category of arrestable offences has replaced and rationalised that of felony. The classification of offences as between what is arrestable and what is not, now more closely accords to contemporary views of the potential seriousness of individual crimes; but perhaps not of particular infringements, a matter impossible of classification by legislation. The Oireachtas sets penalties for crimes and in choosing maximum potential sentences, reflects current views as to seriousness.

A member of An Garda Síochána, who reasonably suspects that an arrestable offence has been committed and that the suspect is the perpetrator, or one of the perpetrators, may arrest such a suspect. Every offence which carries a maximum term of imprisonment of at least five years is classified as arrestable. A person, meaning someone not sworn in as a police officer, may arrest for an arrestable offence where such an offence has actually been committed (suspicion in this regard does not suffice) and where he or she reasonably suspects the person to be arrested of

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747 *The People (DPP) v O'Shea* (1989) 3 Frewen 203.
748 [2014] 3 IR 279
749 ibid, [43].
750 Andrea Ryan, 'Arrest and Detention: A Review of the Law' (2000) 10(1) ICLR 2-10.
751 Archbold, *Criminal Pleading, Evidence and Practice* (26th edn, Roome and Ross 1922).1002.
752 *The People (DPP) v JT* (1988) 3 Frewen 141.
753 Archbold (1922) 1001.

having committed that offence. As with the distinction between felonies and misdemeanours, formerly, a constable could arrest on reasonable suspicion of the commission of the offence and the participation of the offender, but the citizen only where there had been an actual commission of the offence and on suspicion that the person to be arrested was the offender or one of them.

Reasons for arrest

A person arrested is entitled to know the reason for their arrest. This should be given to them by the arresting officer in ordinary language. It has been held sufficient simply to tell the accused that he is being arrested under s 30 of the Offences Against the State Act 1939,[754] but some further information as to the nature of the offence for which the accused was arrested is almost invariably given and should also be given in ordinary language. If the accused is aware from the circumstances in which he or she is arrested, or otherwise of the power on which he or she is arrested, then the arrest is valid.[755] Here, a common-sense view is taken. Arrest is not the same as the drawing up of a charge sheet, where particulars are given and a statutory ground for the offence is stated. Instead, the mischief to be avoided is arbitrary arrest, which can often be exemplified by arrest for no reason. Thus, basic information giving the essence of the power is what is needed. Gardaí are not to be turned into "walking repositories of sections and sub-sections".[756] Knowledge in this context does not carry the same meaning as in a law exam: it is a matter of common sense. A good example of this is provided by the case of *DPP v Connell*.[757] The accused was charged with the offence of drunk driving contrary to s 49(2) of the Road Traffic Act 1961, as inserted by s 10 of the Road Traffic Act 1994. However, the arresting garda had not correctly cited the empowering statutory provision when arresting the accused. The garda had purported to arrest the accused under "s 49(3) of the Road Traffic Act 1994". The accused claimed that this incorrect citation rendered the arrest invalid. In the High Court, Geoghegan J held that the only inference which could be drawn from the statutory citation given by the garda was that he was referring to and intended to arrest under s 49(8) of the Road Traffic Act 1961, even though he gave the citation incorrectly. While an arrested person must have knowledge of the reason for his arrest, on the facts of the case the accused knew the reason for his arrest sufficiently to render his arrest valid. Geoghegan J concluded:

> I ... take the view that the evidence that Sergeant Connolly informed the accused in layman's language that he was being arrested for drunk-driving was sufficient communication of the reason for the arrest and indeed I further agree with the suggestion of Blayney J that having regard to the fact that a breath test was taken and proved positive, it was not even necessary to state a reason. However, a reason which was sufficient was in fact stated.[758]

In *Farrelly v Devally*[759] Morris J reiterated the principle that the powers invested by the Oireachtas in the Garda Síochána are significant and thus a suspect is entitled to be informed of the nature and description of the statutory power which is being used to detain and search him.

Major arrest powers

Listed now are major arrest powers for the purpose of enabling analysis of when a power to deprive a suspect of liberty may be used. The relevant sections of the Criminal Law Act 1997 are now set out since section 4 of the Act sets out the basic rules for arrest without warrant. The section provides:

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754 *The People (DPP) v Patrick Anthony Walsh* (1989) 3 Frewen 260.
755 *Re O'Leighléis* [1960] IR 93.
756 *Mulligan v DPP* [2009] 1 IR 794, [2009] IEHC 334, [14].
757 [1998] 3 IR 62.
758 ibid, [67].
759 [1998] 4 IR 76.

4.(1) Subject to subsections (4) and (5), any person may arrest without warrant anyone who is or whom he or she, with reasonable cause, suspects to be in the act of committing an arrestable offence

(2) Subject to subsections (4) and (5), where an arrestable offence has been committed, any person may arrest without warrant anyone who is or whom he or she, with reasonable cause, suspects to be guilty of the offence.

(3) Where a member of the Garda Síochána, with reasonable cause, suspects that an arrestable offence has been committed, he or she may arrest without warrant anyone whom the member, with reasonable cause, suspects to be guilty of the offence.

(4) An arrest other than by a member of the Garda Síochána may only be effected by a person under subsection (1) or (2) where he or she, with reasonable cause, suspects that the person to be arrested by him or her would otherwise attempt to avoid, or is avoiding, arrest by a member of the Garda Síochána.

(5) A person who is arrested pursuant to this section by a person other than a member of the Garda Síochána shall be transferred into the custody of the Garda Síochána as soon as practicable.

(6) This section shall not affect the operation of any enactment restricting the institution of proceedings for an offence or prejudice any power of arrest conferred by law apart from this section.

Section 5 of the Act provides for arrest on warrant or order of committal:

5. A warrant for the arrest of a person or an order of committal may be executed by a member of the Garda Síochána notwithstanding that it is not in the member's possession at the time; but the warrant or order shall be shown to him or her as soon as practicable.

Section 6 of the Act deals with entry and search of premises in order to effect an arrest:

6.(1) For the purpose of arresting a person on foot of a warrant of arrest or an order of committal, a member of the Garda Síochána may enter (if need be, by use of reasonable force) and search any premises (including a dwelling) where the person is or where the member, with reasonable cause, suspects that person to be, and such warrant or order may be executed in accordance with section 5.

(2) For the purpose of arresting a person without a warrant for an arrestable offence a member of the Garda Síochána may enter (if need be, by use of reasonable force) and search any premises (including a dwelling) where that person is or where the member, with reasonable cause, suspects that person to be, and where the premises is a dwelling the member shall not, unless acting with the consent of an occupier of the dwelling or other person who appears to the member to be in charge of the dwelling, enter that dwelling unless –

(a) he or she or another such member has observed the person within or entering the dwelling, or

(b) he or she, with reasonable cause, suspects that before a warrant of arrest could be obtained the person will either abscond for the purpose of avoiding justice or will obstruct the course of justice, or

(c) he or she, with reasonable cause, suspects that before a warrant of arrest could be obtained the person would commit an arrestable offence, or

(d) the person ordinarily resides at that dwelling.

(3) Without prejudice to any express amendment or repeal made by this Act, this section shall not affect the operation of any enactment or rule of law relating to powers of search or powers of arrest.

Offences Against the State Act 1939, s 30[760]

Historically, among the most used statutory powers of arrest was s 30 of the Offences Against the State Act 1939. The power of arrest exists in respect of any offence committed under the Offences Against the State Acts 1939-1998 and in respect of any offence that is scheduled under the Act. These include firearms and explosives offences.[761] The inclusion of the former, in particular, means that the powers under sections 29 and 30 of the Offences Against the State Act 1939 are often used in the investigation of armed robbery and murder offences. While the title of the legislation implies that functions to guard the State against paramilitary violence, the Act is of general application, provided the powers are used in good faith and in accordance with its statutory purpose.[762] Other legislation provides for similarly wide powers but usually within a particular context.

Sections 29 and 30, as amended,[763] are now set out in full:

(1) In this section "an offence to which this section applies" means—

(a) an offence under this Act,

(b) an offence under the Criminal Law Act 1976,

(c) an offence which is for the time being a scheduled offence for the purposes of Part V of this Act,

(d) treason, or

(e) an offence of attempting or conspiring to commit, or inciting the commission of, an offence referred to in paragraph (a), (b) or (d).

(2) If a judge of the District Court is satisfied by information on oath of a member of the Garda Síochána not below the rank of sergeant that there are reasonable grounds for suspecting that evidence of, or relating to, the commission of an offence to which this section applies is to be found in any place, the judge may issue a warrant for the search of that place and any persons found at that place.

(3) Subject to subsections (4) and (5), if a member of the Garda Síochána not below the rank of superintendent is satisfied that there are reasonable grounds for suspecting that evidence of, or relating to, the commission of an offence to which this section applies is to be found in any place, the member may issue to a member of the Garda Síochána not below the rank of sergeant a warrant for the search of that place and any persons found at that place.

(4) A member of the Garda Síochána not below the rank of superintendant shall not issue a search warrant under this section unless he or she is satisfied—

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760 See generally, Mulloy, 'What suspicions justify a garda arrest under s 30 of the Offences Against the State Act, 1939?' (1993) 3 ICLJ 82.

761 The offences which are scheduled are:

(1) Offences under the Explosive Substances Act 1883;
(2) Offences under the Firearms Acts 1925-1971; and
(3) Offences under the Offences Against the State Acts, 1939-1998.

762 *The People (DPP) v Quilligan and O'Reilly* [1986] IR 495.

763 Section 29 was substituted by the Criminal Justice (Search Warrants) Act 2012, s1. Section 30, ss 4 was substituted by the Offences Against the State (Amendment) Act 1998, s 10 and ss 4C was amended by s 11 of the same Act. Section 30, ss 4D was inserted by the Criminal Justice Act 2006, s 187. Section 30, ss 3A, 4BA, 4BB and 4BC were inserted, and ss 4D was substituted, by s 21(1) of the Criminal Justice (Amendment) Act 2009.

(a) that the search warrant is necessary for the proper investigation of an offence to which this section applies, and

(b) that circumstances of urgency giving rise to the need for the immediate issue of the search warrant would render it impracticable to apply to a judge of the District Court under this section for the issue of the warrant.

(5) A member of the Garda Síochána not below the rank of superintendent may issue a search warrant under this section only if he or she is independent of the investigation of the offence in relation to which the search warrant is being sought.

(6) A search warrant under this section shall be expressed, and shall operate, to authorise the member of the Garda Síochána named in the warrant, accompanied by such members of the Garda Síochána or of the Defence Forces as the member considers necessary—

(a) to enter, at any time or times within one week of the date of issue of the warrant, on production if so requested of the warrant or a copy of it, and if necessary by the use of reasonable force, the place named in the warrant,

(b) to search it and any persons found at that place, and

(c) to seize anything found at that place, or anything found in the possession of a person present at that place at the time of the search, that that member reasonably believes to be evidence of, or relating to, the commission of an offence to which this section applies.

(7) Notwithstanding subsection (6), a search warrant issued by a member of the Garda Síochána not below the rank of superintendent under this section shall cease to have effect after a period of 48 hours has elapsed from the time of the issue of the warrant.

(8) A member of the Garda Síochána or of the Defence Forces acting under the authority of a search warrant under this section may—

(a) require any person present at the place where the search is being carried out to give to the member his or her name and address, and

(b) arrest without warrant any person who—

(i) obstructs or attempts to obstruct the member in the carrying out of his or her duties,

(ii) fails to comply with a requirement under paragraph (a), or

(iii) gives a name or address which the member has reasonable cause for believing is false or misleading.

(9) A person who obstructs or attempts to obstruct a member of the Garda Síochána or of the Defence Forces acting under the authority of a search warrant under this section, who fails to comply with a requirement under subsection (8)(a) or who gives a false or misleading name or address to the member shall be guilty of an offence and shall be liable on summary conviction to a class A fine or imprisonment for a term not exceeding 12 months or both.

(10) The power to issue a search warrant under this section is without prejudice to any other power conferred by statute to issue a warrant for the search of any place or person.

(11) A member of the Garda Síochána not below the rank of superintendent who issues a search warrant under this section shall, either at the time the warrant is issued or as soon as reasonably practicable thereafter, record in writing the grounds on which the warrant was issued, including how he or she was satisfied as to the matters referred to in subsection (4).

(12) In this section—

"independent of", in relation to the investigation of an offence, means not being in charge of, or involved in, that investigation;

"place" includes—

(a) a dwelling or a part thereof,

(b) a building or a part thereof,

(c) a vehicle, whether mechanically propelled or not,

(d) a vessel, whether sea-going or not,

(e) an aircraft, whether capable of operation or not, and

(f) a hovercraft.]The power of arrest in s 30 of the Offences Against the State Act 1939 in its modern form now reads:

30 (1) A member of the Garda Síochána (if he is not in uniform on production of his identification card if demanded) may without warrant stop, search, interrogate, and arrest any person, or do any one or more of those things in respect of any person, whom he suspects of having committed or being about to commit or being or having been concerned in the commission of an offence under any section or sub-section of this Act or an offence which is for the time being a scheduled offence for the purposes of Part V of this Act or whom he suspects of carrying a document relating to the commission or intended commission of any such offence as aforesaid or whom he suspects of being in possession of information relating to the commission or intended commission of any such offence as aforesaid.

(2) Any member of the Gárda Síochána (if he is not in uniform on production of his identification card if demanded) may, for the purpose of the exercise of any of the powers conferred by the next preceding sub-section of this section, stop and search (if necessary by force) any vehicle or any ship, boat, or other vessel which he suspects to contain a person whom he is empowered by the said sub-section to arrest without warrant.

(3) Whenever a person is arrested under this section, he may be removed to and detained in custody in a Gárda Síochána station, a prison, or some other convenient place for a period of twenty-four hours from the time of his arrest and may, if an officer of the Gárda Síochána not below the rank of Chief Superintendent so directs, be so detained for a further period of twenty-four hours.

[(3A) If at any time during the detention of a person pursuant to this section a member of the Garda Síochána, with reasonable cause, suspects that person of having committed an offence (the "other offence") referred to in subsection (1) of this section, being an offence other than the offence to which the detention relates, and—

(a) the member of the Garda Síochána then in charge of the Garda Síochána station, or

(b) in case the person is being detained in a place of detention, other than a Garda Síochána station, an officer of the Garda Síochána not below the rank of inspector who is not investigating the offence to which the detention relates or the other offence, has reasonable grounds for believing that the continued detention of the person is necessary for the proper investigation of the other offence, the person may continue to be detained in relation to the other offence as if that offence was the offence for which the person was originally detained, but nothing in this subsection authorises the detention of the person for a period that is longer than the period which is authorised by or under the other provisions of this section.]

[(4) An officer of the Garda Síochána not below the rank of superintendent may apply to a judge of the District Court for a warrant authorising the detention of a person detained pursuant to a direction under subsection (3) of this section for a further period not exceeding 24 hours if he has reasonable grounds for believing that such further detention is necessary for the proper investigation of the offence concerned.

(4A) On an application under subsection (4) of this section the judge concerned shall issue a warrant authorising the detention of the person to whom the application relates for a further period not exceeding 24 hours if, but only if, the judge is satisfied that such further detention is necessary for the proper investigation of the offence concerned and that the investigation is being conducted diligently and expeditiously.

(4B) On an application under subsection (4) of this section the person to whom the application relates shall be produced before the judge concerned and the judge shall hear any submissions made and consider any evidence adduced by or on behalf of the person and the officer of the Garda Síochána making the application.

[(4BA)

(a) Without prejudice to paragraph (b) of this subsection, where a judge hearing an application under subsection (4) of this section is satisfied, in order to avoid a risk of prejudice to the investigation concerned, that it is desirable to do so, he may—

(i) direct that the application be heard otherwise than in public, or

(ii) exclude from the Court during the hearing all persons except officers of the Court, persons directly concerned in the proceedings, bona fide representatives of the Press and such other persons as the Court may permit to remain.

(b) On the hearing of an application under subsection (4) of this section, the judge may, of his own motion or on application by the officer of the Garda Síochána making the application under that subsection (4), where it appears that—

(i) particular evidence to be given by any member of the Garda Síochána during the hearing (including evidence by way of answer to a question asked of the member in cross-examination) concerns steps that have been, or may be, taken in the course of any inquiry or investigation being conducted by the Garda Síochána with respect to the suspected involvement of the person to whom the application relates, or any other person, in the commission of the offence to which the detention relates or any other offence, and

(ii) the nature of those steps is such that the giving of that evidence concerning them could prejudice, in a material respect, the proper conducting of any foregoing inquiry or investigation, direct that, in the public interest, the particular evidence shall be given in the absence of every person, including the person to whom the application relates and any legal representative (whether of that person or the applicant), other than—

(I) the member or members whose attendance is necessary for the purpose of giving the evidence to the judge; and

(II) if the judge deems it appropriate, such one or more of the clerks of the Court as the judge determines.

(c) If, having heard such evidence given in that manner, the judge considers the disclosure of the matters to which that evidence relates would not have the effect referred to in

paragraph (b)(ii) of this subsection, the judge shall direct the evidence to be re-given in the presence of all the other persons (or, as the case may be, those of them not otherwise excluded from the Court under paragraph (a) of this subsection).

(d) No person shall publish or broadcast or cause to be published or broadcast any information about an application under subsection (4) of this section other than a statement of—

(i) the fact that the application has been made by the Garda Síochána in relation to a particular investigation, and

(ii) any decision resulting from the application.

(e) If any matter is published or broadcast in contravention of paragraph (d) of this subsection, the following persons, namely—

(i) in the case of a publication in a newspaper or periodical, any proprietor, any editor and any publisher of the newspaper or periodical,

(ii) in the case of any other publication, the person who publishes it, and

(iii) in the case of a broadcast, any person who transmits or provides the programme in which the broadcast is made and any person having functions in relation to the programme corresponding to those of the editor of a newspaper, shall be guilty of an offence and shall be liable—

(I) on summary conviction to a fine not exceeding €5,000 or to imprisonment for a term not exceeding 12 months or to both, or

(II) on conviction on indictment, to a fine not exceeding €50,000 or to imprisonment for a term not exceeding 3 years or to both.

(f) In this subsection—

"broadcast" means the transmission, relaying or distribution by wireless telegraphy, cable or the internet of communications, sounds, signs, visual images or signals, intended for direct reception by the general public whether such communications, sounds, signs, visual images or signals are actually received or not;

"publish" means publish, other than by way of broadcast, to the public or a portion of the public.]

[(4BB) Save where any rule of law requires such an issue to be determined by the Court, in an application under subsection (4) of this section no issue as to the lawfulness of the arrest or detention of the person to whom the application relates may be raised.]

[(4BC)

(a) In an application under subsection (4) of this section it shall not be necessary for a member of the Garda Síochána, other than the officer making the application, to give oral evidence for the purposes of the application and the latter officer may testify in relation to any matter within the knowledge of another member of the Garda Síochána that is relevant to the application notwithstanding that it is not within the personal knowledge of the officer.

(b) However, the Court hearing such an application may, if it considers it to be in the interests of justice to do so, direct that another member of the Garda Síochána give oral evidence and the Court may adjourn the hearing of the application for the purpose of receiving such evidence.]

(4C) A person detained under this section may, at any time during such detention, be charged before the District Court or a Special Criminal Court with an offence or be released by direction of an officer of the Garda Síochána and shall, if not so charged or released, be released at the expiration of the period of detention authorised by or under subsection (3) of this section or, as the case may be, that subsection and subsection (4A) of this section,] [or, in case the detention follows an arrest under a warrant issued pursuant to section 30A of this Act, by subsection (3) of this subsec-tion as substituted by the said section 30A.]

[(4D) If—

(a) an application is to be made, or is made, under subsection (4) of this section for a warrant authorising the detention for a further period of a person detained pursuant to a direction under subsection (3) of this section, and

(b) the period of detention under subsection (3) of this section has not expired at the time of the arrival of the person concerned at the court house for the purposes of the hearing of the application but would, but for this subsection, expire before, or during the hearing (including, if such should occur, any adjournment of the hearing), it shall be deemed not to expire until the final determination of the application; and, for purposes of this subsection—

(i) a certificate signed by the court clerk in attendance at the court house concerned stating the time of the arrival of the person concerned at that court house shall be evidence, until the contrary is shown, of the time of that person's arrival there;

(ii) "court house" includes any venue at which the hearing of the application takes place.]

(5) A member of the Gárda Síochána may do all or any of the following things in respect of a person detained under this section, that is to say:—

(a) demand of such person his name and address;

(b) search such person or cause him to be searched;

(c) photograph such person or cause him to be photographed;

(d) take, or cause to be taken, the fingerprints of such person.

(6) Every person who shall obstruct or impede the exercise in respect of him by a member of the Gárda Síochána of any of the powers conferred by the next preceding sub-section of this section or shall fail or refuse to give his name and address or shall give, in response to any such demand, a name or an address which is false or misleading shall be guilty of an offence under this section and shall be liable on summary conviction thereof to imprisonment for a term not exceeding six months

The section applies both to persons suspected of committing the relevant scheduled offences for a subversive motivation and to criminals engaged in such activities for motivations of profit, or otherwise.[764]

Linked offences

Section 30, in particular, extends to the power to arrest any person whom a garda suspects "of being in possession of information relating to the commission or intended commission" of a scheduled offence or an offence under the Acts. As with any power of arrest, it may not be abused. Statutory powers must be exercised in good faith for the purpose for which such powers were granted. It is easy to think of a tenuous connection between the commission of a serious, but not

764 *The People (DPP) v Walsh* [1986] IR 722; [1988] ILRM 137.

scheduled offence, and an offence which is scheduled for the purposes of s 30. Criminal damage is no longer scheduled, but under the guise of malicious damage it was a scheduled offence up to 1991. In *The People (DPP) v Walsh*,[765] the accused was arrested at a time when malicious damage was so scheduled. He was arrested for maliciously damaging the clothing in which the victim was clad when a knife penetrated the victim's body resulting in his death. Earlier, in *The State (Bowes) v FitzPatrick*[766] the justification for the use of s 30 was the malicious damaging of a knife which had occurred while it was being plunged into the victim's skull. Since murder was not, and is not now, a scheduled offence, these justifications were colourable devices to make the powers under s 30 available to the gardaí. Where, however, the offence for which the accused was arrested was in itself a substantial offence which justified that step being taken, then the arrest under s 30 need not be predominantly motivated by a desire to investigate a scheduled offence.[767]

In *The People (DPP) v Quilligan and O'Reilly*[768] the perpetrators of the offence smashed the door into the victims' dwelling, burst in and then savagely beat two pensioners, older men living alone in a remote farmhouse in County Cork. One died immediately and the other died in the county home within six months of the attack. The malicious damage offence in respect of which the suspects were arrested was, in effect, for smashing the lock on the farmhouse door in order to gain entry. The Supreme Court held that once arrested under s 30 a person may be questioned for any offence to which the scheduled offence is linked.[769] The lawfulness of the detention, or the extension of the detention, under s 30 is not dependent on the offence or the suspected offence which is the occasion for the detention being the dominant concern of the members of the Garda Síochána when they may wish to question a detained person in respect of another offence. The arresting officer, however, must be genuinely concerned with investigating a scheduled offence, albeit in the context of a more serious offence to which s 30 does not apply. What cannot lawfully be done is to arrest a person by virtue of the powers given in section 30 of the Offences Against the State Act 1939 simply to make him available for the investigation of some other offence.[770] In *The People (DPP) v Patrick Anthony Walsh*[771] Walsh J, for the Court of Criminal Appeal, explained the distinction:

> The charge for which this man was tried was for the stabbing of two ladies. The two ladies wore clothes at the time. Obviously when they were penetrated by a sharp instrument causing the stabbing the clothes would have been penetrated, so there was malicious damage to the clothes in the strict sense. Section 30 of the Offences Against the State Act 1939, is itself an extraordinary limitation on the rights of persons, who are about to be charged or may be charged in that they may be arrested and held for up to 48 hours without being charged or being brought before a court.
>
> In this particular case the prosecution relies here in this Court upon the decisions in *The People (DPP) v Quilligan* [1986] IR 495 and *The People (DPP) v Howley* [1989] ILRM 629. A close reading of these judgments would indicate that what the Court was dealing with in each case were matters which were quite serious in themselves and unconnected in time and place, to a greater or lesser extent, with the crime which was being charged. Each of those crimes was a substantial crime in the sense that it was worthy of being prosecuted on its own account and the garda in each case were generally pursuing the investigation and perhaps the ultimate solution of those offences.

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765 (1989) 3 Frewen 248.
766 [1987] ILRM 195.
767 *The People (DPP) v* Howley (1988) 3 Frewen 130; [1989] ILRM 629.
768 [1986] IR 495.
769 *The People (DPP) v Quilligan and O'Reilly* [1986] IR 495; [1987] ILRM 606.
770 *The People (DPP) v Howley* [1989] ILRM 629.
771 (1989) 3 Frewen 248.

> In the present case the matter is quite different. Here is a stabbing offence against a person and if the part of the body which was stabbed was clothed, there is nothing in the evidence here that would suggest that there was any genuine or serious investigation by the garda or that they were the least bit concerned about pursuing a case of malicious damage to clothing. What they were concerned with was pursuing a very serious case of the wounding of a very innocent person. This is not a case of the garda being deceitful or being engaged in trickery of any description. They have shown in the case itself and during the investigation of the case that they were very concerned. I think it is a case where they were mistaken as to the law. It is not correct that simply because something is within the Offences Against the State Act 1939, by reason of it being a scheduled offence, that such an act automatically brings into play section 30 of the Act of 1939. In this case it did not. Both *The People (DPP) v Quilligan* and *The People (DPP) v Howley* make it quite clear that the use of section 30 must not be either a pretext or a colourable device for arrest. That means that in effect it must be a genuine investigation of a genuine offence of malicious damage which had been treated genuinely as something which was worthy of an investigation in itself. No such evidence was forthcoming in this case.

Detention[772]

Powers of detention, following upon arrest, are the means whereby a suspect is questioned and evidence is put to him or her for comment as to involvement with a crime. The main powers of detention are consequently set out.

Section 4 detention

Section 4 of the Criminal Justice Act 1984 allows for the detention, for up to twelve hours, of any person who has been arrested in good faith in respect of the commission of an offence. Section 4 authorises detention where the offence upon which the person has been arrested carries at least a maximum term of imprisonment of five years. Section 4, as amended, is applicable to what is essentially the new formulation of a felony, that is an arrestable offence. Hence section 4(1) provides:

> 1) This section applies to any offence for which a person of full age and capacity and not previously convicted may, under or by virtue of any enactment or the common law, be punished by imprisonment for a term of five years or by a more severe penalty and to an attempt to commit any such offence.

Section 4(2) sets out the circumstances in which an arrested person may be detained:

> (a) Where a member of the Garda Síochána arrests without warrant, whether in a Garda Síochána station or elsewhere, a person whom he or she, with reasonable cause, suspects of having committed an offence to which this section applies, the person—
>
> > (i) if not already in a Garda Síochána station, may be taken to and detained in a Garda Síochána station, or

[772] See generally Keane, 'Detention Without Charge and the Criminal Justice (Drug Trafficking) Act 1996' (1997) 7 ICLJ 1; Kevin Sweeney, 'The questioning of criminal suspects in Ireland' (2015) 25(2) ICLJ 37-44.

> (ii) if he or she is arrested in a Garda Síochána station, may be detained in the station, for such period as is authorised by this section if the member of the Garda Síochána in charge of the station to which the person is taken on arrest or in which he or she is arrested has at the time of the person's arrival at the station or his or her arrest in the station, as may be appropriate, reasonable grounds for believing that his or her detention is necessary for the proper investigation of the offence.
>
> (b) Where a member of the Garda Síochána arrests a person pursuant to an authority of a judge of the District Court under section 10(1), the person may be taken to and detained in a Garda Síochána station for such period as is authorised by this section if the member of the Garda Síochána in charge of the station to which the person is taken on arrest has at the time of the person's arrival at the station reasonable grounds for believing that his or her detention is necessary for the proper investigation of the offence.

Section 4(3) sets out the period for which a person may be detained. Prior to the enactment of the 1994 Act, the period between arrest and bringing the person before a court, which had to be done at the first practicable opportunity, could be used for questioning a suspect. Sometimes arrests might be made when the local court was not sitting in order to increase the time for questioning or other instances occurred where the powers under section 30 of the Offences Against the State Act were used in substitution for this opportunity. Section 4(3) puts matters on a more realistic footing and includes powers to detain and to extend or suspend detention:

> (3)(a) The period for which a person so arrested may be detained shall, subject to the provisions of this section, not exceed six hours from the time of his arrest.
>
> (b) An officer of the Garda Síochána not below the rank of superintendent may direct that a person detained pursuant to subsection (2) be detained for a further period not exceeding six hours if he has reasonable grounds for believ-ing that such further detention is necessary for the proper investigation of the offence.
>
> (bb) A member of the Garda Síochána not below the rank of chief superintendent may direct that a person detained pursuant to a direction under paragraph (b) be detained for a further period not exceeding twelve hours if he or she has reasonable grounds for believing that such further detention is necessary for the proper investigation of the offence concerned.
>
> (c) A direction under [paragraph (b) or (bb)] may be given orally or in writing and if given orally shall be recorded in writing as soon as practicable.

The suspension provision in section 4(3A) sets out an arrest power enabling detention to be continued by suspending the period of detention during the time when it first continued. This power exists because it may be that during the detention it may emerge that some investigation is necessary and that the results of this may need to be put to the suspect. Hence, the circumstances in which a suspension may occur are set out:

> (3A)(a) Notwithstanding the generality of subsection (3), if a person is detained pursuant to this section in respect of a relevant offence, the member of the Garda Síochána in charge of the Garda Síochána station where the person is being detained may, at any time during the detention, where the member has reasonable grounds for believing that it is necessary for the purpose of permitting enquiries or investigations to be made for the further and proper investigation of the offence concerned, suspend the detention of the person.

(b) Where the member of the Garda Síochána in charge of the Garda Síochána station suspends a person's detention under this subsection, the person shall, subject to subsection (5A), be released from custody forthwith unless his or her detention is authorised apart from this Act.

Under section 4 (3B), a suspect's detention in respect of the offence for which he or she was arrested may be suspended for no more than two occasions. The total period of suspension cannot exceed four months from the date of the first suspension. Return to custody for the purposes of question occurs by notice in writing. The logistics of this are set out in section 4(3B), (3C), (3D), (3E) and (3F) as follows:

(b) The total period of time for which a person's detention may be suspended shall not in any case exceed a period of 4 months from the date on which the detention was first suspended.

(c) Subject to paragraph (d), a person whose detention is suspended under subsection (3A) shall return to such Garda Síochána station at such date and time as is specified by notice in writing given to him or her under subsection (3C) or at such other date and time or Garda Síochána station as may be notified to him or her in writing under subsection (3D).

(d) Where, in the case of a person whose detention is suspended under subsection (3A)—

(i) his or her detention is continued in respect of another offence, and

(ii) the total period of detention permissible under subsection (9) is reached during that continuation of detention, the member of the Garda Síochána in charge of the Garda Síochána station concerned shall give the person concerned notice in writing or cause him or her to be given notice in writing of that fact, and the notice under subsection (3C) or (3D), as the case may be, shall be deemed to be withdrawn accordingly.

(3C)(a) Where a person's detention is suspended under subsection (3A), the member of the Garda Síochána in charge of the Garda Síochána station concerned shall give the person notice in writing or cause him or her to be given notice in writing—

(i) that his or her detention is being suspended,

(ii) of the Garda Síochána station and of the date and time on which he or she is required to return to such station for the continuation of the detention concerned, and

(iii) of the consequences under sections 4A and 4B of failing to return in accordance with subsection (3B).

(b) A member of the Garda Síochána when giving the notice to any person under paragraph (a) shall explain to him or her orally the effect of the notice.

(3D)(a) Subject to subsection (3B)(b), a member of the Garda Síochána not below the rank of inspector may, in respect of a person whose detention has been suspended under subsection (3A), issue a notice in writing to the person appointing a new date and time or a different Garda Síochána station for the person's return for the continuation of the detention concerned where that member has reasonable grounds for believing that it is

necessary for the proper investigation of the offence concerned to so change the return date and time or the Garda Síochána station, as the case may be.

(b) The person in respect of whom the notice under paragraph (a) is issued shall be given such notice of the new date and time or Garda Síochána station appointed under that paragraph as shall be prescribed in regulations made by the Minister under section 4C.

(c) Only one notice under paragraph (a) may be issued to a person during each period of suspension, but nothing in this paragraph shall prejudice the exercise of the power to issue such notice in the circumstances referred to in paragraph (d).

(d) A member of the Garda Síochána not below the rank of inspector may—

(i) if a person whose detention is suspended under subsection (3A) so requests, and

(ii) the member is satisfied that there is good and sufficient reason for doing so,

issue a notice under paragraph (a).

(3E)(a) Where a person returns in accordance with subsection (3B) or is returned under section 4A to the Garda Síochána station—

(i) his or her detention shall be continued in accordance with this section for such period as is authorised by this section, and

(ii) the period of time commencing on his or her return to the Garda Síochána station for the continuation of the detention concerned shall be included in reckoning a period of detention permitted by this section.

(b) Where, however, the member of the Garda Síochána in charge of the Garda Síochána station concerned no longer has, at the time of the person's return, reasonable grounds for believing that the person's continued detention is necessary for the proper investigation of the offence, the person shall, subject to subsection (5A), be released from custody forthwith unless his or her detention is otherwise authorised by law.

Section 4(3F) deals with the interaction of arrests for a particular offence followed by detention and suspension, and the arrest of the same suspect for a different offence. In essence, the suspension of one detention does not affect the ability of the authorities to investigate subsequent offences:

(3F) For the avoidance of doubt it is hereby declared that—

(a) where a person's detention is suspended under subsection (3A), the detention shall remain suspended until such time as it is continued under subsection (3E) and, accordingly, the period of time during which the detention remains suspended shall be excluded in reckoning a period of detention permitted by this section,

(b) where a person whose detention is suspended under subsection (3A) in respect of an offence, is subsequently arrested and detained ("subsequent arrest and detention") in respect of another offence, the subsequent arrest and detention shall not operate to affect

> the detention which was suspended and it shall remain suspended until such time as it is continued under subsection (3E),
>
> (c) subject to subsection (9), where a person's detention is suspended under subsection (3A) in respect of an offence but his or her detention is continued under subsection (5A) in respect of another offence, the continuation of the detention under subsection (5A) shall not operate to affect the detention which was suspended in respect of the first mentioned offence and the detention shall in so far as it relates to the first mentioned offence remain suspended until such time as it is continued under subsection (3E).

Sections 4(4) and (5) ensure that the time of detention is properly used. In essence, a person cannot arrested and detained for the purpose of harassment. Arrest and detention have to be on reasonable grounds. That principle continues throughout the deprivation of liberty. While the circumstance is unlikely, if the suspicion dissipates, the suspect must be released:

> (4) If at any time during the detention of a person pursuant to this section there are no longer reasonable grounds for suspecting that he has committed an offence to which this section applies, he shall be released from custody forthwith unless his detention is authorised apart from this Act.
>
> (5) If at any time during the detention of a person pursuant to this section there are no longer reasonable grounds for believing that his detention is necessary for the proper investigation of the offence to which the detention relates, he shall, subject to subsection [5A], be released from custody forthwith unless he is charged or caused to be charged with an offence and is brought before a court as soon as may be in connection with such charge or his detention is authorised apart from this Act. (5A) If at any time during the detention of a person pursuant to this section a member of the Garda Síochána, with reasonable cause, suspects that person of having committed an offence to which this section applies, other than an offence to which the detention relates or an offence in respect of which the person's detention has been suspended under subsection (3A), and the member of the Garda Síochána then in charge of the Garda Síochána station has reasonable grounds for believing that the continued detention of that person is necessary for the proper investigation of that other offence, the person may continue to be detained in relation to the other offence as if that offence was the offence for which the person was originally detained.

An interrogation technique that is unfair to the suspect, is also likely to yield information that is unreliable because it is simply given to end an uncomfortable situation, for example that of keeping a person awake. In general, a suspect must be given the opportunity to rest for a reasonable period during the night. This is reckoned in legislative terms, with s 4(6) forbidding questioning in the dead of night:

> (6)(a) Subject to paragraphs (c) and (d), if a person is being detained pursuant to this section in a Garda Síochána station between midnight and 8 a.m.—
>
> (i) any questioning of the person for the purpose of the investigation shall be suspended during that period,
>
> (ii) such period of time shall be excluded in reckoning a period of detention permitted by this section, and
>
> (iii) the powers conferred by section 6 shall not be exercised during the period of suspension.

(b) The member of the Garda Síochána in charge of the Garda Síochána station shall inform, or cause to be informed, the detained person that he or she may object to the suspension of questioning between midnight and 8 a.m.

(c) Paragraph (a) shall not have effect if the detained person objects to the suspension of questioning under that paragraph and such objection shall be recorded in writing or by electronic or other similar means.

Shutting down questioning in situations where other rights are impacted upon in an immediate manner due to the requirement of rest after midnight can be avoided in circumstances that the subsection specifies as thus:

(d) A member of the Garda Síochána in charge of a Garda Síochána station may authorise the questioning of a person detained pursuant to this section between the hours of midnight and 8 a.m. where the member concerned has reasonable grounds for believing that to suspend the questioning would involve a risk of—

(i) interference with, or injury to other persons,

(ii) serious loss of, or damage to, property,

(iii) the destruction of, or interference with, evidence,

(iv) accomplices being alerted or the securing of their apprehension being made more difficult, or

(v) hindering the recovery of property obtained as a result of an offence or the recovery of the value of any proceeds of an offence.

(e) If at any time during which the authorisation is in effect, the member of the Garda Síochána in charge of the Garda Síochána station believes there are no longer reasonable grounds for the authorisation, it shall be withdrawn.

(f) Where an authorisation is given under paragraph (d) it shall have effect from the time of the giving of a notice in the prescribed form under paragraph (g) until 8 a.m. or until the time of the giving of a subsequent notice in the prescribed form under paragraph (h), as the case may be, and—

(i) the period during which the authorisation has effect shall be included in reckoning a period of detention permitted by this section, and

(ii) the powers conferred by section 6 shall be exercisable in respect of the person concerned.

(g) Where an authorisation is given under paragraph (d), the member of the Garda Síochána in charge of the Garda Síochána station shall give a notice in writing in the prescribed form to the detained person which shall—

(i) state that an authorisation has been given,

(ii) specify the time at which the authorisation was given together with the time at which the notice was given,

and that member shall explain to the person orally the effect of the notice so given.

(h) Where an authorisation is withdrawn under paragraph (e), the member of the Garda Síochána in charge of the Garda Síochána station shall give a notice in writing in the prescribed form to the detained person which shall—

(i) state that the authorisation has been withdrawn, and

(ii) specify the time at which the authorisation was withdrawn together with the time at which the notice was given,

and that member shall explain to the person orally the effect of the notice so given.

(i) An authorisation or a withdrawal of an authorisation under this subsection may be given orally or in writing and if given orally shall be recorded in writing as soon as practicable.

(j) Nothing in paragraph (a) shall operate to prevent the powers conferred by section 6 being exercised in respect of a person who is arrested and detained between the hours of midnight and 8 a.m.

(k) In this subsection "prescribed" means prescribed by the Minister in regulations made by the Minister under section 7.

The section requires that persons under twelve years of age should not be detained for questioning:

(7)(a) Subject to paragraph (b), subsection (2) shall not apply to a person below the age of twelve years.

(b) If the member in charge of the Garda Síochána station in which a person is detained has reasonable grounds for believing that the person is not below the age of twelve years the subsection shall apply to him as if he were of that age, provided that, where such member ascertains or has reasonable grounds for believing that the person is below that age, he shall be released from custody forthwith unless his detention is authorised apart from this Act.

Medical attention must be provided where this is reasonably required:

(8) Where it appears to a member of the Garda Síochána that a person arrested in the circumstances mentioned in subsection (2) is in need of medical attention, or where during his detention it comes to notice that he is in need of such attention, and he is taken for that purpose to a hospital or other suitable place, the time before his arrival at the station or the time during which he is absent from the station, as the case may be, shall be excluded in reckoning a period of detention permitted by this section.

(8B)(a) Where a medical practitioner—

(i) has, at the request of a member of the Garda Síochána, assessed the condition of a person detained pursuant to subsection (2), and

(ii) certifies that the person, although the person's condition is not such as to require the person's hospitalisation, is unfit for any questioning for the purpose of the investigation for a specified period, no questioning of the person shall take place during that period and that period shall be excluded in reckoning a period of detention permitted by this section.

(b) The period that may be specified in a certificate provided under paragraph (a) by a medical practitioner shall not exceed 6 hours.

> (c) A certificate may be provided under paragraph (a) on one occasion only in respect of the particular person detained pursuant to subsection (2).

If an application for an inquiry into the lawfulness of the suspects detention is taken on his behalf under Article 40.4 of the Constitution, the section provides that any court appearance does not take from the statutory period of detention.

> (8A) Where a person detained pursuant to subsection (2) is taken to a court in connection with an application relating to the lawfulness of his detention, the time during which he is absent from the station for that purpose shall be excluded in reckoning a period of detention permitted by this section.

For the purpose of clarity, the maximum period of detention for investigation is set at 24 hours under section 4:

> (9) To avoid doubt, it is hereby declared that a person who is being detained pursuant to subsection (2) in connection with an offence shall in no case be held in detention (whether for the investigation of that or any other offence) [for longer than twenty four hours] from the time of his arrest, not including any period which is to be excluded under subsection (3F)(a), (6), (8), (8A) or (8B) or section 4A or 5A in reckoning a period of detention.

Section 4 does not affect the operation of other powers, including statutory powers of arrest or common law powers:

> (10) Nothing in this section shall affect the operation of section 30 of the [Offences Against the State Act] 1939.
> (11) The powers conferred by this section are without prejudice to any powers exercisable by a member of the Garda Síochána in relation to offences other than offences to which this section applies.
> (12) In this section "relevant offence" has the meaning it has in the Criminal Justice Act 2011.[773]

Custody Regulations

While in custody, under this section, the accused's rights are protected by the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987.[774] A full explanation of the terms of these regulations is outside the scope of this work. Nonetheless, a summary of the relevant provisions is provided in the chapter entitled Hearsay and Confessions.

Breach of custody regulations

Section 7(3) of the Criminal Justice Act 1984 provides:

> A failure on the part of any member of the Garda Síochána to observe any provision of the regulations shall not of itself render that person liable to any criminal or civil proceedings or

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[773] As to when a person should be released from custody under this provision see *The People (DPP) v Reddin and Butler* [1995] 3 IR 560.
[774] SI 119/1987.

> of itself affect the lawfulness of the custody of the detained person or the admissibility in evidence of any statement made by him.

In *The People (DPP) v Reddin and Butler*,[775] the Court of Criminal Appeal admitted a statement where the period of interrogation had exceeded four hours with the consent of the accused. The later case of *The People (DPP) v Crowe*[776] concerned a menacing voice message sent to a member of An Garda Síochána by telephone. The Garda in question identified the accused's voice from a videotaped interview of him conducted by another garda. The DPP argued before the Court of Appeal that the prohibition against using electronically recorded interviews for identification applied only to visual and not vocal identification, and that the Court had discretion to excuse any breach of reg. 17 of the Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997 (S.I. No. 74) under section 7(3). In rejecting this argument, the Court of Appeal held:

The court is reinforced in its view that minimum standards of fairness were not achieved in circumstances where it is satisfied that there was indeed a breach of reg. 17 of the Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997. The court considers that, having regard to the overall unfairness of the voice identification procedure engaged in, this is not an appropriate case in which to exercise its discretion under s. 7(3) of the Criminal Justice Act 1984 to forgive the breach.[777]

> Accordingly, in determining whether or not minimum standards of fairness can be met in admitting before a jury voice identification evidence or voice recognition evidence which is clear and cogent in its terms, the trial judge will concerned to ascertain to what extent the proposed evidence is capable of being adequately tested in the crucible of cross-examination so that infirmities with the potential to affect its reliability might be properly elucidated and exposed before the jury. In that regard, it will be a relevant, though not necessarily dispositive, enquiry to ascertain whether procedural safeguards that might have assisted in that regard could reasonably have been expected to have been put in place in the circumstances of the case, and whether and to what extent they were in fact utilised. If the trial judge can be satisfied that the controversial evidence is capable of being adequately tested then it may be safely admitted providing a appropriate warning of the Casey / Turnbull type, adapted to the context of voice identification or recognition, is given in due course in the judge's charge. If the trial judge concludes that he cannot be so satisfied, and that the circumstances in which the evidence was obtained were so egregiously unfair that no warning could suffice to guard against the risk of miscarriage of justice, then the proper course would be to exclude it.[778]

Criminal Justice (Drug Trafficking) Act 1996

Drug offences and other arrest powers

Further powers of detention are contained in the Criminal Justice (Drug Trafficking) Act 1996. A controlled drug is defined as in the Misuse of Drugs Acts 1977 as amended. A drug trafficking offence is as defined in s 3 of the Criminal Justice Act 1994.The relevant powers of detention are set out in section 2 of the Act. As amended by s 10 of the Criminal Justice Act 2006:

(a) Where a member of the Garda Síochána arrests without warrant a person ("the arrested person") whom he or she, with reasonable cause, suspects of having committed a drug trafficking offence, the arrested person –

(i) if not already in a Garda Síochána station, may be taken to a Garda Síochána station, and

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[775] [1995] 3 IR 560.
[776] [2015] 3 IR 329.
[777] ibid, [69].
[778] [2015] IECA 312, [52].

(ii) if he or she is arrested in a Garda Síochána station, may be detained in the station, for a period or periods authorised by subsection (2) if the member of the Garda Síochána in charge of the station to which the arrested person is taken on arrest or in which he or she is arrested has at the time of the arrested person's arrival at the station or his or her arrest in the station, as may be appropriate, reasonable grounds for believing that his or her detention is necessary for the proper investigation of the offence.

(b) Without prejudice to paragraph (a), where a member of the Garda Síochána suspects an arrested person of concealing in his or her person a controlled drug, that person may –

(i) be taken to a place of detention, and

(ii) if a member of the Garda Síochána not below the rank of inspector who is not investigating the drug trafficking offence has, at the time of that person's arrival there, reasonable grounds for believing that his or her detention is necessary for the proper investigation of the drug trafficking offence, be detained in that place of detention for a period or periods authorised by subsection (2).

Section 2 sets out the powers of detention. These start with an initial period of 6 hours but that may be extended by a superintendent for another 18 hours where that officer considers that there are reasonable grounds for believing that such further detention is necessary for the proper investigation of the offence. Section 2(2) is now set out:

(a) The period for which a person may be detained under subsection (1) shall, subject to the provisions of this subsection, not exceed 6 hours from the time of his or her arrest.

(b) An officer of the Garda Síochána not below the rank of superintendent may direct that a person detained under subsection (1) be detained for a further period not exceeding 18 hours if he or she has reasonable grounds for believing that such further detention is necessary for the proper investigation of the offence concerned.

(c) An officer of the Garda Síochána not below the rank of chief superintendent may direct that a person detained pursuant to a direction under paragraph (b) be detained for a further period not exceeding 24 hours, if he or she has reasonable grounds for believing that such further detention is necessary for the proper investigation of the offence concerned.

(d) A direction under paragraph (b) or (c) may be given orally or in writing and, if given orally, shall be recorded in writing as soon as practicable.

(e) Where a direction has been given under paragraph (b) or (c), the fact that the direction was given, the date and time when it was given and the name and rank of the officer of the Garda Síochána who gave it shall be recorded.

(f) The direction or, if it was given orally, the written record of it shall be signed by the officer giving it and –

(i) shall state the date and time when it was given, the officer's name and rank and that the officer had reasonable grounds for believing that such further detention was necessary for the proper investigation of the offence concerned, and

(ii) shall be attached to and form part of the custody record (within the meaning of the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987) in respect of the person concerned.

Such detention may be further extended but only by a judge. This arises under section 2(2)(g) and such a decision may be scrutinised at a later criminal trial as to the reasons given to the judge for

the purpose of determining if the decision was arrived at in accordance with whatever requirement of reasonableness distinguishes the statutory formula in question. It is unnecessary for the prosecution to call the judge and the record of the court proves itself if it is an official copy.[779]

(g)

(i) An officer of the Garda Síochána not below the rank of chief superintendent may apply to a judge of the Circuit Court or a judge of the District Court for a warrant authorising the detention of a person detained pursuant to a direction under paragraph (c) for a further period not exceeding 72 hours if he or she has reasonable grounds for believing that such further detention is necessary for the proper investigation of the offence concerned.

(ii) On an application under subparagraph (i) the judge concerned shall issue a warrant authorising the detention of the person to whom the application relates for a further period not exceeding 72 hours if, but only if, the judge is satisfied that such further detention is necessary for the proper investigation of the offence concerned and that the investigation is being conducted diligently and expeditiously.

(h)

(i) An officer of the Garda Síochána not below the rank of chief superintendent may apply to a judge of the Circuit Court or a judge of the District Court for a warrant authorising the detention of a person detained under a warrant issued pursuant to paragraph (g)(ii) for a further period not exceeding 48 hours, if he or she has reasonable grounds for believing that such further detention is necessary for the proper investigation of the offence concerned.

(ii) On an application under subparagraph (i) the judge concerned shall issue a warrant authorising the detention of the person to whom the application relates for a further period not exceeding 48 hours if, but only if, the judge is satisfied that such further detention is necessary for the proper investigation of the offence concerned and that the investigation is being conducted diligently and expeditiously.

Certain other formalities are required under the section. Hence, it is necessary under ss 3 to produce the suspect before the court. Perhaps the point of that is that the process of the extension of detention should take place within a public forum. Such an approach also obviates any suggestion that a suspect has been taken and squirreled away out of sight for the purposes of dubious interrogation practices. That being said, under ss 3A a judge hearing the application has the discretion to alter how the hearing proceeds in order to avoid a risk of prejudice to the investigation concerned. This may include deciding whether the application is heard in public, excluding certain persons from attending the hearing and setting restrictions as to the publication of information.

> (3) On an application under subsection (2) the person to whom the application relates shall be produced before the judge concerned and the judge shall hear any submissions made and consider any evidence adduced by or on behalf of the person and the officer of the Garda Síochána making the application.

Where reasonable grounds for detaining the person no longer exist, the suspect should be released by the judge. Similarly, the custody officer should require the release of a detained person where reasonable grounds no longer exist. Where the investigation comes to a point where all checking

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779 *Byrne v Grey* [1988] IR 31; *Dun Laoghaire Rathdown County Council v Westwood Club Ltd* [2019] IESC 43. Contra see The *People (DPP) v Power* [2018] IECA 119.

has been done and it is no longer justified reasonably to detain the arrestee, that person should be charged or if reasonable suspicions have dissipated, released. Here are subsections 4 and 5:

> (4) When issuing a warrant under subsection (2) the judge concerned may order that the person concerned be brought before a judge of the Circuit Court or a judge of the District Court at a specified time or times during the period of detention specified in the warrant and if, upon the person's being so brought before such a judge, he or she is not satisfied that the person's detention is justified, the judge shall revoke the warrant and order the immediate release from custody of the person.
>
> (5) If at any time during the detention of a person pursuant to this section there are no longer reasonable grounds for believing that his or her detention is necessary for the proper investigation of the offence to which the detention relates, he or she shall, subject to subsection (6), be released from custody forthwith unless he or she is charged or caused to be charged with an offence and is brought before a court as soon as may be in connection with such charge or his or her detention is authorised apart from this Act.

Subsection 6 contains a specific provision to deal with a situation where arrest on one crime that is actionable under the section results in the dissipation of reasonable suspicion but where another crime is reasonably suspected:

> (6) If at any time during the detention of a person pursuant to this section a member of the Garda Síochána, with reasonable cause, suspects that person of having committed a drug trafficking offence other than the offence to which the detention relates and –
>
> (a) the member of the Garda Síochána then in charge of the Garda Síochána station, or
>
> (b) in case the person is being detained in a place of detention, a member of the Garda Síochána not below the rank of inspector who is not investigating the offence to which the detention relates or the other offence,
>
> has reasonable grounds for believing that the continued detention of the person is necessary for the proper investigation of that other offence, the person may continue to be detained in relation to the other offence as if that offence was the offence for which the person was originally detained.

The limit on such detention is 168 hours. Hence, subsection 7 provides:

> (7) To avoid doubt, it is hereby declared that a person shall not be detained pursuant to this section for more than 168 hours from the time of his or her arrest, not including any period which is to be excluded under section 4(8) of the Act of 1984 (as applied by section 5) in reckoning a period of detention.

One of the abuses possible under totalitarian regimes was that while arrest powers seemed limited by the letter of the law, rearrest was not forbidden based on the same foundation of suspicion. Section 4 dispenses with the possibility of rearrest save where there is further information. On such an arrest, section 4(3) provides for the application of the safeguards in section 2 to be applied with the necessary modifications. Section 4, as amended,[780] reads:

> (1) Where a person arrested on suspicion of having committed an offence is detained pursuant to section 2 and is released without any charge having been made against him or her, he or she shall not—
>
> (a) be arrested again in connection with the offence to which the detention related, or

[780] Section 4, ss 1 and 1A were inserted by s 22(2) of the Criminal Justice (Amendment) Act 2009. Section 4, ss 3(a) was inserted by s10 of the Criminal Justice Act 2006.

(b) be arrested for any other offence of which, at the time of the first arrest, the member of the Garda Síochána by whom he or she was arrested suspected, or ought reasonably to have suspected, him or her of having committed, except on the authority of a warrant issued by a judge of the Circuit Court or the District Court who is satisfied on information supplied on oath by a member of the Garda Sóochána not below the rank of superintendent that either of the following cases apply, namely—

(i) further information has come to the knowledge of the Garda Síochána since the person's release as to the person's suspected participation in the offence for which his or her arrest is sought,

(ii) notwithstanding that the Garda Síochána had knowledge, prior to his or her release, of the person's suspected participation in the offence for which his or her arrest is sought, the questioning of the person in relation to that offence, prior to his or her release, would not have been in the interests of the proper investigation of the offence.

(1A) An application for a warrant under this section shall be heard otherwise than in public.

(2) When issuing a warrant under subsection (1), the judge concerned may order that the person concerned be brought before a judge of the Circuit Court or a judge of the District Court on arrest or at any specified time or times during the period of detention authorised by section 2 as applied by subsection (3) and if, upon the person's being so brought before such a judge, he or she is not satisfied that the person's detention is justified, the judge shall revoke the warrant and order the immediate release from custody of the person.

(3) Section 2 shall apply to a person arrested in connection with an offence to which that section relates under a warrant issued pursuant to subsection (1), as it applies to a person to whom that section applies, with the following and any other necessary modifications:

(a) Where a member of the Garda Síchána arrests a person (an "arrested person") under a warrant issued pursuant to section 4(1), the arrested person may be taken to and detained in a Garda Síochána station for a period or periods authorised by subsection (2) if the member of the Garda Síochána in charge of the station to which the arrested person is taken on arrest has at the time of the arrested person's arrival at the station reasonable grounds for believing that his or her detention is necessary for the proper investigation of the offence.

(b) the substitution for paragraphs (c) and (d) in subsection (2) of the following paragraphs:

"(c) An officer of the Garda Síochána not below the rank of chief superintendent may apply to a judge of the Circuit Court or a judge of the District Court for a warrant authorising the detention of a person detained under paragraph (b) for a further period not exceeding 24 hours if he or she has reasonable grounds for believing that such further detention is necessary for the proper investigation of the offence concerned.

(d) On an application under paragraph (c) the judge concerned shall issue a warrant authorising the detention of the person to whom the application relates for a further period not exceeding 24 hours if, but only if, the judge is satisfied that such further detention is necessary for the proper investigation of the offence concerned and that the investigation is being conducted diligently and expeditiously."

and

> (c) the substitution in paragraph (g)(i) of subsection (2) for "pursuant to a direction under paragraph (c)" of "under a warrant issued pursuant to paragraph (d)".

Further, there is a prohibition of a similar kind against arbitrary rearrest under section 4(6), which reads thus:

> (6) Where a person who has been arrested under section 30 of the Act of 1939 or detained under section 4 of the Act of 1984 in connection with an offence is released without any charge having been made against him or her, he or she shall not be detained pursuant to section 2 –
>
> (a) in connection with the first-mentioned offence, or
>
> (b) in connection with an offence to which section 2 relates which, at the time of the first arrest, the member of the Garda Síochána by whom he or she was arrested suspected, or ought reasonably to have suspected, him or her of having committed.

Under subsection 4(4) the rights of the arrestee under section 2 apply whether that section relates to the arrest or not. All have the right to be treated in an equal manner. Further, section 4(5) explicitly provides for the equality of such treatment:

> (4) A person arrested in connection with an offence other than one to which section 2 relates, under a warrant issued pursuant to subsection (1), shall, subject to subsection (2), be dealt with under section 4 of the Act of 1984 in like manner as a person arrested without warrant to whom the said section 4 applies.
>
> (5) Notwithstanding subsection (1), a person to whom that subsection relates may be arrested for any offence for the purpose of charging him or her with that offence forthwith.

The provisions of the foregoing Act are self-explanatory. They have re-introduced seven-day detention, but extensions beyond two days are only given on the authorisation of a judge. Seven-day detention was last introduced into Irish law in 1977 with the Criminal Justice Act of that year,[781] but prior to this Act, had long since lapsed. Explicit safeguards are, however, built into the legislation.

Subsection 4 was considered by the High Court in *the People (DPP) v Early*.[782] This case concerned a situation where the detention period was extended under s 2(2) of the 1996 Act by a District Court judge. It then transpired that the Judge was not a nominated judge for the purposes of the Act and had no jurisdiction to extend the detention. The suspects were then released and rearrested under s 4(1) of the 1996 Act. However, the provisions of that section had not be satisfied (that being rearrest on foot of new information) and it was ordered that the suspects be rereleased. The suspects were then arrested pursuant to s 4(5) of the 1996. The question facing the High Court in this case concerned the interaction for s 4(1) and 4(5); whether re-arrest could only be affected under s 4(1) and whether that section overrode s 4(5). McGuinness J, taking a practical approach, differentiated s 4(1) and s 4(5). She found that an arrest under s 4(1) was a re-arrest for the purpose of further detention and questioning, justified by new information. Whereas, an arrest under s 4(5) was for the purpose of charging the suspect and bring them to trial. As such the suspects could be arrested under s 4(5). In an *obiter* comment, McGuinness J clearly delineated that it was the role of the High Court, not the District Court, to determine the legality of custody.[783]

A similarly practical approach to rearrest was seen in *Massoud v Judge Watkins*.[784] A husband and wife were arrested for false pretences pursuant to the Larceny Act and detained under s 4 of the

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[781] See *Re The Criminal Justice Bill 1977* [1977] IR 159; 111 ILTR 29.
[782] [1997] IEHC 179; [1998] 3 IR 158.
[783] ibid, 171.
[784] [2004] IEHC 434; [2004] IEHC 435

Criminal Justice Act 1996. The period of detention was extended. The pair were released and advised that following their release, they would be rearrested for the purpose of charge. Rearrest did so occur virtually immediately and the pair were charged with conspiracy to defraud rather than false pretences. The Court decided:

> I take the view that in the particular circumstances of this case, once the applicant had been re-arrested pursuant to s. 10(2) in respect of the offence of false pretences, it was incumbent on the member to charge the applicant with false pretences and proceed from that point on with the normal logical consequences. The applicant was not in custody for the purpose of the relevant member obtaining instructions from the Director of Public Prosecutions having regard to the fact that she had already been in custody for 12 hours pursuant to s. 4 and then released. The applicant was in custody having been re-arrested effectively immediately in respect of a particular offence for the purpose of being charged with that offence forthwith and once the decision was taken not to charge her with that offence and to charge her only with the offence of conspiracy to defraud in my view her original arrest became unlawful because its very purpose in accordance with the provisions of s. 10(2) was not going to be fulfilled and she was in unlawful custody and was being held in breach of her constitutional right to liberty pursuant to Article 40.4.1 of the Constitution.[785]

Further significant powers of arrest exist in s 50 of the Criminal Justice Act 2007. Under s 50, a person arrested for offences quintessential to organised crimes, such as murder involving a firearm or explosive, murder of a Garda, prison officer or head of State, possession of a firearm with intent to endanger life, an offence under s 15 of the Non-Fatal Offences against the Person Act 1997 involving a firearm and an offence under Part 7 of the Criminal Justice Act 2006, may be detained for a period of up to 7 days. The procedure for extending the detention period under s 50 is as follows: initially the detention period is 6 hours and can be extended by 18 hours and again by 24 hours if a Garda, not below chief superintendent rank directs that there is reasonable grounds to extend detention for the proper investigation of an offence concerned; the period can be further extended by 72 hours and then again by 48 on application to the Court.

2(2)(b) of the Drug Trafficking Act as amended stipulates that an officer of the Garda Síochána not below the rank of superintendent may direct that a person be detained for a further period not exceeding 18 hours, and subsection (c) states if he or she has reasonable grounds for believing that such further detention is necessary for the proper investigation of the offence concerned" and section 2(2)(c) states that an officer Garda, not below the rank of chief superintendent may direct that a person detained under paragraph (b) be detained for a further period of up to 24 hours, provided that he or she has a reasonable grounds for believing further detention is necessary for the proper investigation of the concerned offence.

Search warrant

A search warrant is an instrument entitling the persons to whom it is addressed to enter, by force if necessary, either a suspect's home or to enter some other place where it is reasonably suspected that evidence relating to the commission of an offence may be found. Some authorities suggest that where a garda is intent on arresting a suspect he may enter his premises for the purposes of effecting that arrest.[786] Otherwise an entry must be made pursuant to a search warrant. As to whether a search is lawful or not depends upon compliance with the terms of the search warrant. In *CRH v Competition and Consumer Protection Authority*, the issue was one confined to searches under the Competition Act 2002. The Authority had searched a cement company and had copied the entire email drive of a number of executives. The Supreme Court held that a more nuanced search was required under that specific legislation. The decision is thus confined to that specific offence.

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[785] ibid, 451.

[786] See for example the judgment of O'Flaherty J in *The People (DPP) v David Owens*, Supreme Court, unrep, 16 February 1999.

All searches will involve intrusions onto the privacy of suspects and of those innocent persons residing or working at the place searched. This does not make searches unlawful since the nature of a search warrant is to authorise such intrusions.[787]

Construing a search warrant may be in issue. In the *CRH* case, Charleton J made these observations:

> 18. There is no general power for investigating authorities to enter and search business premises, much less the dwelling of a citizen which, under Article 40.5 of the Constitution, is "inviolable and shall not be forcibly entered save in accordance with law." Since the decision in *Entick v Carrington* (1765) 19 State Tr 1001, an entry onto private property must be justified either at common law or be within the specific terms of the statute authorising the intrusion. Since entry must be justified "upon some rule of positive law", actions such as sorting through documents or emails, copying material or taking it away for analysis, which involve what is ordinarily a trespass to property or a breach of copyright, also require statutory or common law authority…
>
> 19. The extent of the powers available on a warrant is a matter of construction of the statute under the authority of which it is issued. Such legislative authority is to be construed from the plain words enacted, read in the light of any other relevant provision, within the statutory context as a whole. When addressing the conferring of powers of search or arrest, it is desirable that "broad, plain, intelligible principles" should be stated. Those tasked with the temporary deprivation of liberty that arrest involves or the intrusion into home or business which a warrant authorises, as well as those who are the subject of same, need plain guidance and clear boundaries; see the remarks of Best J in *R v Weir* (1823) 107 ER 108 at 117. This principle is echoed in the judgment of the Court of Justice of the European Union in Case C-37/13P in *Nexans SA v Commission* [2014] 5CMLR 13 which refers at para 34 to the need for specific reasons on search application to show proportionality and to "put the undertakings" concerned "in a position to understand the scope of their duty to co-operate".
>
> 20. Here, the statutory authority is a unique one apart from general criminal law.

There are multiple search powers under individual statutes. As offences are created by legislation, generally specific search powers are tagged on. A full recital of these is unnecessary. The general power to issue search warrants is contained in section 6 of the Criminal Law Act 1997. That general power now defines the circumstances under which a member of the Garda Síochána may enter premises. The interpretation of s 6 was consider by Hogan J in the High Court in *Rozmyslowicz v The Minister for Justice and Equality*.[788] In this case, a warrant was issued solely on the opinion of one garda, who thought the person they sought was in the house they searched as she had seen a movement she believed to be a hand. On interpreting whether this constituted 'reasonable cause' under s 6(1), Hogan J commented that while the garda subjectively believed she had reasonable cause, this needed to be assessed objectively. As such, this was found to not constitute a reasonable suspicion.

Apart from the specific powers of search contained in a myriad of statutes, s 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997 gives a general power to the District Court to issue a search warrant. This provides:

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[787] [2017] IESC 34. See the judgment of Charleton J at [22]
[788] [2018] IECA 289.

10.(1) A judge of the District Court, on hearing evidence on oath given by a member not below the rank of inspector, may, if he or she is satisfied that there are reasonable grounds for suspecting that evidence of, or relating to the commission of –

(a) an indictable offence involving the death of or serious bodily injury to any person,

(b) an offence of false imprisonment,

(c) an offence of rape, or

(d) an offence under an enactment set out in the First Schedule to this Act,[789] is to be found in any place, issue a warrant for the search of that place and any persons found at that place.

(2) A warrant under this section shall be expressed to and shall operate to authorise a named member, accompanied by any other member, to enter, within one week of the date of issuing of the warrant (if necessary by the use of reasonable force), the place named on the warrant, and to search it and any persons found at that place and seize anything found at that place, or anything found in the possession of a person present at that place at the time of the search, which the said member reasonably believes to be evidence of or relating to an offence referred to in subsection (1).

(3) A member acting under the authority of a warrant under this section may –

(a) require any person present at the place where the search is carried out to give to the member his or her name and address, and

(b) arrest otherwise than on foot of a warrant any person –

(i) who obstructs or attempts to obstruct that member in the carrying out of his or her duties,

(ii) who fails to comply with a requirement under paragraph (a), or

(iii) who gives a name or address which the member has reasonable cause for believing is false or misleading.

(4) A person who obstructs or attempts to obstruct a member acting under the authority of a warrant under this section, who fails to comply with a requirement under paragraph (a) of subsection (3) or who gives a false name or address to a member shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,500, or to imprisonment for a period not exceeding 6 months, or to both.

Rights of arrested person[790]

An accused person has the right not to be subject to degrading treatment while in garda custody. He has the right to medical assistance where it may reasonably be regarded as necessary.[791] Apart from the duty of investigating crime the gardaí, as members of the executive, have a positive duty to defend and vindicate the constitutional rights of a prisoner. This includes a positive duty to see that his constitutional rights are not infringed. It is a further legal obligation to ensure that whatever rights he is granted by law are upheld.[792] The issue of the entitlement of the accused to have a

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789 Punishment of Incest Act 1908, s1; Criminal Law Amendment Act 1935, s 1-2; Criminal Law (Rape) (Amendment) Act 1990, s 3-4; Criminal Law (Sexual Offences) Act 1993, s 3; s5.

790 See generally Yvonne Daly, 'Is Silence Golden? The Legislative and Judicial Treatment of Pre Trial Silence in Ireland' (2009) 31 DULJ 35; Yvonne Daly, 'Does the Buck Stop Here: An examination of the Right to Pre-Trial Legal Advice in the Light of *O'Brien v DPP'* (2006) 28 DULJ 345; Andrea Ryan, 'Avoiding the Hard Question: *DPP v Buck* and the Constitutional Right of Access to Legal Advice' (2003) 25 DULJ 257; Kevin Sweeney, 'Solicitors in garda stations: in or out?' (2017) 27(4) ICLJ 126-135.

791 Re Article 26 and the Emergency Powers Bill 1976 [1977] IR 159; 111 ILTR 29. See generally, Butler and Ong, 'Breach of the Constitutional Right of Access to a Lawyer and the Exclusion of Evidence – The Causative Link' (1995) 5 ICLJ 156, and Butler, 'The Right to be Informed of the Right to a Lawyer – The Constitutional Dimension' (1993) 3 ICLJ 173; Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Siochána Stations) Regulations 1987, regulation 21.

792 *The People (DPP) v Madden* [1977] IR 337.

solicitor present while he is being questioned is considered in the chapter Hearsay and Confessions.[793]

It is submitted that there is no right to the services of a particular solicitor.[794] A solicitor is not a confessor. One such example of the limitation of a person's right to access a solicitor is set out in *The People (DPP) v Buck*.[795] In this case, there was a considerable delay between the request for a solicitor and the arrival of one. The important point however was that the accused did not make a statement before the arrival of a solicitor. The lack of causative link between absence of solicitor and the making of an incriminating statement meant that there was no breach of the accused's rights.[796] Therefore, what the accused is entitled to is professional legal advice and such reasonable access to professional legal advice as will operate as a buffer between the powers of the State focused on him for the purpose of interrogation and his entitlement to respond to questioning with the benefit of access to a person who can professionally advise him.

[793] *The People (DPP) v Doyle* [2017] IESC 1, *Doyle v Ireland* ECHR Case 51979/17.
[794] See generally *Healy v Donoghue* [1976] IR 325; *Carmody v Minister for Justice, Equality and Law Reform* [2005] IEHC 10; *The People (DPP v O'Brien)* [2005] 2 IR 206.
[795] [2002] 2 IR 268
[796] ibid, 283.

Chapter 5

Disclosure and Privilege[797]

Facts and responsibility

No accused person is obliged to take to the witness stand and explain any of the actions in issue at a criminal trial. Since the prosecution bear the burden of proof, save for limited exceptions, it is not required that the accused offer any account as to whether or why or with what state of mind he or she did or did not do something. The presumption of innocence means that as regards deciding whether a case has been proven beyond reasonable doubt, it is for the prosecution to establish facts which convict the accused and not for the accused to explain his actions. To this, there are exceptions, noted below. Failure to offer alternative facts to those alleged by the prosecution may leave an accused in the situation that the only account available to the jury is that of the prosecution. Similarly, an inference against the accused may only be drawn where that inference arises on the facts and in such a way as to be compelling to the beyond reasonable doubt standard. When it comes to the trial, or in facing an accusation, the accused may remain mute. Provided that no statutory presumption arises, the accused is not to have any issue inferred in consequence of not denying conduct or explaining it. In *The People (A-G) v Quinn*,[798] a trial judge commented on the silence of the accused in the face of reading a charge, stating:

> Gentlemen, it is the first opportunity which was given to the accused man of meeting this horrible charge that he had sexual intercourse with this young girl. How does he meet it? He is cautioned that he need not make a statement and he says 'I will not make any statement.' … The [garda] mentioned [the girl's] complaint to him and told him he was accused of keeping company with her, and accused of having put her in the family way. How does he meet it? 'I will not make any statement.' He is quite entitled to say that, gentlemen, but having regard to the seriousness of the charge … what would a decent honest man have said straightaway?

The Court of Criminal Appeal described this direction as "utterly wrong". In England, it had been regarded as appropriate for a trial judge to make similar remarks to those condemned where an accused choose not to give evidence.[799] This changed with the trial of Dr Bodkin Adams before Devlin J, where the trial judge expressly commented to the jury that there was a right to keep out of the witness box, hoping that "the day will never come when that right is denied to any Englishman."[800] Enthusiastically, this has been taken up in this jurisdiction.

Non-fictional nature of the trial process

It is often thought that defence counsel should act as judge over their client; it being widely but unthinkingly thought immoral to defend the guilty. The issue of guilt is expressly reserved under our constitutional system to the courts, with the jury deciding facts in indictable crimes subject to the entitlement of the Director of Public Prosecutions to refer cases to the three-judge Special Criminal Court. Ethically, counsel and solicitors have the duty to take the instructions of the accused as to the facts and to pursue the accused's case expressly. It is completely unethical for lawyers to advise the accused to make up facts. To do so, arguably, is to become complicit in the crime itself as an accessory after the fact. Instead, the legal profession acts as a cipher; one whose

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797 See generally, Dwyer, 'The Duty of Disclosure in Criminal Proceedings' (1993) 3 ICLJ 66; Mary Rose Gearty and Miriam Delahunt, 'Delay and disclosure: disaster?' (2018) 23(3) The Bar Review 83; Peter Charleton and Máire Reidy, 'Disclosure in criminal cases: Tripping up the prosecution in a legal vacuum' (2010) 20(2) ICLJ 44; Thomas O'Malley, The Criminal Process (Round Hall 2009) 694-697.

798 [1955] IR 57.

799 See the trial of Nodder (1937), described in Glanville Williams, The Proof of Guilt: A Study of the English Criminal Trial (Stevens & Sons, 1963) 60.

800 ibid 59-61.

view of the facts is of no importance, but where the facts as related by the accused, for good or bad, sensible or incredible, are to be put to witnesses with a view to securing a favourable outcome to the trial.

This does not mean that the trial proceeds as if the accused were absent. Rather, what the accused's case consists of is put to the witnesses to which that narrative is relevant. Consequently, the process of trial is a process of discovery. The prosecution lay out the building blocks of their case and the answer of the accused emerges through what is put to the prosecution witnesses. The accused is not obliged to give evidence or to call testimony from any witness supportive of his case. Even still, as the trial unfolds, the defence will disclose what its case is. Exceptionally, the prosecution's case may be so weak that the accused, through his legal advisers, chooses to put no questions to prosecution witnesses or to put forward an alternative scenario whereby he may be adjudged not guilty of the offence. The rule of cross-examination, however, is that by the close of that process, the court is entitled to be on notice as to precisely what affirmative case the accused makes.[801]

Ordinarily, therefore, a criminal trial is a process of disclosure by the defence to the court. No case inconsistent with the accused's instructions to counsel may be made. Since the burden of proving the case is on the prosecution, prior disclosure of that case is made so that the accused may prepare whatever factual answer may arise to it. In contrast, it is only where an alibi is to be relied on that any prior disclosure to the prosecution is to be made of the fact that the accused could not have been at the scene of the crime and the witness to support that.[802]

Disclosure as a neutral process

The prosecution is obliged to disclose to the defence all evidence relevant to the charge within its possession. Relevant evidence includes information which may reasonably be regarded as providing a lead to other information which might reasonably assist the accused in either attacking the prosecution's case or making a positive case of his or her own.[803] In short: "the prosecution are under a duty to disclose to the defence any material which may be relevant to the case which could either help the defence or damage the prosecution and that if there is such material which is in their possession they are under a constitutional duty to make that available to the defence."[804] This has to be analysed on a reasonable basis however. Similarly, while the investigating authorities proceed with an open mind and may follow leads which tend towards proving the guilt of the person suspected, other avenues of suspicion may be pursued where these appear potentially productive on a reasonable assessment. Where witnesses are interviewed, such statements are part of potential disclosure. The prosecution is under no obligation, however, to disclose irrelevant material to the defence. Generally, the prosecution tends to err on the side of caution, furnishing witness statements whether for or against the accused and enabling inspection of exhibits. Should there be a serious doubt as to appropriate disclosure, then, as in civil cases, a judge can be asked to decide the issue.[805] The issues which arise are likely to be relevance and whether a privilege against disclosure arises.

Informers

The prosecution is exempt from disclosure where that information consists of confidential statements made by a police informer or where such statements would otherwise identify such an informer. This principle is of long standing. Since *AG v Briant* in 1846,[806] the prosecution are not just privileged from disclosing, but actively required not to disclose information from, or otherwise

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801 *McDonagh v Sunday Newspapers Ltd* [2017] IESC 59; *McNamee v Revenue Commissioners* [2016] IESC 33.
802 Criminal Justice Act 1984, s 20.
803 *The People (DPP) v Meleady* [1995] 2 IR 517.
804 *McKevitt v DPP,* Supreme Court, unreported 18 March 2003.
805 *Ward v Special Criminal Court* [1998] 2 ILRM 493; *DPP v Special Criminal Court*, High Court, Carney J, unrep 13 March 1998.
806 (1846) 15 MWR 169, 185.

identifying, a confidential informant.[807] A statement of the rule is contained in *Marks v Beyfus*,[808] where Lord Esher MR said:

> What, then, is the rule as to the disclosure of the names of informants, and the information given by them in the case of a public prosecution? In the case of *AG v Briant*, Pollock CB discussing the case of *Rex v Hardy* says that on all hands it was agreed in that case that the informer, in the case of a public prosecution, should not be disclosed ... Now this rule as to public prosecutions was founded on grounds of public policy, and if this prosecution was a public prosecution the rule attaches; I think it was a public prosecution and the rule applies. I do not say it is a rule which can never be departed from; if upon the trial of a prisoner the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to show the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy which must prevail. But except in that case, this rule of public policy is not a matter of discretion; it is a rule of law, and as such should be applied by the judge at the trial, who should not treat it as a matter of discretion whether he should tell the witness to answer or not ...[809]

Throughout countries following the common law tradition, prosecuting and investigating authorities are bound not to identify those who have communicated information to them on a confidential basis as assistance in solving a criminal case. The impetus for the rule is the protection of life: the courts being familiar with the methods of enforcing loyalty among criminal gangs. In addition, as with other privileges, it is of assistance to society to maintain confidentiality while it does not undermine any positive case of innocence that an accused may make. The importance of the rule was emphasised in the Canadian case of *Leipert*,[810] where the rule was explained thus by McLachlin J for the Supreme Court:

> Informer privilege is of such importance that, once found, courts are not entitled to balance the benefit enuring from the privilege against countervailing considerations, as in the case, for example, with Crown privilege or privileges based on Wigmore's four-part test: see Sopinka, Lederman and Bryant 'The Law of Evidence in Canada' (1992) pp 805-806. In *Bisaillon v Keable* [1983] 2 SCR 60 this court contrasted informer privilege with Crown privilege in this regard. In Crown privilege, the judge may review the information and in the last resort revise the minister's decisions by weighing the two conflicting interests, that of maintaining secrecy and that of doing justice. The court stated (at 97-98):
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> > 'This procedure, designed to implement Crown privilege, is pointless in the case of secrecy regarding a police informer. In this case, the law gives the Minister, and the Court after him, no power of weighing or evaluating various aspects of the public interest which are in conflict, since it has already resolved the conflict itself. It has decided once and for all, subject to the law being changed, that information regarding police informers' identity will be, because of its content, a class of information which it is in the public interest to keep secret, and that this interest will prevail over the need to ensure the highest possible standard of justice. Accordingly, the common law has made secrecy regarding police informers subject to a special system with its own rules, which differ from those applicable to Crown privilege.'

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807 *D v NSPCC* [1978] AC 171; *Marks v Beyfus* (1890) 25 QBD 494; *Alister v The Queen* (1984) 154 CLR 412; *Commission of Police v Ombudsman* [1985] 1 NZLR 578; *Mason* [1975] 2 NZLR 289.

808 Volume XXV QB (1890) 494.

809 ibid 498.

810 1997 CanLII 367 (SCC); [1997] 1 SCR 281.

> The court in *Bisaillon v Keable* [1983] 2 SCR 60 at 93 summed the matter up by asserting that the application of informer privilege 'does not depend on the judge's discretion, as it is a legal rule of public order by which the judge is bound'.
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> In summary, informer privilege is of such importance that it cannot be balanced against other interests. Once established, neither the police nor the court possesses discretion to abridge it.[811]

On issues such as journalistic privilege, there can be an issue as to whether the entitlement not to disclose documents or statements belongs to the informant, or to the person to whom the information is communicated, or whether such privilege is a branch of State privilege. Issues as to the balance between the interests of justice and maintaining the privilege also may arise. But not here. Informer privilege is a category which the State is obliged to assert. Were it otherwise, an informer would lose anonymity by being required to attend court in order to claim an entitlement inherent to the privilege. It is the duty of the State to maintain this privilege. McLachlin J put the matter thus:

> The privilege belongs to the Crown: see *Solicitor General of Canada v Royal Commission of Inquiry* (Health Records in Ontario) [1981] 2 SCR 494. However, the Crown cannot, without the informer's consent, waive the privilege either expressly or by implication by not raising it: see *Bisaillon v Keale* [1983] 2 SCR 60 at 94. In that sense, it also belongs to the informer. This follows from the purpose of the privilege, being the protection of those who provide information to the police and the encouragement of others to do the same. This is the second reason why the police and courts do not have a discretion to relieve against the privilege.
>
> The fact that the privilege also belongs to the informer raises special concerns in the case of anonymous informants, like those who provide telephone tips to Crime Stoppers. Since the informer whom the privilege is designed to protect and his or her circumstances are unknown, it is often difficult to predict with certainty what information might allow the accused to identify the informer. A detail as innocuous as the time of the telephone call may be sufficient to permit identification. In such circumstances, courts must exercise great care not to unwittingly deprive informers of the privilege which the law accords to them.[812]

Informants contrasted to protected witnesses

The prosecution is further exempt from disclosure where revealing the identity of a potential witness, or a party who has simply assisted the gardaí confidentially without ever intending to be a witness, or where the prosecution has agreed not to reveal such a person, and where disclosure would place that person in peril.[813] Fundamental to the privilege is the protection of life and bodily integrity, rights guaranteed by Article 40.3.1° of the Constitution. The accused has the right to a fair trial under Article 38 of the Constitution. As part of the community, the victim and the community itself, has an expectation that resort can be had within an ordered society to investigative authorities for the purpose of detection and punishment. It would be wilful blindness not to acknowledge that organised crime is grounded on being a self-justifying society at loggerheads with the constitutional order. Hence, in the maintenance of internal secrecy, conspiracies are as violent in self-protection as necessity requires and without compunction in respect of any moral standards. In order to prise information from within criminal organisations, the police may well insert agents; though in this jurisdiction that is rare, if it occurs at all. More common is that moral revulsion will inspire the wider society of family or friends within the ambit of a criminal gang to turn against their actions by revealing a line of enquiry to the authorities. Where that is done on a confidential basis, express or implied by the circumstances, including

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811 ibid [12]-[14].
812 ibid [15]-[16].
813 *Ward v Special Criminal Court [*1998] 2 ILRM 493; *DPP v Special Criminal Court*, High Court, unrep 13 March 1998, Carney J.

those of fear of retribution, it is for the State to uphold the privilege of informers through the prosecution asserting their entitlement not to be identified by any material that might potentially lead back to them.

Witness protection schemes

A situation can also arise where someone from within the criminal gang turns State-evidence. Such a witness may colloquially be called an informer but that is a misnomer. A witness under threat, not cooperating in confidence, or who initially cooperated in confidence and later agrees to be a witness, is the same as any other and is subject to full disclosure. They are entitled to expect protection, perhaps even to the extent of relocation. In order that an allegation cannot be made that a witness is subject to a bribe, care as to their treatment needs to be taken so that the duty of fidelity to the nation and loyalty to the State, declared under Article 9.3 of the Constitution, does not seem to be replaced with a rewards-based justice system. It may be necessary, in aid of protecting life, to relocate a witness and their family. Drawing on the experience in other countries, such a relocation is made on the basis of like-for-like. A person from local authority housing is not to be relocated to luxury accommodation abroad, but instead are offered what they came from to what they are going to.[814] Since relocation is a huge disruption in the course of a person's life, it is appropriate to offer time for retraining or education so that the witness and his or her family may have a reasonable chance to earn a reasonable living within their new circumstances. In *The People (DPP) v Gilligan*, the Court of Criminal Appeal closely examined a witness protection program offered to three witnesses who were either inside or peripherally involved in the crime gang which imported drugs in industrial quantities and firearms, partly for self-protection and partly for bribery through supply to a subversive group. The principles of fairness just touched on guided the authorities in their approach. Denham J considered that these were along the lines of that which had been honoured by safe application in other countries:

> While a Witness Protection Programme is a new feature in Ireland it has been introduced elsewhere. It has been part of the response to the changing nature of crime. The situations which have given rise to such a programme are not unique to Ireland, they include organized crime, gang warfare, drug trafficking and significant funds entering the criminal world by criminal activities such as selling drugs illegally. It has been determined in other jurisdictions that it was necessary to protect witnesses who give evidence of such activities. It is not unusual that a witness in a Witness Protection Programme be both a member of the programme and an accomplice. Counsel for the applicant did not argue seriously that there could not be a Witness Protection Programme, quite correctly in my view, but rather made submissions on the way that the programme applicable to this case was organized and applied.
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> The Witness Protection Programme in relation to the events in issue was the first such programme in the State and there is no doubt that it was not well organised or executed. It had deficiencies. However, the fact that it was not organized as counsel for the applicant submitted it should be, the fact that it was not a perfect programme, is not immediately fatal. It is necessary to consider the facts and circumstances to determine whether it undermined due process and rendered the trial unfair.[815]

Hence, the conviction was safe. She was also of the view that a court should be wary of such evidence:

> In contemplating the position of evidence from persons in a Witness Protection Programme the law relating to the testimony of an accomplice is a useful analogy. The evidence of an accomplice is admissible and may ground a conviction even if there is no

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814 *The People (DPP) v Gilligan* [2005] IECCA 78.
815 [2005] IESC 78 [8.8].

> corroborating evidence. However, it has been well settled in Irish common law that there should be a warning given to the jury on the dangers of convicting on such evidence absent corroborating evidence. This was stated clearly by Butler J. in Dental Board v. O'Callaghan [1969] I.R. 181 at 183 where he said:
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> > "There is no rule of law to the effect that the uncorroborated evidence of an accomplice must be rejected. The rule is that the tribunal of fact, be it District Justice or jury, must clearly bear in mind and be warned that it is dangerous to convict on the evidence of an accomplice unless it is corroborated; but having borne that in mind and having given due weight to the warning, if the evidence is none the less so clearly acceptable that the tribunal is satisfied beyond doubt of the guilt of the accused to the extent that the danger which is generally inherent in acting on the evidence of an accomplice is not present in a case, then the tribunal may act upon the evidence and convict."
>
> The warning is mandatory, but, that having been given, corroboration is not. The trier of fact, having considered the circumstances and the warning, may determine that the evidence is credible and accept such testimony. Alternatively, it is open, in all the circumstances, to require that there be independent evidence to support the testimony of such a witness. Such a determination will depend on the facts and circumstances of the case.[816]

Denham J drew a conclusion based on the treatment of accomplices who turn State's evidence to require courts dealing with protected witnesses to also exercise awareness of the potential dangers which might arise where a witness requires to be protected by the prosecuting authorities:

> The rationale behind the common law rule requiring a warning before acting upon the uncorroborated evidence of an accomplice applies equally to the evidence of a person in, or who is going to join, a Witness Protection Programme. There is a danger that the witness may not tell the truth in the hope of receiving benefits. In relation to the Witness Protection Programme this applies also to expectations the witness may have into the future for him or herself and their family. Thus there is the danger that the witness may seek to obtain additional benefits by his or her evidence. There are dangers especially where there has been a grant of immunity, and/or the prosecution has supported the giving of a light sentence. These and other factors may arise in relation to a witness in a Witness Protection Programme.
>
> I am satisfied that to ensure a fair trial the same approach should be taken to evidence given by a witness in a Witness Protection Programme as to evidence given by an accomplice. Thus, to adapt the exposition of Butler J set out above, there is no rule of law to the effect that the uncorroborated evidence of a person in or going into a Witness Protection Programme must be rejected. The rule should be that the trier of fact must clearly bear in mind and be warned that it is dangerous to convict on the evidence of such a witness unless it is corroborated; but having borne that in mind and having given due weight to the warning, if the evidence is none the less so clearly acceptable that the trier of fact is satisfied beyond reasonable doubt of the guilt of the accused to the extent that the danger which is generally inherent in acting on the evidence of a witness in a Witness Protection Programme is not present in the case, then the trier of fact may act upon the evidence and convict.[817]

While it would be wrong for a court to blind itself to potential dangers in the protection of and relocation of witnesses, it is surely for the defence to raise the point if it is regarded as advantageous

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[816] ibid [8.4].
[817] ibid and see *The People (DPP) v Meehan* [1999] 7 JIC 2901.

to their position to pursue cross-examination based on such a point. These matters are for decision by the defence.[818] Where a witness is to be relocated, that fact, but obviously not any details, should be disclosed to the defence. This can then be explored at trial if that is the accused's choice. There can be obvious countervailing reasons why the defence might eschew such a strategy.[819]

Innocence at stake exception

These exemptions from non-disclosure do not apply where failing to disclose the material could reasonably be regarded as keeping from the accused material which establishes, or might rationally be regarded as helping to establish, his or her innocence of the offence charged. This is not the same test as the test of relevance: that test is completely different. The test of relevance determines whether material should be disclosed in the first instance. Essentially, the prosecution will reveal every piece of information which relates to the commission of the crime and the essential building blocks of the case which the prosecution makes against the accused. While the duty is to reveal all that may impact on the circumstances of the crime, in reality the prosecution would not be proceeding unless that material pointed in a clear way to the guilt of the accused. Thus, statements which suggest innocence will rarely arise in this context. It could be, however, that some witness places the accused away from the scene of the crime at the vital time. That is the kind of information which trumps the prosecution's duty to hold back information which may identify the confidential informant. The privilege blocks the disclosure. The prosecution must, however, by some means, where it has information at its disposal which positively establishes, or which might reasonably be regarded as tending to positively establish the innocence of the accused, pass the essence of that information to the defence or otherwise reveal that information in evidence to the court of trial. As to whether the privilege exists in respect of disclosure, or whether the innocence at stake exception applies, is a matter for the prosecution subject to any ruling that may be made by the court of trial. On revealing that such an issue exists, the defence are entitled to ask the court to read the material to ensure that a correct decision has been made. With a non-jury court, that may be regarded as undesirable. Information damning any potential defence of the accused is not such as to put his innocence at stake.

Discontinuing a prosecution

The protection of life and bodily integrity is a duty towards the informer and towards that informer's family, since retribution is unlikely to be precisely targeted. Where it is impossible to provide information to establish the innocence at stake exception, the prosecution is not entitled to reveal the source of confidential information. Instead, the prosecution should be discontinued. These principles were laid down in dramatic circumstances in a judicial review taken by the Director of Public Prosecutions against the Special Criminal Court where, in the trial of one Paul Ward, that court illogically and contrary to precedent ruled that statements by informers should be disclosed to counsel for the accused but not to the accused himself.

DPP v Special Criminal Court

These rules were laid down or clarified by the High Court, through Carney J and by the Supreme Court, unanimously through O'Flaherty J in the litigation arising out of the murder of Veronica Guerin and the trial of Paul Ward for that offence.[820] The circumstances are central to the correctness of the analysis.

Veronica Guerin was an investigative journalist whose attention had turned, for some time prior to her death, to the affairs of a criminal gang operating out of an industrial estate in Greenmount, Harold's Cross, Dublin. She had sought to interview a person she may have thought was the leader

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818 *The People (DPP) v FitzGerald* [2018] IESC 58.
819 See also *The People (DPP) v Meehan* [2006] IECCA 104.
820 *Ward v Special Criminal Court* [1998] 2 ILRM 493; *DPP v Special Criminal Court* [1998] IEHC 48.

of that gang about his activities. His name was John Gilligan. In seeking an interview, she had apparently been seriously assaulted. He was later acquitted of a murder by the Special Criminal Court but convicted of drugs offences and possession of firearms, including automatic weapons, machine guns and such accoutrements as silencers, and given a heavy sentence as the leader of the criminal conspiracy in that regard. Within four years of release from Mountjoy Jail on serious offences, John Gilligan had opened an equestrian centre at Jessbrook in the countryside of West Dublin. In search of information, the journalist had written to him, inquiring as to the source of his funds. Receiving no reply, she had called on his premises. She later complained of a savage physical assault by him. Shortly before that charge came to trial, the journalist was murdered returning from the District Court in Naas on the Dublin dual carriageway on 26 June 1996. The circumstances of the murder were that as she was stopped at a red traffic light, a motorcycle with a pillion passenger had drawn level to her vehicle. The pillion passenger pulled out a weapon and discharged six shots into the victim, killing her. Later, one member of the gang suspected of cooperation with the gardaí had the house in which he was living burnt to the ground. Further, his girlfriend was threatened with death. A vast range of statements was taken from multiple sources. This was only one of several threats of a similar kind against various gang members and their associates. All of the enquires leading to statements from potential witnesses were disclosed save for some information gathered in confidence.

Before the Special Criminal Court, the prosecution had argued that this confidential material in their possession should not be disclosed to the defence. They asserted privilege against disclosure on two bases. The first was that some of the witnesses fell within the classic exception to disclosure as being police informers. The second privilege asserted was related to the need to preserve the life and bodily integrity of persons who had co-operated and, they asserted, might never give evidence in the trial of any member of the Greenmount gang. As the analysis of the various courts proceeded, including the High Court and the Supreme Court, it became clear that these two considerations were two sides of the same coin. The Special Criminal Court ruled that rather than the court reading the confidential statements, these should be furnished to counsel for the defence but, bizarrely, not to the accused. The Director of Public Prosecutions then instructed that a judicial review of the court's decision should be taken. Carney J in the High Court upheld the existence of a privilege arising in both these circumstances. The Supreme Court agreed. After a comprehensive review of the authorities Carney J in the High Court, ruled that disclosure to lawyers was not an available substitute for disclosure to the accused. He concluded as follows:

> I have come to the view that the Special Criminal Court exceeded its jurisdiction in fundamentally altering the established relationship between defence lawyers and their client. It does not seem to be any answer that Mr Ward has consented to his legal team having sight of the statements on the terms that they are not disclosed to him without leave of the court. His present legal team would be discharged at any time and it does not seem to me that there would be a trial in accordance with constitutional justice if any subsequent legal representatives did not enjoy the full lawyer-client relationship with their client, but were under an obligation to keep secrets from him. I accordingly quash by order of certiorari the ruling of the Special Criminal Court dated 21 January, 1998. The Special Criminal Court will examine the 40 statements concerned and determine whether any of them might help the defence case, help to disparage the prosecution case or give a lead to other evidence. On the basis of this examination, the Special Criminal Court will determine which, if any, of the forty statements concerned should be disclosed to the defence ... In conducting its examination of the sensitive material, the Special Criminal Court will be exposed to material prejudicial to the accused. I accept their assurances quoted earlier in this judgment to the effect that they will nevertheless be able to deal with the case fairly and in accordance with law. It is the function of every professional judge to adjudicate on the admissibility of evidence prejudicial to an accused person and to exclude it from his mind if it is not

> admissible according to the rules of evidence. I would not see it as necessary for another chamber of the court to deal with the matter.[821]

In the Supreme Court the foregoing judgment was upheld. O'Flaherty J rejected an argument on behalf of Paul Ward that it would be both impractical and unrealistic to expect the trial court to carry the burden of ruling on disclosure where it cannot be privy to instructions from the accused or his representatives, or to the fruits of investigations carried out by the defence, or to circumstances where it has no knowledge of the vast bulk of the other unused material. O'Flaherty J stated:

> The State's response to the appellant's contention is to say that if we were to expand the law to that extent, we would destroy the informer privilege. Further, they ask how can there be a distinction between an accused who is represented by lawyers and one who elects to conduct his own defence? Or if, in the course of this trial, the accused elected to dispense with his legal representatives, is he to be shut out from seeing the same documents as they saw? Undoubtedly, there is force and substance in these points and I, for my part, accept them. There is a further point. It is important to emphasise that what is in debate is not only the State's privilege, but also the protection of rights to which the informer may be entitled *viz* confidentiality as well as protection of life and limb. While it is clear to the court, and to everyone who took part in the debate here, that the trustworthiness of counsel and solicitors is beyond question in this jurisdiction – is this something that would necessarily be clear to an informant? Would not a lay person immediately identify the interests of the legal adviser with the client? I think that in most cases this would be the likely reaction of the informant ... It will be clear that there are two conflicting interests involved here. I hold that the informer's privilege is of ancient origin and that it is essential for the prevention and detection of crime and, therefore, the preservation of law and order and that that privilege should remain intact; subject only to the 'innocence at stake' exception. Counsel for the prosecution have a critical role in this regard. Their task is to present the evidence to the court – having disclosed any possible source of evidence that may help the defence. Their task is not just to secure a conviction: rather they must always be ministers of justice.[822]

Summary

It follows from the foregoing that once a witness comes within the definition of a police informer that his or her statement can never be disclosed to the defence, or to any other party, without his express permission. Where, however, a witness does not fit within the informer privilege exception, but is a witness to whom the threat exception applies, such a statement can be used or disclosed provided that adequate arrangements as to security are made for his or her protection. It may be noted as to this case. that the ultimate decider of where such a privilege resides or its application is the court. In the *Ward* case, and the later *Meehan*, *Gilligan*, and *Holland* cases which followed it at intervals due to the need to extradite the accused from foreign jurisdictions to which they had fled following the murder, the defence never made an application that the Special Criminal Court read the undisclosed material. This was their entitlement. It may be inferred that the material would have done nothing for any case which they wished to make.

Abuse of disclosure

Consistently in all jurisdictions which have considered the matter, the principle against disclosure must give way where a statement is both relevant to the issues in the case and also needs to be disclosed in order to demonstrate the innocence of an accused person. That is the only exception. Courts in many jurisdictions have, however, warned against the abuse of criteria of relevance with a view to expanding what should be disclosed in an attempt to undermine the prosecution's ability

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[821] ibid 20.
[822] [1999] 1 IR 60, 87.

to present its case and to maintain the identity of police informers in secrecy and to protect potential witnesses in other cases. A leading statement as to when disclosure must be made by reason of the ability of a statement to establish the accused's innocence was given in *Leipert*,[823] by the full Supreme Court of Canada through McLachlin J:

> In *Bisaillon v Keable* [1983] 2 SCR 60 at 93 this Court held: 'The rule is subject to only one exception imposed by the need to demonstrate the innocence of an accused person'. As Coy J stated in *R v Scott* [1991] LRC (Crim) 130 at 140: 'In our system the right of an individual accused to establish his or her innocence by raising a reasonable doubt as to guilt has always remained paramount'. In order to raise the innocence at stake exception to informer privilege, there must be a basis on the evidence for concluding that disclosure of the informer's identity is necessary to demonstrate the innocence of the accused: see *R v Chiarantano* [1990] OJ No. 2603 (QL) *per* Brooke JA; affirmed [1991] 1 SCR 906. In *R v Chiarantano* the possibility that the information provided by the informer regarding the arrival at a residence of drugs later found in the possession of the accused might conflict with the evidence of the accused was held not to raise a basis for disclosure pursuant to the innocence at stake exception. The Court held that the usefulness of the information was speculative and that mere speculation that the information might assist the defence is insufficient. If speculation sufficed to remove the privilege, little if anything would be left of the protection which the privileged purports to accord. On the other hand, circumstances may arise where the evidence establishes a basis for the exception, as where the informer is a material witness to the crime or acted as an agent provocateur: see *R v Scott* [1991] LRC (Crim) 130. Where such a basis is established the privilege must yield to the principle that a person is not to be condemned when his or her innocence can be proved."

The United States Supreme Court has reached a similar conclusion. The conclusion is, however, firmly based on the criterion of relevance to the alleged innocence of the accused. It is not expanded into consideration of what is essentially a revelation of material irrelevant to the accused's innocence whereby the prosecution case or the ability of the police to conduct their enquiries in a proper fashion, is undermined. In *Ravario v United States*[824] the criterion is set out as follows:

> Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defence of an accused, or is essential to a fair determination of a cause, the privilege must give way.[825]

Using disclosure to stop the prosecution

Where the prosecution finds that it is in possession of a statement from a police informer which may reasonably be regarded as assisting in establishing the innocence of the accused, it may be unable to proceed with the prosecution. It may be that the disclosure of the information contained in the informer's statement, which assists in establishing the innocence of the accused, may be made by the prosecution through other evidence at the trial, or through disclosure of facts without giving over a statement, or through disclosure which does not identify in any way the police informer. If this is not possible, the prosecution must stop. The prosecution is not entitled to embark on an unjust procedure. Failing to disclose the existence of a witness who could prove the innocence of the accused could not be part of a trial in due course of law guaranteed by Article 38.1 of the Constitution. Clearly, it would be an unjust procedure to fail to reveal to the court of trial, or to the defence, a fact which might reasonably be regarded as assisting in establishing the innocence of the accused. It would also be to confront the fundamental principles of the Constitution to leave hang out to dry those who in good faith have communicated in confidence

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823 [1997] 2 LRC 260, 269.
824 (1957) 353 US 53.
825 ibid 60.

with the authorities as to what they know about the commission of crime. The duty to uphold their and their families' rights to life and bodily integrity is a higher value than securing the conviction of an offender.

Nonetheless, applications based on infiltration or arguments founded on the relevance of a wide range of considerations that have nothing to do with the building blocks of the prosecution case may be made in the hope of triggering the collapse of the case. If these are potentially valid, they must be explored. If not, forensic strategy should be examined as to both its validity and as to any foundation in reality such an argument may be based. Hence, it is submitted that trial judges should be wary of applications for disclosure and of defences which seek to embarrass the prosecution by targeting undisclosed material which is subject to privilege, with a view to forcing the entry of a trial collapse by the prosecution being forced not to proceed.

By allowing the acceptance of arguments as to relevancy to range beyond what on a reasonable view would be regarded as relevant, and by failing to apply the innocence at stake exception correctly, the trial judge opens up the prospect of a discovery motion leading to a potentially mistaken order for disclosure which has the result of the prosecution being forced to consider whether it may continue with the trial. The same danger applies to the innocence at stake exception. In England and Wales, where this issue as to disclosure has been the subject of much consideration, the Court of Appeal has twice warned that particular care should be paid by judges to defence arguments as to relevancy. In *Turner*,[826] the Court warned:

> Since *Ward* there has been an increasing tendency for defendants to seek disclosure of informant's names and roles, alleging that these details are essential for the defence. Defence says that the accused has been set up, and allegations of duress, which at one time used to be rare, have multiplied. We wish to alert judges to the need to scrutinise applications for disclosure of details about informants with great care. They will need to be astute to see that the assertions of a need to know of such details, because they are essential to the running of the case, are justified.[827]

In *Browne*[828] the Court of Appeal indicated that it was the function of trial judges to firmly discourage unnecessary and oppressive requests for discovery. It is submitted that the observations of the Court of Appeal are pertinent in this regard:

> Finally, we would make a few observations about the way in which the disclosure system works and a possible way forward. The first relates to the undoubted fact that defence lawyers sometimes bombard the prosecution with requests for thousands of documents with little regard to their relevance ... The only answer is to be found in a proper application of the criterion of relevance. The extent of discovery permitted in a particular case, in the light of the issues in that case, must be left to the good sense of the trial judge, who must ... discourage unnecessary and oppressive requests for discovery.[829]

Both the accused and the prosecution have a privilege against disclosing the advice of counsel or, in the case of the Director of Public Prosecutions, the advice of the legal officials working for that officer.[830] The prosecution is obliged to call all relevant evidence to the attention of the court, or, if it does not propose to use that evidence, to pass a proof of that evidence, or whatever information it has on that evidence, to the defence.[831]

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826 [1955] 2 Cr App R 94; [1995] 3 All ER 432; [1995] 1 WLR 264.
827 ibid [18].
828 [1995] 1 Cr App R 191; [1994] 1 WLR 1599.
829 ibid 20.
830 *Breathnach v Ireland* [1992] ILRM 755.
831 *The People (DPP) v Tuite* (1983) 2 Frewen 175.

Missing Witness

The relevant guidelines in relation to missing witnesses were set down by Quirke J in *Flynn v The Director of Public Prosecutions*.[832] This was a case arising out of the collapse of Aer Lingus Holidays, ALH. It is useful to follow the reasoning of the High Court in this regard as Quirke J first of all sets out the applicable principles as follows:

> It has been contended on behalf of the applicant that since Mr Maurice Harskin will not now be available to testify on behalf of the prosecution at the trial of the charge preferred against the applicant that the applicant's defence has been explicitly prejudiced and that his absence will work an injustice upon the applicant in that it will prejudice his capacity to adduce vital evidence in his defence and deprive him of his constitutional right to a fair trial. In support of that contention, the Applicant relies, *inter alia*, upon the decisions of the Supreme Court in *The People (The Director of Public Prosecutions) v Christopher Quilligan and Patrick O'Reilly (No 3)* [1993] 2 IR 305 and *The People (The Director of Public Prosecutions) v Gerard Tuite* (1982) 2 Frewen 175.
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> With regard to the latter authority, I accept that it is the obligation of the prosecution under Irish law to procure the attendance of all relevant witnesses insofar as that is reasonably possible. On the evidence, I am satisfied that in the instant case, the respondent has discharged that obligation conscientiously.
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> With regard to the former authority, I similarly accept without question that where it is determined by a court of law that prejudice will undoubtedly potentially exist as a result of the non-availability of a particular witness (in the *Quilligan* case, a potential alibi witness became unavailable by reason of decease) then it will almost certainly be appropriate for the Court to prohibit the trial in order to prevent a possible injustice to the accused.[833]

What, however, matters is that the court not proceed to a ruling preventing a trial in circumstances where the allegedly missing or unavailable witness would in reality be of no assistance to the defence. As Quirke J explained:

> … I have already indicated herein … the testimony which I believe Mr Harskin would have been in a position to adduce, were he available to testify at the trial. In addition, the respondent has openly offered (through his counsel at the trial of the proceedings herein) to admit that the entire of the statement of evidence of Maurice Harskin pursuant to s 21 of the Criminal Justice Act 1984, together with the exhibits therein referred to. Further, or in the alternative, the respondent through his counsel in the proceedings herein openly offered to make specific admissions pursuant to s 22 of the 1984 Act, many of which were favourable to the applicant.
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> It was explained on behalf of the applicant that the presence of Mr Harskin was vitally necessary in the interests of the applicant in order to enable the applicant to adduce evidence on the part of Mr Harskin in the course of cross-examination which will raise doubts in the minds of jurors in such a manner as to potentially implicate Mr Harskin himself in possible irregular dealings involving the officers and directors of ALH and Aer Lingus Plc. Reliance was placed upon reference within the statement of Mr Harskin to three bank drafts dated 13 October 1988 and it was suggested that in the course of cross-examination this reference and others could be used to discredit other officers and directors of ALH and Aer Lingus Plc and possibly Mr Harskin himself raising potential doubts in the minds of prospective jurors.

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832 [1997] IEHC 155.
833 ibid [54]-[56].

> I should say that, having reviewed the very large volume of documentation which came before me at the trial of this action, I cannot find within it a shred of support for the suggestion that Mr Harskin could be implicated in some way with the directors or officers of ALH and Aer Lingus Plc.[834]

The non-availability of a witness who is scheduled to be called from the book of evidence does not necessarily require the trial to be halted as being unfair. The judge should scrutinise with particular care the role of that witness and whether the non-availability of the witness helps the defence, rather than hinders it. Claims that the defence may wish to cross-examine a particular witness in order to establish a particular proposition should be looked at in the context of all of the material in the case and, in particular, the nature of the evidence which the witness is scheduled to give.

In the case of *DPP v CC*[835] the non-availability of a witness for the defence was considered alongside the delay in proceedings being brought against the accused in deciding whether in those circumstances a fair trial was possible. The proceedings had been brought after several decades, the victim alleging that the domestic partner had brought her naked as an 11 year old girl to the bed of her uncle. That witness was now dead. The Supreme Court, by a majority, declined to halt the prosecution on a close analysis of the evidence, which included that the accused had confessed to his son. The central approach can be seen in the judgment of O'Donnell J:

> It is, I think, apparent that there is a consensus in this court as to how a court of trial should approach an application such as this. The difference between us in this case involves the assessment of the facts in this particular and unusual case. Insomuch as this case can be said to raise any distinct issue of law, rather than the application of general principles to particular, if unusual, facts, then I would suggest that the following principles might be identified:- (i) The jurisdiction to determine whether it is just to permit a trial of an accused person on historic allegations to proceed, is one normally best conducted at the trial; (ii) The decision the trial judge should make is whether he or she is satisfied that it is just to permit the trial to proceed; (iii) The obligation on the trial judge is to make a separate and distinct determination in this regard, and the trial judge must do so conscientiously, in the light of everything that has occurred at the trial; (iv) The test to be applied does not involve any assessment of the guilt or innocence of the accused, which is a matter for the jury, but rather the fairness and justice of the process by which it is sought to determine that matter(v) While an appellate court must recognise that a trial court has particular advantages in the making of this assessment, the decision of a trial court is subject to appeal, and trial judges should therefore set out clearly the considerations leading to the conclusion that it is or is not just to permit the trial to proceed.[836]

Other privileges

Many other privileges against production of evidence are recognised, but few are relevant to criminal trials. Most, such as state privilege,[837] are not absolute but subject to a balancing exercise as between the privilege asserted and the interests of justice. Lawyers have an almost absolute privilege. Documents brought into being for the purpose of litigation, such as expert reports, are immune from production in a civil suit.[838] Similarly, a person accused of a crime may consult an expert on a particular subject, such as handwriting or pathology or firearms, but need not reveal the fact , or the results, of any such exercise. What the accused has told his or her lawyers prior to trial is privileged from production and no statement of proposed evidence is compellable at the

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834 ibid [58]-[65].
835 [2019] IESC 94.
836 ibid [48].
837 *Murphy v Dublin Corporation* [1972] IR 215.
838 *Silver Hill Duckling Ltd. v Minister for Agriculture* [1987] IR 289.

suit of the prosecution. Nor are the lawyers required to volunteer even the wildest contradiction of whatever testimony the accused gives at trial.

The sole potential exception is one very unlikely to arise in practice and relates to the innocence at stake exception. Where a person, AB, is tried for a crime, say murder, but prior to the trial another person, CD, has consulted a lawyer and has confessed to committing that murder for the purpose of seeking legal advice, then the lawyer may break privilege for the purpose of affording AB a proper defence.

Chapter 6

Witness examination

A criminal trial before a jury proceeds by the authorities investigating the offence and then laying a charge against a person. That accused is then furnished with statements as to the case to be made against him or her and an indictment, stating the charge in formal language, is laid against the accused. The trial begins with an opening speech by the prosecution to the jury. Material in the book of evidence that is notified by counsel for the accused as being subject to objection during the trial is not then to be revealed to the jury. Hence, if the main building block of the case is based on a confession disputed as to voluntariness, the prosecution speech may be sparse of detail. Prosecution witnesses are then called and examined in chief by the prosecution counsel and the defence counsel has an opportunity to cross examine them. Objections as to evidence are properly to be taken before the judge in the absence of the jury. When the prosecution case closes, the defence quite often assert that there is no case to answer on one or more of the charges. This is dealt with elsewhere in this volume.[839] The defence, if the jury is not directed by the trial judge to find the accused not guilty, may then call evidence. Counsel for the defence may make an opening statement if evidence is being called. Prior to 1984, if evidence as to fact, as opposed to character, were called by the defence, they lost the right to make the final speech to the jury. Since the Criminal Justice Act 1984, the defence always have the right to make a closing address to the jury after the prosecution's closing address. The trial judge then explains the nature of the charges, tells the jury of their function as finders of fact and explains the standard and burden of proof, and may also summarise the important aspects of the evidence. The jury then render a verdict, by a majority of 11:1, or 10:2 if after two hours they cannot unanimously agree.[840] While the weft and web of a trial judge's charge to the jury are minutely analysed in notices of appeal, should the verdict go against the accused, a measure of appreciation should be given to the person tasked with running the trial in deciding on the proper presentation of the issues.[841]

Competence and compellability

All persons who are subject to the jurisdiction of the court are both competent and compellable witnesses. To reiterate, the court is entitled to the benefit of the evidence of every person who can assist it in the determination of an issue before it.[842] Since the Criminal Justice (Evidence) Act 1924 the accused, and the spouse of the accused, is a competent witness for the defence. Traditionally, the accused could not be compelled to give evidence and failure of the accused, or the spouse of an accused to give evidence cannot be the subject of any comment by the prosecution.[843] In fact the accused was barred from the witness box at common law; though the accused could make a statement from the dock, unsworn. One view is that this was an application of the principle that a person accused of a crime had the right to remain silent but another theory is that the accused was barred from testimony because of a fear of perjury. Since witnesses, once testifying, are required to answer all questions that are relevant to the charge, and to fail to answer a relevant question once directed by the court is contempt of the court, the accused if asked if he committed the crime is obliged to answer. However unlikely that such a question will result in a truthful answer, nonetheless it once was held that a conviction based on the accused's own testimony was bad.[844]

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839 This can be found in chapter X of this book.

840 Criminal Justice Act 1984.

841 *The People (DPP) v Gleeson* [2018] IESC 53 [8]-[9]. See also: *Attorney-General v Murray* [1926] IR 266; *R v Lawrence* [1982] AC 510 per Lord Hailsham LC; Coonan and Foley, The Judge's Charge in Criminal Trials (Dublin 2008) chapter 2; and Archbold, *Criminal Pleading, Evidence and Practice* (66th edition, London 2018) paragraphs [4-430] -[4-444].

842 *The People (DPP) v JT* (1988) 3 Frewen 141; and see the judgment of Carney J in *The People (DPP) v Special Criminal Court* for wider survey of the constitutional issues involved, High Court, unreported 13 March 1998.

843 Criminal Justice (Evidence) Act 1924, s 1.

844 *R v Sullivan* Ir Rep 8 CL 404, where the accused gave evidence in his own defence on a charge of keeping a dog without a licence and was then prosecuted for perjury.

Piecemeal statutory changes in England in respect of various crimes were subject to a general rule; first by the Evidence Act 1877 and then by the Criminal Evidence Act 1898, enabling the accused to defend himself or herself in testimony. This did not apply to Ireland but was introduced on independence in the form of the 1924 Act.

Spouses

The Criminal Evidence Act 1992 provides for the competence of a spouse to give evidence against the other spouse,[845] at the requirement of the prosecution, where the offence involved violence to the spouse or a child of the spouse or of the accused or any person under the age of 17 years.[846] This rule also applies to a co-accused.[847] A child includes an adopted child or a person to whom the accused was in the role of a parent.[848] The offences covered include inchoate forms of such crimes. Where the marriage was not subsisting at the time of the offence, in the sense that the parties had been subject to a decree of judicial separation or divorce, a former spouse is treated as any other witness.[849] The accused may compel the testimony of a spouse but not where they are co-accused unless the case has been finally disposed of by a guilty plea.[850] Marital privacy subsists even in testimony in criminal cases. While the extent of that right is uncertain, extending to such intimate areas as the use of contraception in intimate relations,[851] in the unlikely event that a question is asked intruding into that esoteric realm, need not be answered.[852] The 1992 Act is to be construed on its own terms and not by reference to other definitions of spouse occurring in separate legislation.[853]

The accused

In testifying in his or her own defence, no accused has an entitlement to refuse to answer a question on the basis that it may incriminate them in the offence charged.[854] As a witness, the accused may be asked any question in cross-examination notwithstanding that the answer, or the form of a question, might tend to incriminate him as to the offence charged. The accused can, of course, decline to answer any question which might incriminate him in relation to a charge which is not before the court on that indictment. Further, an accused is like any other witness when it comes to answering questions which might incriminate another person; he or she is obliged to answer. In this context, relevance to the matters at issue on the trial is the touchstone. All witnesses are obliged to answer relevant questions, if they do not they could be in contempt of court.

Conduct of questioning at trial

It is the task of the trial judge to maintain order at the trial. This involves calming any eruptions of emotion, hearing applications in relation to admissibility in the absence of the jury, ensuring that witnesses and the accused are treated with dignity and that the trial proceeds under the cloak of decorum. Central to the task of any judge is to ensure that the trial retains focus and is not side tracked into irrelevant matters, and to ensure the identification for the jury of the building blocks of the prosecution and defence cases .

Interruption by the trial judge

The trial judge is entitled to intervene in the evidence of a witness if the judge feels that, by reason of the technical nature of the evidence or otherwise, it is only by putting questions from the bench

[845] Section 20 is the definitions section.
[846] Section 21 and section 22.
[847] Section 24.
[848] Section 22(3).
[849] Section 22(2).
[850] Section 25.
[851] *Magee v Attorney General* [1973] IR 284.
[852] Section 26.
[853] *DPP v JC and MC* [2019] IECA 2.
[854] Archbold 1922, 457- 458.

that the judge and jury can properly follow and appreciate what the witness is saying. However, such interventions should be as infrequent as possible when the witness is under cross-examination. This is because it is only by cross-examination that a witness's evidence can be properly tested, and the cross-examination loses much of its effectiveness if the witness is given time to think out an answer to awkward questions. The essence of cross-examination lies in the unbroken sequence of question and answer. In *The People (DPP) v McGuinness*[855] the cross-examination of the complainant in a rape trial consisted of 423 questions, of which 123 were put by the judge directly to the complainant. Those 123 questions did not include about 60 remarks and directions to counsel. The interventions by the judge sometimes included a sequence of consecutive questions. In the opinion of the Court of Criminal Appeal these interventions made it impossible for an effective cross-examination to be conducted. Kenny J said:

> When the defence to a charge of rape is that the complainant consented to the sexual intercourse with the accused, the task of counsel for the defence is particularly difficult. The complainant will never admit that she consented, and counsel must seek to show that at the time of the offence her character and behaviour were such that she would be likely to have consented or that she has invented the evidence which she is giving. Both of these are extremely difficult to establish but counsel must try. He often seeks to do so by cross-examining her about events in the past so that he can introduce doubts into the minds of the jurors about her character or her credibility and he may have to cover many aspects of her past life. He has probably carefully planned his cross-examination before the trial and he must be allowed to follow this without unnecessary interruption.

The court counselled patience in trial judges:

> The very gist of cross-examination lies in the unbroken sequence of question and answer' *per* Denning LJ at p 65 of the report of *Jones v National Coal Board*. Counsel for the accused will be severely handicapped if he is diverted from his plan. When the defence to such a charge is consent, the cross-examination of the complainant is the most important evidential part of the trial. It may be long and counsel should be allowed to return to matters he has already dealt with if he has succeeded in showing that on other matters the witness is not to be believed. The judge must be patient and confine his interventions to the minimum necessary for a fair trial. The judge should intervene only when cross-examining counsel miss-states evidence already given or asks a question which the witness may not understand, or when the judge thinks that the witness has misunderstood the question. When the defence is consent, the judge must allow unpleasant charges to be made against the complainant in connection with her past; he should not indicate to the jury that he disapproves of this being done.

In *The People (DPP) v Mulcair*[856] Haugh J held that for the prosecution to interrupt the evidence in chief of the accused is subject to the same principles. These principles, however, do not prevent the judge from clarifying matters as the need arises and nor should a trial judge be inhibited from intervening moderately to ensure that the conduct of the case maintains momentum and focus.

The cross-examination of the accused is limited to matters of which he has been given notice in the book of evidence. In a trial on indictment, therefore, the questions asked by the prosecution are limited by the scope of what they have been able to prove in evidence in chief. In *The People (DPP) v Cull*[857] the accused was charged with membership of the self-styled "Irish Republican Army". While in the witness box he was asked about matters pursuant to s 3 of the Offences Against The State (Amendment) Act 1972, which were not proved by the prosecution, in respect of which no notice was given to him. Gannon J, for the Court of Criminal Appeal, commented:

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[855] [1978] IR 189.
[856] Trial in Dublin Circuit Court, April 1997.
[857] [1980] 11 JIC 2401.

> There can be no doubt that an accused person when taking the position of witness upon his own trial can properly be asked in cross-examination questions on matters pertinent and relevant to the issues for trial of which no previous notice has been given to him. Matters which are neither pertinent nor relevant to the issue of guilt or innocence should not be put to the accused person, when giving evidence on his own behalf, by way of cross-examination if the effect of such questions should in any way be prejudicial to his fair trial. Certainly matters could be put to the accused person in cross-examination tending to test his credibility as a witness even though not directly pertinent to the issue of his guilty or innocence. But the Court should be alert to prevent the course of cross-examination being used in a manner inconsistent with the presumption of innocence or being abused by the introduction of prejudicial matter neither relevant nor pertinent to the issue for trial ... The provisions of Part II of the Criminal Procedure Act requiring that an accused person be informed of the nature and substance of the evidence intended to be offered in support of the charge preferred against him, form part of the essential requirements of a fair trial. From the transcript and the submissions on behalf of the Director of Public Prosecutions in this court it seems that at the time the statements of evidence were furnished to the applicant for his trial, facts concerning his conduct of the nature indicated in section 3(1) of the 1972 Act were known to the Garda Síochána and had been known for a sufficient time to have had it determined whether evidence thereof could be offered in support of the charge. From the submissions made it would seem that such evidence as was available would not fulfil the requirements of subsection (1) of section 3 of the 1972 Act, and that no reference was made in the statement of evidence furnished to the applicant to such facts on the grounds that to do so would be prejudicial to the defence of the accused upon his intended trial. Having been then excluded upon such grounds, matters of that nature should not have been put to the applicant for the first time in the course of cross-examination.[858]

It may be that the evidence in chief of the accused ranges outside of the facts that he or she has been accused of. In so far as such issues impact on the facts which are in issue on the trial, there is no principle of evidence that prevents the prosecution from testing such evidence by cross examination.

Leading questions

Prosecution counsel may not ask prosecution witnesses leading questions, nor is defence counsel entitled to ask the accused, or his witnesses, leading questions. In essence the prohibition against leading questions being put to witnesses called by the party examining them is to stop a witness being turned into a sounding board for the instructions of the case which the prosecution or defence wish to make. Whether in examination in chief or in cross-examination, it is more valuable with a view to uncovering the truth if the witness is allowed to speak from his or her own recollection. Suggestion and agreement are of limited value as a dialogue between counsel and witness. Sandes[859] summarises the relevant rules as follows:

> Leading questions, as a rule, are not permitted, ie questions so framed as to suggest to the witness the answers required of him. Leading questions are, however, permitted: (1) In matters merely introductory to others and not material, or which are not disputed; (2) in order to identify a person or a thing already described; (3) in order to obtain a direct contradiction to a certain fact already sworn to by another witness; (4) with leave of the judge, when a witness is obviously forgetful, or in the judge's opinion, hostile.

A leading question is thus a question which suggests to the witness the answer that they should give as regard the fact in issue. As the trial proceeds what is, or is not, a fact controverted by the

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[858] ibid,
[859] Sandes, 125.

defence will become apparent. If, for example, it is not controverted by cross-examination of prosecution witnesses that the victim died by a gunshot wound to the head on a particular date, at a particular time, the prosecution is entitled to proceed by leading other witnesses through non-controverted facts until it reaches a point where a fact has either been identified by previous cross-examinations to be in issue, or is new. Then they may not ask a question which suggests to a witness that a particular answer is desired.

Cross-examination

A witness may be asked leading questions in cross-examination by counsel for the adverse party. Cross-examination extends to questions as to pertinent and relevant facts and also to matters which might reasonably tend to affect the credibility of the witnesses. By the end of cross-examination the adverse party is entitled to know what case is being made in respect of or against that witness as to material fact by the party cross examining.[860] The cross-examiner is entitled to reasonable latitude as to the approach to the task, but is bound to put to a witness whatever positive case is being set up by that party to the trial.

Duty to put case to witness

Thus it is not sufficient where the issue is visual identification, to cross-examine a witness as to his recollection, perception and possible prejudgment that he might have seen the accused at a particular place, where he has sworn to identifying him, without putting it to the witness at some stage that his identification is either mistaken or invented. Any witness may be cross-examined as to his previous criminal activities, including drug taking. In *McDonagh v Sunday Newspapers*,[861] the plaintiff claimed that statements by him taken in Garda custody in relation to money lending and drug dealing activities were unreliable. Counsel appearing for him omitted to put to any witness the basis for the unreliability of such statements; whether it was invention, tiredness by the suspect or mistreatment. In the Supreme Court it was commented by Charleton J that for a meaningful trial to take place, the essence of whatever was alleged about or against a witness should be put in cross-examination to that witness in a manner which enabled him or her to comment or reply:

> It was incumbent on counsel for Martin McDonagh to put a minimum of the reasons for those denials to the Garda witnesses in cross-examination. That process does not have to be long. In *McNamee v Revenue Commissioners* [2016] IESC 33, the judgment of Laffoy J approves the decision of the House of Lords in *Browne v. Dunn* (1893) 6 R 67 which is encapsulated in the following statement of Lord Halsbury at pages 76-77:
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> > To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity often to defend their own character, and not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.[862]

The extent to which fairness requires cross-examination is essentially dependent on how a trial runs. Fairness, however, is what the law requires both in relation to procedures that are dedicated towards achieving a correct conclusion in a trial and in relation to the right of a witness to be given a real opportunity to comment on a verdict, the implication of which may only be interpreted as adverse. If a party intends to impeach a witness, that party is bound, whilst that testimony is live, to give that witness an opportunity to make any reply by way of explanation. This was characterised

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860 *McDonagh v Sunday Newspapers* [2017] IESC 59.
861 ibid.
862 ibid, [40].

as not only a rule of professional practice in the conduct of the case, but as essential to fair dealing:[863]

> [B]ut it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point which is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling. Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity to give an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted.

In *The People (DPP) v Fitzgerald*[864] that principle was approved by the Supreme Court. There, counsel on behalf of an accused pursued a line in cross-examination that his client was not in the house of a witness at the time when an expedition from there to murder the victim set out. On appeal, however, it was claimed that the witness was in some vague way an accomplice to the crime. The choice made by counsel was on instructions and was a proper exercise of his duty. It did not admit of a different case to be made on appeal when it failed.

Credit of witnesses

It is now an established practice to furnish to the defence a list of such previous convictions of prosecution witnesses of which the gardaí are aware.[865] Similarly, the defence may demand, and receive, from the prosecution evidence in relation to drug taking, if such is known to the gardaí, by a prosecution witness. The accused, however, may generally not be asked questions tending to show that he has previously been previously convicted of a crime.[866]

The credit of a witness refers to the extent to which that witness may be accepted as a reliable witness. Hence, questions in a visual identification case as to interaction with the person claimed to be the accused and the perpetrator of the crime may test means seeing the suspect, lighting, wearing of glasses and other factual matters but none of this impugns the credit of the witness. Where, however, the witness is asked about his prior conduct and character, such as running a brothel or lies told about other matters, the purpose is to undermine the believability of the testimony because it comes from such an unworthy source. A court is entitled to check improper examination as to both the facts and as to credit:

> Any examination by counsel of what a witness says is subject to the rule that it should be based on instructions and directed towards what a represented party wishes to assert as an explanation as to what happened, or to present a contrary point of view. Where focus is kept, cross-examination of witnesses is concise. Any party examining a witness is expected to come to the point, with reasonable latitude, and to be polite, with no latitude. Examination should converge on what is important. While cross-examination is an instrument for finding the truth, it can also be used to obfuscate and to divert attention away from the central issues. It is expected that represented parties will provide their legal representative with clear instructions; that they will tell them what facts they will later testify to. Cross-examination as to credit can be legitimate. That may, or may not, be in the discretion of counsel. It may depend on the client or it may be within counsel's hands. The

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[863] Cited with approval in *McDonagh v Sunday Newspapers* [2017] IESC 46 [41].
[864] [2018] IESC 58 [30]-[31].
[865] The same practice exists in the UK Practice Direction (Crime: Antecedents) (No 2) [1997] 1 WLR 1482.
[866] Criminal Justice (Evidence) Act 1924, s 1(f). and see below paragraph. (At page 17 of this chapter whatever paragraph that ends up being).

> credit of a witness may be important, apart from their opportunity of observation, sureness of memory or possible motive. Where is a witness coming from may be germane to some cases. If, for instance, a prisoner sharing a cell with an accused person on remand on a charge of murder claims that the accused confessed his motive to him for killing the victim, then the fact that the prisoner as a witness himself has a previous fraud convictions, is important. It would be less important if he had been unfaithful to his girlfriend, or perhaps had done something discreditable while under strain or while young. The law of evidence allows the control of cross-examination as to the credit of a witness based on its usefulness to the determination of the facts at issue and its length. That is a rule of commonsense.[867]

Credit and finality of answers

Answers given in cross-examination as to credit are final. This means that where a prosecution witness has been asked a question which goes to his or her credit, as opposed to a question relevant to a fact in issue, whatever answer he gives may not be contradicted by the defence. Obviously, the application of these rules is, subject to the exceptions noted, bilateral. In certain exceptional cases an answer as to credit may be contradicted by calling evidence adverse to the answer given. Under ss 4 and 5 of the Criminal Procedure Act 1865 a witness may be asked whether he has made a statement inconsistent with his testimony. If this is denied, on the statement being put to him, that statement may be proved by calling a witness who took the statement. If a witness denies that he has been previously convicted, that conviction may be proved by producing the order of the court convicting him, together with a witness identifying the person named in the order as the witness. A witness who denies a bias in favour of a party[868] or animus against a party may be contradicted.[869] In *Toohey v The Metropolitan Police Commissioner*[870] the accused were charged with the assault with intent to rob a teenage boy. The defence run was that the accused had found the boy in an hysterical state brought on by drink and were not assaulting him and demanding money and cigarettes, but helping him home. When brought to the police station the witness was in an hysterical condition and had drink taken. The House of Lords held that evidence from a police doctor should have been admitted on the issue of the condition of the boy and whether an hysterical condition exacerbated by drinking might have accounted for the witness' allegations. The case is taken as authority for the proposition that evidence as to the medical state of a witness at the time of the matter in issue, may be admitted if medical evidence could assist in the resolution of that issue. In *The People (DPP) v Campion*[871] the accused was convicted on the evidence of a prisoner who was suffering from high levels of anxiety, to the extent of requiring psychiatric treatment. The defence applied to the trial judge to have the witness examined by psychiatrists on their behalf. That application was refused since the court did not have that competence without the witness's consent. The defence also sought to have him declared incompetent. He had participated, on the prosecution's case, in assisting in the murder of a nightclub security man for the apparent motive of the victim having opposed gang activity. In ruling he was competent, the trial judge did not rule out the defence calling the existing psychiatric evidence and expressly stated that questions put to the witness as to his reliability and health were proper. In the Supreme Court, these rulings were upheld, O'Malley J stating:

> In this case the trial judge did not accede to the application for a determination of competency. Indeed, the application seems to have become subsumed to a large extent into the debate about the application to have the witness examined. In any event, I cannot see that such a procedure would have been warranted. The threshold for competency is low – an ability to understand questions and give intelligible answers on matters relevant to the issues in the trial. It is not the

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867 Third report of the Disclosures Tribunal, October 2018, pg 23.
868 *Thomas v David* (1836) 7 C and P 350.
869 *Dunn v Aslett* (1838) 2 Moo and R 122.
870 [1965] AC 595; [1965] 1 All ER 506.
871 [2018] IESC 35.

> case that a party is entitled simply to put a witness's competency in issue by way of formal challenge, and thereby become entitled to a full hearing on the issue. Some foundation must be laid, whether by way of formal evidence or the presentation of other material, that gives rise to a genuine question for the trial judge to resolve. There was nothing in this case to indicate any doubt as to whether [this witness] could pass the threshold test.

Finally, a witness may be asked if he has a bad reputation for truthfulness. If he denies it, the opposite party may call a witness who knows the reputation of the accused to be that of a liar of such notoriety that his evidence on oath should be discounted.

Fact in issue or credit?

Cross-examination as to credit is final, save in the exceptions which have been noted above. Cross-examination as to an issue, on the other hand, is never final. The distinction is that in questions related to an issue the opposing party has a constitutional entitlement to call evidence on that issue. It is often difficult to draw a distinction between what is cross-examination merely as to credit and cross-examination as to an issue in the trial. In *Forshall v Bank of Ireland*[872] the plaintiff claimed to have entered into a contract for the supply of Lamborghini Diabolo motor cars with a tiny dealership in Macroom, Co Cork. The apparently extraordinary nature of this contract was, according to the plaintiff, above suspicion because of assurances she was given by an official in the Bank of Ireland in Bandon, Co Cork. These allegedly were to the effect that this company was an official authorised dealer and that the cars would be made available to her. One Andrew Gunther testified as to receiving assurances to that effect from the bank official in Bandon and also to ringing a solicitor who acted for the firm, Mary O'Brien Daly.[873] The solicitor was supposed to have given an assurance that if certain other further moneys were paid, then the Lamborghini cars would be made available to Forshall. The plaintiff objected to the calling of the solicitor for the defence case, on the grounds that to do so would merely be to pursue an issue as to credit. Shanley J ruled, however, that the evidence she might give related to a fact in issue at the trial. His analysis of the relevant law is as follows:

> The rule appears to be that a witness who denies facts put to him in cross-examination cannot be contradicted as to such facts unless they are relevant to the issues in the case. The rule in some measure appears to be founded upon the authority of the *Attorney General v Hitchcock* (1847) 1 Exchequer, p 94 during the course of which case Chief Baron Pollock says at p 99: 'If the answer of a witness is a matter which you would be allowed on your part to prove in evidence, if it has such a connection with the issues that you would be allowed to give it in evidence, then it is a matter on which you may contradict him'. That authority, as best as I can understand the position, is not one which has been overruled in any fashion. Indeed, the case is referred to in *Hobbs v Tinling* [1929] KB 1, 12 (CA) where, in the Court of Appeal, the Court was considering the issue as to the admissibility of such evidence. At p 50, Lord Justice Sankey in the course of his judgment said as follows: 'A long argument was addressed to us as to the limits and the effect of cross-examination as to credit and the effect of the cross-examination as to credit and a number of cases are cited, especially *The Attorney General v Hitchcock*, see also *Palmer v Trower'*. Then Lord Justice Sankey quotes what he believes to be the appropriate principle: 'An opponent may be cross-examined as to his credit but he cannot be contradicted upon any point not material to the issue in order to show that his evidence is not to be believed'. It seems to me that possibly that passage, which is Lord

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872 This ruling is taken from the transcript of the trial which occurred in April and May 1997. We are grateful to Alan Lewis, Assistant Manager of the Bank of Ireland, Legal Department for supplying us with the text of this transcript. The language of the shorthand note-taker has been slightly revised, but does not in any way change the sense of the judgment.

873 An article in The Independent on Sunday on 28 February 1999 indicated that Andrew Gunther had subsequent to this trial been barred from running a children's home in England. The newspaper reported that he had invented a university degree and three A levels for himself and a qualification for his wife. None of this, however, was known at the date of the trial at which he represented himself to be a credible person. In fact he was a former Private in the British Army.

> Sankey's summary of what he considers the law to be, is probably most clearly expressed as 'The witness cannot be contradicted on any point not material to the issue'. So, it seems to me that we probably ought not be concerning ourselves with what is an adequate definition of collateral matters, or credit, but ask the question in this particular case whether if Mary O'Brien Daly is permitted to be called to give evidence as to the nature and number of 'phone calls she had on the 6th November, 1990 with persons attending the London meeting, and if she is permitted to be called to give evidence as to the nature of the 'phone calls she had and their number with Mr Gunther, whether in doing so she is merely attacking the credit of Mrs Forshall and Mr Gunter and other persons, or whether the evidence that she would be giving, or it is anticipated she would give, would go, and would be material, to the issues in this case.
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> … All I have to decide, at this point in time, is whether upon Mary O'Brien Daly being called, and upon her being asked the questions that it is suggested she will be asked, such evidence as she might give in these matters might be material to the issues. I decide that they may and accordingly she may be called.[874]

Rules governing the testimony given

A witness, whether for the prosecution or the defence, is restricted in what they may say by the nature of the charge before the court. No one is entitled, for instance, where the accused is being tried for murder, to suddenly claim that the accused has sexually assaulted several children. Order, focus and, to a degree, predictability are the touchstones of a properly conducted criminal trial. In giving evidence, certain other rules apply which experience has shown focus and direct the trial towards a proper result.

No Self-Corroboration

What a witness has previously said in relation to a fact in issue is hearsay. A witness is not entitled to bolster his or her testimony by referring to occasions prior to the trial where that witness gave the same account of facts to other people. Nor are witnesses allowed to be called to prove such prior iterations of apparent fact. Where, however, it is alleged to a witness in cross-examination that a particular statement was a recent fabrication, then previous statements to the same effect may be proved for the purpose of undermining that allegation[875] Such a statement will be admissible in re-examination, not as evidence of the truth of its contents, but to negative the suggestion and confirm the witness's credibility.[876] A witness may also speak as to his reaction to events provided they form part of the *res gestae*, as explained above.[877] It is submitted that it is proper, on issues of visual identification, where a witness identifies the accused as the perpetrator of the crime, to ask, if such evidence exists, about a prior identification on an identification parade, or prior informal identification. In sexual violence cases, evidence may be led of a complaint by the alleged victim to the crime which is proximate to the time of its supposed commission. This is not corroboration. Exceptions to the rule against self-corroboration are led merely to prove consistency of testimony, within the special rules set out, and for no other reason. Corroboration, on the other hand, is some evidence independent of the witness in respect of whose testimony corroboration is either required by law or is desirable, which tends not only to show that the crime was committed, but that the accused committed the crime.[878] A witness is allowed to refresh his or her memory from a prior note, and by doing so does not infringe on the rule against self-corroboration. The prior note must have been made at or about the time to which it refers; have been made by the witness himself or by some other person in his presence and checked by him

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[874] High Court, unreported, May 1997.
[875] See *Y* [1995] Crim LR 155.
[876] *Y* [1995] Crim LR 155; Oyesiku (1971) 56 Cr App R 240.
[877] See para [X].
[878] This is discussed in the context of sexual offences at para [X].

for correctness when the facts were fresh in his memory.[879] It is appropriate where a witness has given a statement of proposed evidence for that witness to have had the chance to read that statement prior to giving evidence at trial.

Prior Inconsistent Statement

A witness will be called to prove a positive fact. The fact might be, for example, that the witness saw the accused assault the victim on a particular day in a particular place. Given the rule that a party cannot cross-examine a witness called by them, if the witness gives an entirely different account a problem arises. Clearly it would be unjust if the party cross-examining him would not have a right to challenge him, and then to prove, that on a prior occasion he had given a formal witness statement to the effect expected. This matter is provided for in ss 4 and 5 of the Criminal Procedure Act 1865. This generally applies so that a party cross-examining a witness may point to statements prior to testimony that contradict what is being said in the witness stand. The circumstances under which, by reason of a prior inconsistent statement, a witness may be generally impeached as to credibility when giving evidence in chief is set out in s 3 of that Act. This applies to both cross-examination and examination in chief but its use as against a party's own witness is subject to special rules. These rules have been modified by the introduction of a hearsay exception enabling the introduction as evidence of a prior written statement by section 16 of the Criminal Justice Act 2006.

Section 4 of the Criminal Procedure Act 1865 provides:

> If a witness, upon cross-examination as to a former statement made by him relative to the subject matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such a statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness and he must be asked whether or not he has made such a statement.

The section is not confined to statements previously made on oath or in the form of a deposition. In *O'Neill*[880] the accused (O) was tried together with M. There were two counts in the indictment to the first of which M pleaded guilty. M then gave evidence on his own behalf in respect of the second count. In cross-examination he was asked whether O had committed with him the offence alleged in count 1. When M denied the involvement of O, his verbal statement to the police in which he said the opposite was put to him under s 4. The English Court of Criminal Appeal upheld the ruling.

Section 5 of the Criminal Procedure Act 1865 provides:

> A witness may be cross-examined as to previous statements made by him in writing or reduced to writing relative to the subject matter of the indictment or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; provided always that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit.

An older English authority provides that where a witness is cross-examined on a copy of the statement which is used to contradict the witness, the entire statement should be exhibited and put before the jury.[881] The modern practice is that contradictory portions of the statement may be

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879 See Sandes, p 125.

880 [1969] Crim LR 260.

881 Riley (1866) 4 F&F 964; Wright (1866) 4 F&F 967. In the former case Channell B explained that the rule that the entire statement should go into evidence will allow it to appear, how far the suggested contradiction exists and the absence of a

put to the witness subject to the right of the opposing party, if there is unfairness in the manner in which the statement has been put, for example, by over-editing, to refer to any other sentence or passage which elucidates or clarifies the point on which the cross-examiner has alleged there is a contradiction.[882] In more recent times, in England, the prior practice of cross-examination on a small portion of a statement causing the entire of the statement to be put in evidence has not been followed. In *Beattie*[883] the Court of Appeal was critical of a decision to allow a jury to see the entirety of a statement when only two small matters from it had been the subject of cross-examination.

Subject to the modification introduced in specific circumstances by s 16 of the Criminal Justice Act 2006, where a witness is cross-examined as to what he said on a prior occasion this does not enable the judge or the jury to treat a witness's earlier statement as evidence of the truth of its contents.[884] If the witness indicates in cross-examination that the prior inconsistent statement is true, then his testimony on that point is entirely undermined. If, however, the witness swears on oath that his prior inconsistent statement was incorrect, then his statement on oath may be acted upon subject to his credibility having been impeached by the contradictory nature of what he has previously said. Where a witness refuses to admit that on a prior occasion he has made a contradictory statement then that statement may be proved by calling the person to whom it was made, or who otherwise witnessed such statement. This practice does not introduce positive evidence enabling the prior statement to become evidence, rather it is designed to undermine the credibility of whatever the witness swears to at trial.

The hostile witness

Section 3 of the Criminal Procedure Act 1865 provides:

> A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such a statement.

The foregoing provides an exception to the rule that the prosecution may not cross-examine its own witness. If the witness has forgotten his or her testimony, or has thought matters over and come to the honest conclusion that his original statement was wrong,[885] the witness is not adverse. A hostile witness, on the other hand, is one that is adjudged to be evading telling the truth, having previously given an account which he or she then indicated conformed to the truth and which led the prosecution to believe that such witness would give testimony to a particular effect. Where a witness is allowed to be cross-examined by the prosecution as a hostile witness any relevant prior inconsistent statement will be put to him. That prior inconsistent statement is hearsay. Absent a ruling by the trial judge enabling the application of s 16 of the Criminal Justice Act 2006, it never becomes evidence in the case, and the jury are not entitled to act upon it. A statement by the witness that he or she accepts on oath before the jury the truth of such prior statement is admissible in evidence to the extent of whatever fact is accepted. If the witness does not accept it, but denies the truth of such prior statement, there is no evidence as to the facts therein stated to go before

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particular statement may be explained by the context, or, even if there is a discrepancy on one point, it may appear that it is only one minute point and that in all the rest of the evidence there is perfect consistency, so that the general result of the comparison may be confirmation rather than contradiction.

[882] May, Criminal Evidence (3rd ed, 1995) at p 447 argues that the terms of the statement allows a trial judge to make such use of it as he thinks fit. Accordingly it is argued that the trial judge has a discretion in determining if the statement should be exhibited.

[883] (1898) 89 Cr App R 302.

[884] *Berch* (1924) 18 Cr App R 26; Golder (1960) 1 WLR 1169. *North Australian Territory Co v Goldsborough* (1893) 2 Ch 381.

[885] See Ryan and Magee, The Irish Criminal Process (1983, Mercier Press), pp 336-338.

the jury. The cross-examination of a hostile witness is allowed for the purpose of giving the witness an opportunity to affirm on oath the truth of an earlier account given or to allow the prosecution to negative the hostility of the witness by impugning their credibility on the basis of the prior statement. The proper approach was set out by Walsh J in *The People (AG) v Taylor*[886] as follows:

> The proper procedure if it is desired to have a witness treated as hostile, is make the application to the judge and put before him the material upon which it is sought to have the witness declared to be a hostile witness. This, of course, should be done in the absence of the jury and, if the judge rules that the witness may be treated as hostile, then the witness may be cross-examined. That is something quite different and distinct from the rules and procedure which govern the admissibility of written statements in cross-examination. This particular witness had been allowed to be treated as hostile and, when the jury were recalled to court, the proper procedure for the prosecution was to have put to the witness that she had on another occasion made a statement which differed materially from or contradicted the one she was making in the witness-box. If she were to deny that, then the proper procedure would have been to have her stand down from the box, and to prove in fact that she did in fact make a statement by putting into the box the person who took the statement, proving it in the ordinary way without revealing the contents of the statement at that stage. The earlier witness should then have been put back in the box and the statement put to her for identification, and then her attention should have been directed to the passage in which the alleged contradiction or material variation appears. If she had agreed that there was such a contradiction or material variation, that should have been the end of the matter in so far as the question of impugning her credibility was concerned because there would then have been before the jury an admission from the witness to the effect that she had made contrary statements on the same matter. The statement might then put in evidence, though that would not be strictly necessary at that stage when the admission had been made. If she had persisted in denying the contradiction, then the statement, having been proved, would have gone in as evidence of the fact that the witness had made a contrary statement.
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> It must at all times be made clear to the jury that what the witness said in the written statement is not evidence of the fact referred to but is only evidence on the question of whether or not she has said something else – it is evidence going only to her credibility.

This procedure has been rendered less important by virtue of s 16 of the Criminal Procedure Act 2006.

Criminal Justice Act 2006 s 16

A change in the law enabling prior witness statements to become evidence of the facts therein stated even though a witness later denies those facts on oath came about in consequence of a series of cases where it was thought that the accused had intimidated witnesses out of testifying adversely to their interests. The result was s 16 of the Criminal Procedure Act 2006. Anyone, apart from a suspect being questioned about an offence, may in addition to signing a witness statement about an arrestable offence, may also make a statutory declaration, under the Statutory Declarations Act 1938, that facts therein stated are true.[887] Section 16 applies to arrestable offences essentially when a witness refuses to testify to what they had previously said. Section 16(1) states:

> Where a person has been sent forward for trial for an arrestable offence, a statement relevant to the proceedings made by a witness (in this section referred to as "the statement") may, with the leave of the court, be admitted in accordance with this section as evidence of any fact mentioned in it if the witness, although available for cross-examination—
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> (a) refuses to give evidence,

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[886] [1974] IR 97.

[887] Criminal Justice Act 2006, section 17. Such statutory declarations may also be made to other public officials under s 18.

(b) denies making the statement, or

(c) gives evidence which is materially inconsistent with it.

The section operates initially in the presence of the jury, unless the prosecution is forewarned, where a witness apparently fails to testify as notified by his or her statement. The prosecution will then examine the witness in the absence of the jury and ask the judge to allow the witness to be treated as hostile, so that he or she may be cross-examined on the statement, thus undermining his or her credibility, or that the statement be admitted in evidence through being put to the witness or otherwise proved as to its contents in the presence of the jury. The disadvantage of the hostile witness procedure is that the prior statement only undermines the credibility of a witness who may be saying the contrary to what he or she had previously said while the 2006 Act enables their prior statements to be evidence. The judge should not, however, admit such statements in evidence if "having had regard to all the circumstances, including any risk that its admission would be unfair to the accused or, if there are more than one accused, to any of them, that in the interests of justice it ought not to be so admitted" or where admitting such statements as evidence "is unnecessary, having regard to other evidence given in the proceedings."[888] The weight to be attached to such a statement depends upon "all the circumstances", which must include how it was taken and whether the witness makes any allegation of for instance harassment, "from which any inference can reasonably be drawn as to its accuracy or otherwise." This provision was a significant change to the existing law and enables out of court statements as evidence even to the point that these are sufficient to convict a person of the most serious criminal offences. In *The People (DPP) v Rattigan*,[889] the Court of Criminal Appeal recognised the radical nature of the change effected, O'Donnell J commenting:

> This section introduced a significant statutory exception to the hearsay rule and provided for the admission in evidence of certain out of court statements in certain circumstances and in particular where the witness "although available for cross-examination" refused to give evidence, denied making the statement, or gave evidence which was materially inconsistent with it. As was observed by this Court in The People (Director of Public Prosecutions) v. Murphy, [2013] IECCA 1:
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> > "Moreover, under its provisions a person could be convicted of the most serious crimes known to law, on an out of court statement which is subsequently disallowed on oath by its maker, despite the fact that he and his story may be subject to rigorous scrutiny under strictly controlled court conditions. Consequently s.16 is a fundamental departure from traditional common law principles which for good reason, have always placed such high regard on sworn evidence given directly, immediately, and spontaneously before the fact adjudicator. Such principles have their foundation, not solely in the rule against hearsay, but far more deeply rooted in our criminal law system.
> >
> > The preceding events said to have given rise to the enactment of Part 3 of the 2003 Act, of which s.16 forms part, are well known and do not require repetition in this judgment. It can be said however that its provisions were largely intended to deal with gangland or organised criminality and criminals, many of whom prided themselves on being beyond the laws reach: in this regard recourse to the most violent means available so as to intimidate witnesses against doing their civic duty in giving evidence was common place. The Legislature, as is its right, responded inter alia with the section in question." (paras. 21 and 22)

The criteria upon which such a statement may be admitted are as set out in s 16(2) and these involve either the witness testifying that it was made by them or some other witness, for instance

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[888] Criminal Justice Act 2006, section 16 (4).
[889] [2013] IECCA 3; see Supreme Court decision [2018] 3 IR 417.

the officer interviewing them, so testifying. The statement cannot otherwise change the rules of evidence and it is thus only if the facts deposed to in the text would be admissible in oral testimony that same are to be admitted. Hence section 16(2):

> (2) The statement may be so admitted if—
>
> (a) the witness confirms, or it is proved, that he or she made it,
>
> (b) the court is satisfied—
>
> (i) that direct oral evidence of the fact concerned would be admissible in the proceedings,
>
> (ii) that it was made voluntarily, and
>
> (iii) that it is reliable,

Furthermore, while under the Criminal Justice Act 1984, statements may be made under statutory declaration, this is not a condition of admissibility since if the court is satisfied that the witness in making the prior statement understood that it was required to tell the truth. Thus the conditions of admissibility are set out in s 16(2)(c) as either:

> (i) the statement was given on oath or affirmation or contains a statutory declaration by the witness to the effect that the statement is true to the best of his or her knowledge or belief, or
>
> (ii) the court is otherwise satisfied that when the statement was made the witness understood the requirement to tell the truth.

In looking to reliability as a criterion of admissibility in the presence of the jury, regard is had to the circumstances including the solemnity of its taking and the circumstances of its taking. Hence s 16(3) provides:

> (3) In deciding whether the statement is reliable the court shall have regard to—
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> (a) whether it was given on oath or affirmation or was videorecorded, or
>
> (b) if paragraph (a) does not apply in relation to the statement, whether by reason of the circumstances in which it was made, there is other sufficient evidence in support of its reliability,
>
> and shall also have regard to—
>
> (i) any explanation by the witness for refusing to give evidence or for giving evidence which is inconsistent with the statement, or
>
> (ii) where the witness denies making the statement, any evidence given in relation to the denial.

In terms of how the section works in practice, experience suggests that juries have careful regard to what witnesses say as to how they were interviewed by gardaí. A videorecorded narrative gives such a statement immediacy. Oath, affirmation or statutory declaration tends to add solemnity. Experience does not suggest, however, that there is automatic acceptance of facts later denied or forgotten. Rather, such statements are treated as merely another item of evidence.

Partly this has to be because the prosecution, as with any witness, do not have the last word. The witness has to be there to be cross-examined by the defence and any fact that may tend to undermine the reliability of the statement may be brought out with a view to lessening its impact or the weight the jury may give to it. The section should simply be applied as it is written and judges should be aware that the fundamental right of cross-examination is not lost, as the Court

of Criminal Appeal commented in *The People (DPP) v Rattigan*[890] where O'Donnell J emphasised the continued existence of this right:

> This provision permits the introduction of the out of court statement of a witness which would otherwise be excluded as hearsay, and is therefore one further statutory exception to the hearsay rule. Section 16 is consonant with developments in the common law world. In some jurisdictions an exception to the hearsay rule was effected by case law and in others, as here, by statute. The objective however, is the same. The most obvious circumstance in which a witness who has given a detailed witness statement might nevertheless refuse to give evidence at the trial is when there has been interference with the witness, whether by way of inducement or intimidation or otherwise, or where the witness has developed a reluctance to giving evidence without any direct threat or inducement. The capacity of any legal system to compel the production of relevant testimony and real evidence is central to its ability to perform the function of the administration of justice. Interference with witnesses is not just an ugly and insidious crime which is by definition difficult to detect and punish, it is also fundamentally subversive of the administration of justice and its capacity to provide a fair trial of a charge. A provision such as section 16 therefore provides a partial remedy for a real problem and in doing so removes, or at least reduces, the incentive for anyone to seek to encourage a witness not to testify. While counsel for the applicant argued that the Court should approach the section on the basis that it was a very powerful provision since a statement so admitted could not be cross examined, this is a necessary consequence of the admission of any out of court statement under an exception to the hearsay rule. Indeed, under section 16 the opposing party is in a somewhat better position since the witness must be available for cross examination, and the opposing party can seek to exploit the witness's uncertainty, or professed lack of memory, if he or she thinks it desirable. That possibility is not available in other exceptions to the hearsay rule. The fact that evidence admitted under the rule may be effective and even powerful in some cases, is not itself a reason to approach the section with any scepticism.[891]

Ultimate Issue

A witness is never entitled to give evidence as to the ultimate issue before the jury. Thus, a witness may never be asked "and do you say that the accused is guilty?" Rather the witness describes being assaulted, or otherwise seeing or hearing some fact that is part of the relevant building blocks of the case. Witnesses are entitled to depose to what they experienced, but the interpretation of the facts, and the inferences to be drawn from such facts as are proven, is exclusively one for the jury. A psychiatrist, for example, is entitled to give evidence of having examined the accused and to testify as to that person's state of mind; that they suffered from insane delusions or irresistible impulses. While the distinction is often a fine one, the witness is not entitled to testify that the accused did not intend to kill the victim. A witness cannot act as a thirteenth juror.[892]

Experts

Evidence of opinion is admissible on questions of art and science outside the competence of ordinary members of the community, from which jurors are drawn, provided that opinion is given by an expert in the relevant field. An expert is a person with special knowledge in an arcane subject.[893]

It is for the judge to decide whether a witness is sufficiently qualified or experienced to express an opinion in an expert field. This is usually attested to by the giving of evidence of relevant

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[890] *The People (DPP) v Rattigan* [2013] IECCA 3.
[891] ibid, [9].
[892] *The People (DPP) v Kehoe* [1992] ILRM 481.
[893] See generally: Tottenham, Prendergast, Joyce and Madeden, A Guide to Expert Witness Evidence (2019) chapters 1 and 7.

qualifications, as in the case of a pathologist, or evidence as to courses of study followed, as in the case of a fingerprint expert or a scenes of crime examiner. The following illustrates the difference between evidence as to fact and evidence as to opinion. The body of the deceased is found at the scene of the crime. There are stains on the walls. A witness gives evidence as to the finding of the body and to seeing dark red coloured stains on the wall. A sample is taken and a pathologist gives evidence that the stains, when tested were according to the applicable science human blood. A scenes of crime examiner is called who has followed a course of training in that field. He gives evidence that the blood pattern is consistent with flying blood landing on a wall and that the configuration of the blood pattern and their shape shows that the blood flew through the air from the direction of a site within the room. The finding of the physical objects and their description in ordinary language is a matter for ordinary testimony. The nature of the substance on the wall, how it got there and from where it flew is a matter for expert opinion.

Character

The general rule is that the prosecution is prohibited from leading evidence that the accused is of bad character. By this is meant such evidence as prior convictions or the testimony of any witness as to the general reputation for morality of the accused. In contrast, an accused is entitled to call evidence as to his good character. By doing so he puts his character in issue. This might be adduced by asking questions of a garda witness as to whether the accused has previous convictions. The accused may also call positive evidence from character witnesses to indicate that his past life has been so blameless, and exemplary in terms of good works, that it makes it unlikely that he would commit the crime charged. This evidence is as to the general character of the accused and not specific evidence as to whether the witness believes that the accused committed the crime.[894] That witness may be the spouse of the accused. A spouse is not compellable to disclose any communication made by the other spouse during a marriage.[895] Where the accused is lead by the prosecution into asserting he is of good character he does not thereby put his character in issue.[896] Where the accused calls specific evidence of his good character and general conduct, this may be rebutted in the same general terms by the prosecution.[897]

Throwing away the shield

The rules as to the circumstances under which an accused throws away his shield have become detailed beyond the scope of the governing statute, the Criminal Justice (Evidence) Act 1924.[898] In essence, however, an accused may be cross-examined as to his credit when the accused has caused questions to be asked of witnesses for the prosecution with a view to establishing his own good character, or has called evidence as to that character.[899] An attack on a dead person, or on a person who is not a prosecution witness, does not put the accused's character in issue.[900] An attack on the conduct of an interview by the police may involve, in the presence of the jury, an imputation on the character of prosecution witnesses.[901] The test is whether the question goes beyond a denial of the charge, which may of necessity involve calling someone a liar,[902] for example by alleging consent in a rape case,[903] or that a witness should not be believed because of drunkenness,[904] but embarks on an attack on their character or antecedents.[905] In essence the judge has a discretion;

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894 *R v Rowton* (1865) Le & Ca 520
895 Criminal Justice (Evidence) Act 1924.
896 *Beecham* [1921] 3 KB 464.
897 Rowton above, *R v Winfield* [1939] 4 All ER 164
898 See May, Criminal Evidence (London, 1995) paras 7.03-7.77.
899 *The People (DPP) v McGrail* [1990] 2 IR 38, 50.
900 *Lee* [1976] 1 WLR 71.
901 *Britzmann and Hall* (1983) 76 Cr App R 134.
902 *Rouse* [1904] 1 KB 84, 20 Cox 592.
903 *Turner* [1944] KB 463.
904 *MacLean* [1978] Crim LR 430.
905 For examples of such an attack see *Hudson* [1912] 2 KB 464; *Bishop* [1975] QB 274; *Jenkins* (1945) 35 Cr App R 1; Jones (1923) 17 Cr App R 117 (attack on a police confession).

see *The People (DPP) v McGrail*.[906] In exercising it the court should ask whether the attack the jury has heard on the prosecution ought fairly to cause to be introduced particular previous convictions of that accused. If such convictions are let in it is to balance the attack on the credit of prosecution witnesses by showing the jury that the character of the accused in making the allegations against them is not blameless, and so assist in assessing his credibility and not his guilt. The jury should be told this.[907]

Attacking a co-accused

Where A, B and C are charged with the same offence, and A gives evidence in his own defence which blames the commission of the offence on B and C, then A may be asked questions tending to show his previous bad character. Section 1(f) of the Criminal Justice (Evidence) Act 1924, as amended by s 33 of he Criminal Procedure Act 2010 provides:

> A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless –
>
> (i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or
>
> (ii) he has personally or by his advocate asked questions of any witness with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the person in respect of whom the offence was alleged to have been committed or the witnesses for the prosecution; or
>
> (iii) he has given evidence against any other person charged with the same offence; or
>
> (iv) the person has personally or by the person's advocate asked questions of any witness for the purpose of making, or the conduct of the defence is such as to involve, imputations on the character of a person in respect of whom the offence was alleged to have been committed and who is deceased or is so incapacitated as to be unable to give evidence …

The purpose of this legislation is not to stop an accused from giving a factual account of his or her defence in apprehension that if that factual defence involves directly relevant events, that prior misconduct of the accused may be revealed on application to the trial judge. The law in this jurisdiction was set out by the Court of Criminal Appeal in *The People (DPP) v McGrail*.[908] The accused had been convicted on charges under the Firearms Act 1964. The case for the prosecution was that he was arrested while trying to escape from a house which gardaí had entered pursuant to a search warrant, that he had made certain incriminating statements and that he had pointed out a place on the premises where some guns had been hidden. During the course of their cross-examination by counsel for the accused, the garda witnesses denied allegations put to them that the accused had made none of the statements tendered in evidence, that he had not pointed out the place where the guns were hidden and that the gardaí were trying to convict the accused by inventing false verbal statements and other incriminating evidence. The trial judge, on application, gave the prosecution leave to cross-examine the accused as to his previous convictions. The Court of Criminal Appeal held that this decision was wrong and ordered a re-trial. Hederman J drew a sharp distinction between cross-examination or evidence by the accused disputing the prosecution case which involved putting a contrary case and independent evidence which targeted prosecution witnesses as to their character:

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[906] [1990] 2 IR 38, 50 which analyses the distinctions between necessary testing and unwarranted character attacks.
[907] *Richardson v Longman* [1969] 1 QB 299, (1968) 52 Cr App R 317.
[908] [1990] 2 IR 38.

> Every criminal trial involves an imputation as to the character of somebody. The mere fact that an accused is accused of a criminal offence and that evidence is offered to support that view is in effect an imputation against the character of the accused. If the accused, either by giving evidence or through his counsel's cross-examination of the witnesses for the prosecution, suggests to them that they are not to be believed, that is also an imputation as to their character in as much as it is suggested that they are telling an untruth, if that is the way the matter is put to them. The defence may even require, in its efforts to rebut the prosecution case, to suggest to the witness and to the court that in fact the real author of the crime, if it has been proved to have been committed, is not the accused but one or other, perhaps, of the witnesses for the prosecution. Such a course of conduct is inevitable if an accused person is not to be seriously hampered in the conduct of his defence. Any ruling otherwise would have the effect of inhibiting the conduct of the defence in that an accused person, who may have a criminal record, may be intimidated into abandoning an effort to put in issue the truth of the evidence of a prosecution witness lest his own character outside the facts of the trial be put in issue. For example, in a prosecution for rape, if the accused's case is that the alleged sexual intercourse was by consent, to put that case to the complainant is in effect to say that she was guilty of immoral, although not unlawful, conduct. Such suggestion or inference is not based on any matter independent of the evidence given by the complainant. It would be a totally different matter if it was put to the complainant that she behaved in a similar immoral fashion on occasions or in situations quite independent of the facts of the case in issue. Such an attack on the character of the complainant is now restricted by s 3 of the Criminal Law (Rape) Act 1981. Thus to suggest to her that she was a common prostitute or had had sexual relations by consent with other persons independently of the accused would be to put her character in issue for the purpose of discrediting her testimony.

This analysis also applies where an accused person who has, on the face of it, confessed to a crime and signed an inculpatory statement. Such a witness may allege, for example, that a video recording of a confession occurred by reason of threats out of sight of cameras without putting his own character in issue and enabling the prosecution to call evidence of a list of prior convictions.

> The provisions of the Criminal Justice (Evidence) Act, 1924, prohibit putting in evidence the bad character of the accused unless 'the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution'. The question is what construction is to be put on the words 'imputations on the character of the prosecutor or the witnesses for the prosecution'. In the view of the court this must be construed as applying only to imputations made on the character of the prosecutor or his witnesses independent of the facts of the particular case, as, for example, when it is suggested that the witnesses are of such general ill-repute that they are persons who are not to be believed. To put to a prosecution witness that he fabricated the evidence he is giving, or that he and other witnesses for the prosecution combined together to fabricate evidence for the particular trial in question, may be necessary to enable the accused to establish his defence, if in fact his defence is that he made no such statement to one or more of the prosecution witness. It seems immaterial whether the allegation of untruthfulness is made directly to the witness or witnesses or is a necessary inference on the questions put. If the accused gives evidence and if, for example, he denies the facts of the offence alleged against him and it is put to him that he is not telling the truth, is that to be taken as attack by the prosecution on his character? The court thinks not. A distinction must be drawn between questions and suggestions which are reasonably necessary to establish either the prosecution case or the defence case, even if they do involve suggesting a falsehood on the part of the witness of one or the other side, on one hand and, on the other hand, an imputation of bad character

> introduced by either side relating to matters unconnected with the proofs of the instant case.[909]

It follows that an accused person is entitled, and bound according to the rule in *Browne v Dunne*,[910] to put such unpleasant alternative view of facts to witnesses as may involve an allegation that they behaved wrongly without thereby dissolving the shield against the accused's own character being put in issue in the trial. Provisions introducing allegations of prior misconduct against an accused that are not directly related to the charge are to be strictly circumscribed.[911] As Hederman J stated, a judge has "no discretion to permit cross-examination of the accused when the matters complained of relate directly to the evidence given in the case at hearing, either by way of suggesting the untruthfulness of witnesses or an agreement between the prosecution witnesses to concoct a case against the accused."

Section 1(e) allows questions to be put to an accused giving evidence even though the answers to such questions "would tend to incriminate him as to the offence charged", as opposed to any other offence. The watchword there must be relevance.[912] Questions should be kept to what incriminates the accused on the charge before the court, for which by giving evidence in his or her own defence, the privilege against self-incrimination is foregone.[913]

Prejudice

It is a general rule that evidence should only be admitted if it is relevant to the charge against the accused. Hence, the building blocks of the prosecution case will, by the introduction of testimony of conduct and motive, seek to prove that the accused committed the crime. It is also a general rule that courts should be alert to the admission of evidence which has no such probative value but which undermines the fairness of the trial by raising unrelated implications against the accused or which seeks to inflame race, religious or orientation prejudice. Naturally, the purpose of evidence linking the accused to the crime is to demonstrate involvement. That is not prejudice, which by definition amounts to conclusion without the consideration of whatever facts and necessary inferences may support a reasoned decision. Sometimes, evidence may be both probative in nature but its prejudicial effect, if heard by the jury, may inflame a prejudiced verdict. The exclusion of such evidence is a balancing exercise by the trial judge: with an appropriate direction, is it still the case that by the jury hearing such testimony there is a real danger that they will judge the accused not on the evidence but by reason of hostile emotion?

Prior crimes[914]

Hence, evidence of prior convictions or of being previously investigated or charged with an offence is generally inadmissible. However, evidence which tends to show that the accused has previously been convicted of an offence, is admissible if it is relevant to a fact in issue and the probative nature of that evidence outweighs any prejudicial effect it may have. For instance, where the body of the deceased has been dismembered with the professional skill of a butcher, it is relevant to prove that the accused had previously learned that trade while a prisoner.[915] In the current day, where it is necessary to lead such evidence, the prosecution usually attempts, if that is possible, not to reveal to the jury any connection with the commission of prior offences. Thus, for example, in such a case it might be possible to call a witness to testify that he was a teacher and that during a particular period of time, in unspecified circumstances, he had taught the accused the trade of butchery at which he then became competent.

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[909] [1990] 2 IR 38, 48.
[910] (1893) 6 R 67, *McDonagh v Sunday Newspapers* [2017] IESC 59.
[911] *The People (DPP) v Ferris* (10 June 2002, Court of Criminal Appeal, unreported).
[912] *Jones v DPP* [1962] AC 2 WLR 575.
[913] *The People (DPP) v Kelly* (21 March 2002, Court of Criminal Appeal, unreported).
[914] See Mee, 'Similar Fact Evidence: accusation = guilt?' (1991) 1 ICLJ 122.
[915] *The People (AG) v Kirwan* [1943] IR 279.

Evidence may be admissible, even though it shows that the accused was of previous bad character, if it negatives the defence of accident. In *Smith*,[916] the accused was charged with murdering a woman with whom he had gone through a ceremony of marriage. This was the "Brides in the Bath" case. The victim died in the bath after the accused had insured her life in his favour. The circumstances of the death were, according to the knowledge of pathology at that time, consistent with death by an epileptic fit. The prosecution was allowed to prove that the accused had gone through ceremonies of marriage with two other women who had also died while apparently taking a bath in circumstances consistent with epilepsy and where a financial benefit from their death was to accrue to the accused. Also led was evidence of an experiment whereby a police woman was upended and rendered unconscious in a bath by her legs suddenly being grabbed and pulled so as to submerge her. In the later case of *Makin v The Attorney General for New South Wales*,[917] a husband and wife were charged with murdering a baby entrusted to their care. The body was found in the back yard of a house which they occupied. The accused husband and wife took in babies for small charges. In houses which they had previously occupied bodies of babies were found buried in the back yard. The evidence was admitted as negativing the likely defence that the baby had died of natural causes. It is logical to suggest that where a pattern of facts is established by the prosecution which strongly proves that the accused acts according to such pattern and which, in the circumstances, outweighs any prejudicial effect resulting from the revelation of the accused's bad character, that such evidence is admissible.

In *Boardman*,[918] Lord Hailsham suggested that the reason why evidence of bad character is usually excluded is because: (i) it is irrelevant and (ii) its prejudicial value outweighs its probative value. In *Boardman* allegations of homosexual offences were made against the accused schoolmaster in respect of two boys. The common feature of the two incidents upon which the prosecution relied was that the accused had sought to play a passive role. The House of Lords held that such evidence was admissible under the similar fact exception. Since what is concerned is the admission of bad character in a context where the jury are sworn to try the case only on the basis of objective analysis, particular care is needed. Some judges emphasised that a high degree of probative force was required before such evidence could be admitted. Lord Wilberforce stated this principle in the following terms:

> The basic principle must be that the admission of similar fact evidence (of the kind now in question) is exceptional and requires a strong degree of probative force. This probative force is derived, if at all, from the circumstance that the facts testified to by the several witnesses bear to each other such a striking similarity that they must, when judged by experience and common sense, either all be true, or have arisen from a cause common to the witnesses or from pure coincidence. The jury may, therefore, properly be asked to judge whether the right conclusion is that all are true, so that each story is supported by the others.

In *DPP v P*,[919] the House of Lords accepted that "striking similarity" was not a standard required for the admissibility of prior misconduct evidence on a charge where that was relevant. P had been charged with rape and incest in respect of each of his two daughters. The similarities in the two girls' stories included the possessive behaviour of P and his willingness to pay for abortions. None of this could be described as strikingly similar, at least in the context of the facts which are often present in cases of incest. However, the House of Lords held that, notwithstanding the lack of a striking similarity, the evidence was still admissible. Lord Mackay LC said:

> I would deduce the essential feature of evidence which is to be admitted is that its probative force in support of the allegation that an accused person committed a crime is sufficiently

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916 (1915) 11 Cr App R 229.
917 [1894] AC 57.
918 [1975] AC 421.
919 [1991] 2 AC 447.

> great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime. Such probative force may be derived from the striking similarities in the evidence about the manner in which the crime was committed…But restricting the circumstances in which there is sufficient probative force to overcome a prejudice of evidence relating to another crime to cases in which there is some striking similarity between then is to restrict the operation of the principle in a way which gives too much effect to a particular manner of stating it, and is not justified in principle.

An illustration of the principles to be applied is the notorious case of *West*.[920] Rosemary West was convicted of ten murders committed with her husband, who had killed himself before the trial. She denied complicity in the murders. In seven of the murders the victims were naked and bound, their bodies had been mutilated and they had been buried under the West's family home. The evidence of four witnesses who had been sexually abused by Mrs West and her husband acting together was held to have been correctly admitted. They showed that Mrs West had been an enthusiastic and committed perpetrator in acts of sexual violence, and to show that she derived gratification from them. There was no direct evidence that Mrs West had perpetrated the crimes charged, but the prosecution was able to rely on the similar fact evidence as proof of her complicity in them. The question that remained was how likely was it that the murders had been perpetrated under the nose of Mrs West when she could be proved to be a person with a propensity to join in acts of serious sexual violence against young women.

Similar fact evidence can be used to identify the accused. Suppose R is charged with murdering X, and with administering a stupefying drug to Y in order to rob him. The two offences occurred some months apart. The circumstances of the murder are strikingly similar to the robbery, except that the victim died. Evidence that R had drugged and robbed Y will be admissible to establish the identity of the murderer of X.[921] In *The People (DPP) v Nevin*,[922] the accused kept an inn together with her husband who had been murdered by a single shot to the chest when doing his accounts late at night. She purported to be the victim of a robbery. Evidence was admitted from three men who on separate occasions had been asked by her to murder her husband in a context of making the crime seem like a robbery. The decision in *The People (DPP) v BK*,[923] was concerned with an over-technical struggle with the issue of separate trials and has now probably been subsumed by later cases. Nonetheless, it contains a useful summary of the principles whereby similar fact evidence may be introduced. In that case, the applicant had been convicted on several counts of attempted buggery and indecent assaults against a number of young boys in a residential home for children. The trial had proceeded on foot of four counts involving three separate complainants. Two of the counts charged him with indecent assault and buggery respectively against one of the young boys. The other two counts charged him with attempted buggery against the other two. In the case of the two counts against the first complainant, the offences were alleged to have occurred in a dormitory at night following lewd suggestions by the applicant to the complainant earlier that day. In respect of the other two counts, the complainants alleged that the offences had occurred while they were sharing a bed with the applicant in a caravan. It was in respect of these latter two counts only that the applicant was convicted. Barron J delivering the judgment of the Court of Criminal Appeal distilled the following applicable principles:

(1) The rules of evidence should not be allowed to offend common-sense.

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920 [1996] 2 Cr App R 374.
921 *Ruiz* [1995] Crim LR 151.
922 [2003] 3 IR 321.
923 [2000] 2 I.R. 199.

(2) So, where the probative value of the evidence outweighs its prejudicial effect, it may be admitted.

(3) The categories of cases in which the evidence which can be so admitted, is not closed.

(4) Such evidence is admitted in two main types of cases:-

(a) to establish that the same person committed each offence because of the particular feature common to each; or
(b) where the charges are against one person only, to establish that offences were committed.

In the latter case the evidence is admissible because:-

(a) there is the inherent improbability of several persons making up exactly similar stories;
(b) it shows a practice which would rebut accident, innocent explanation or denial.[924]

Whilst similar fact evidence is often used in sexual violence or murder trials, it is not limited to such offences. Thus in *Mullen*[925] the fact that the accused used a blow torch to crack glass in order to enter and burgle premises provided a link between his crimes.

There is some uncertainty as to whether mere evidence of propensity can be admitted under this rule. It is submitted that the answer is yes, so long as the evidence can be shown to be of a very specific significance to an issue before the court.[926]

It is clear, however, that the practice of ordering separate trials for an accused indicted for a series of sexual offences against separate victims is suspect. This can result in four trials, for example, where each jury is unaware that three other victims make similar complaints. The better course is to try all the cases together but to instruct the jury that evidence in one case is only evidence in the other victim's cases where there are such degrees of similarity that make it logical to conclude that the one supports the allegation in the other. In Scotland, this has been the practice since that jurisdiction requires at least two pieces of evidence to convict any accused. This is sometimes called the corroboration rule but it is really a two-witness approach where documentary evidence or a circumstantial situation can support a case as well as another actual witness. A sensible approach is also taken to the problem of sexual abuse and of intimate circumstances. In *Moorov v HM Advocate*[927] the accused was indecently assaulting a number of his employees in a dressmaking business. The employees were not left to give evidence alone in a series of isolated cases. The Full Bench of the High Court of Justiciary ruled that the evidence from one girl could corroborate the evidence of another. In Scotland, the doctrine in *Moorov* has been developed so that juries regularly get to hear evidence of other misconduct from other complainants with a view to corroborating the evidence on the main charge. No one suggests that this is working unfairly; see the judgment of Lord Carloway, in *M R v HM Advocate*[928]

Penalty

The matter of penalty is exclusively reserved to the trial judge following conviction. Neither the prosecution nor the defence are entitled to address the jury as to the likely penalty upon conviction. Nor, traditionally, are the defence entitled to reveal to the jury what the maximum penalty, or mandatory penalty, on conviction for an offence is. This rule is perhaps outdated since our

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924 ibid, 210-211
925 [1992] Crim LR 735.
926 This is the view taken in Blackstone's Criminal Practice 1998 at [f12.8].
927 1930 JC 68.
928 [2013] HCJAC 8.

newspapers regularly report debates as to sentencing and as to the penalties for new forms of crime created by legislation. Juries are people of intelligence and might be expected to know that the mandatory penalty on conviction for murder is life imprisonment, that people sentenced to life imprisonment are mostly released on licence after a decade and a half or more and that rape, robbery, drug pushing and possession of firearms with intent to endanger life carry a possible maximum penalty of imprisonment for life. They are also sure to be aware that no one ever gets such a sentence except where it is mandatory, as is the case with murder.

Chapter 7

Inchoate Offences

Introduction

Alexander Solzhenitsyn's criticism of Soviet law was that it was adapted to serve the regime so much as to lack conscience, making mere thought against official ideology a crime.[929] This extract from his Harvard commencement address 1978, warns that law without an underpinning of social justification and moral necessity risks the destruction of human dignity:

> I have spent all my life under a Communist regime and I will tell you that a society without any objective legal scale is a terrible one indeed. But a society with no other scale but the legal one is also less than worthy of man. A society based on the letter of the law and never reaching anything higher fails to take advantage of the full range of human possibilities.[930]

In considering inchoate offences, the scope of offences which are not, by definition a substantive crime, requires analysis as to both utility and justification. There are three inchoate offences: attempt, conspiracy and incitement. The word "inchoate" may be misleading in this context, for an incitement, conspiracy or attempt is a completed offence in itself, even if the projected harm has not materialised. In the words of one leading text, "it would in many cases be a primitive and rather useless system of criminal law that had to sit back and wait for those objectives to materialise before it could act."[931]

Many forms of criminal offence are based not on the commission of the substance of an offence but on ensuring that such crimes are never committed. Hence, there are prohibitions against the possession of dangerous weapons and of controlled drugs. The policy is that the outlawing of the use of instruments of violence and self-destruction is best done by ensuring that people cannot have access to instruments of future criminal conduct. Similarly, rather than waiting for terrorist outrages, many forms of preliminary or preparatory conduct are outlawed whereby the agar from which such germs might grow is sterilised. The Criminal Justice (Terrorist Offences) Act 2005 gives effect to a number of international instruments directed to terrorism but also prohibits the training of terrorists or the direction of their activities. No one would consider that prohibiting the training of choirs or the organising of concerts should be outlawed but were that to happen, a huge element of human culture would be undercut. In the spirit that human conduct should only be proscribed when a danger to self, society or others is manifest, inchoate offences can be argued to go too far in criminalising communications, as in incitement, agreements, as in conspiracy, and private preparations for actions which would only be a breach of the criminal law if actually carried out, as in attempts. There, the argument would run, that what is being outlawed is mere thought. There is very strong social utility, however, in recognising that engaging in persuading others to commit crimes, as in incitement, is a wrong against the State, while attempts to commit crime are defined in such a way as to be more than merely bitter private playacting, and the strength of mutual support and societal danger that comes from a group of associates turning themselves into a criminal gang through agreeing to embark on a course of criminal conduct requires society to respond.

In the definition of the elements of inchoate crime, there are strong barriers to any expansion of crimes based on communication, preparation and agreement becoming so vague and so thought-based as to defy moral justification. Attempts and incitement require overt actions in pursuit of

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929 Alexandr Solzhenitsyn, Gulag Archipelago (New York, Collins & Harvill 1974) Chapter 2.

930 Alexandr Solzhenitsyn, 'A World Split Apart' (327th Harvard Commencement, Harvard University, 8 June 1978) <https://www.americanrhetoric.com/speeches/alexandersolzhenitsynharvard.htm> accessed [9 June 2020].

931 Alan Mewett and Morris Manning, Mewett and Manning on Criminal Law (3rd ed, Butterworths 1994) 303.

the crime. While such a requirement has yet to be made for conspiracy in this jurisdiction, as it has in others, the general trend in the common law has been to ensure that its definitional elements circumscribe any temptation by prosecuting authorities to resort to any inchoate offence as a substitute for proof of criminal conduct. Properly construed, the inchoate offences of conspiracy, incitement and attempt are in themselves the commission of a criminal offence. Unlike in England, this jurisdiction has not adopted any scheme making assistance to criminals a separate crime.[932] Here, assistance in the commission of the offence in order to enable the commission of that offence constitutes complicity. In England, ss 44 to 47 of the Serious Crime Act 2007 add encouragement to the existing common law offences of incitement, conspiracy and attempt.

[A] Attempt[933]

The law as to attempt arose from the determination of the Star Chamber to eradicate the practice of duelling. Where a fatality occurred, the victor was treated as guilty of manslaughter or murder. Many duels did not result in a fatality, as in the duel between Bezukhov and Dolokhov in War and Peace, the pistols might misfire or the participants miss or merely wound. Further, the participants consented to potential harm. Seeking, from policy reasons, to punish seconds and those who helped in the preparations for the duel, it became necessary to extend the law of homicide. This originated the idea of a preparatory crime from which the modern concepts of attempt, conspiracy and incitement evolved. Trespass in the home is a chilling event, particularly when those entering have no good in mind. Consequently, burglary has been a crime in itself since the 12th century but it is in reality a form of attempt to steal short of the requirements of overt action, beyond trespass, and the necessity of a proximate action. It would be an affront to justice that a man escape by chance an assault on his person with a crossbow bolt, yet such an attempt to kill him would not be classified as a crime. Hence, all attempts to commit a crime are crimes.[934]

All criminal attempts, conspiracies and incitements were misdemeanours at common law. Since the Criminal Law Act 1997 has now abolished the distinction between felonies and misdemeanours, all inchoate offences are simply classified as offences. Reference should be made to Chapter 1. If not statutory forms of attempts, most modern legislation now providing for this though not defining the crime in relation to the substantive offence, at common law the penalty remains at the discretion of the judge.[935]

Difficulties

The law in relation to criminal attempt has been the source of disquiet in terms of throwing up a pattern of inconsistently decided cases that reflect the theoretical uncertainty that results from

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932 Serious Crime Act 2007, Part 2.

933 See generally, Anon, 'Attempt' (1967) 101 ILTSJ 243; Anon, 'Inchoate Crimes – Attempt' (1968) 102 ILTSJ 364; Antony Duff, Criminal Attempts (OUP 1996); Donald Stuart, 'The Actus Reus in Attempts' [1970] Crim LR 505; Bebhinn Donnelly-Lazarov, A Philosophy of Criminal Attempts: The Subjective Approach (CUP 2015); Binchy, 'Criminal Liability for Attempting Non-Criminal Acts' (1972) 106 ILTSJ 1/11/17/27; Christopher Clarkson, 'Attempt: The Conduct Requirement' (2009) 29 OJLS 25 (https://academic-oup-com.ucd.idm.oclc.org/ojls/article/29/1/25/1445212); Glanville Williams, Salmond on Jurisprudence (10th ed, Sweet and Maxwell 1947 (**I think it's 1947 not 74!)); Glanville Williams, 'Police Control of Intending Criminals' [1955] Crim LR 626; Anon, 'Merger of Felonies in Misdemeanours' (1876) 10 ILTSJ 350; Glanville Williams, 'The Lords and Impossible Attempts, or Quis Custodiet Ipsos Custodes?' (1986) 45 Camb LR 33; Glanville Williams, 'Wrong Turnings on the Law of Attempts' [1991] Crim LR 416 and KJM Smith 'Proximity in Attempt – Lord Lane's "Mid Way Course"' [1991] Crim LR 576; Jerome Hall, 'Criminal Attempt – A study of foundations of criminal liability' (1940) 49 Yale Law Journal 789 (https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4073&context=ylj); Steve Foster 'Defining the mens rea in criminal attempts' (2015) 179 CL&J 322; Steve Foster 'Defining the actus reus in criminal attempts' (2015) 179 CL&J 343.

934 See Andrew Simester, John Spencer, Findlay Stark, GR Sullivan and Graham Virgo, Simester and Sullivan's Criminal Law (7th ed, Hart Publishing 2019) 355; David Ormerod and Karl Laird, Smith, Hogan, & Ormerod's Criminal Law (15th ed, OUP 2018) 494- 498.]

935 Archbold, *Archbold's Pleading, evidence & practice in criminal cases* (26th ed, Sweet and Maxwell 1922) 1431.

failing to codify central concepts of the criminal law.[936] Modern statutory formulations, while either automatically or specifically retaining the law in relation to attempt, also seek to sidestep it. The creation of an offence automatically implies the criminalisation of an attempt to commit that offence. So, the existence of the law of attempt implies that where the legislature creates a new offence, or redefine an existing crime, they also create the offence or re-define the offence of attempting to commit that crime. That is not an issue. Basically, the trouble arises with defining what an attempt is. The intention of an accused, in criminal law, is his purpose in embarking upon the conduct which has been proved against him at his trial. That intention can only be inferred from the circumstances if the jury are satisfied beyond reasonable doubt that his mental state amounted to the purpose outlawed by the specific criminal offence. That mental state can also, as in rape, be recklessness as to the absence of consent, or a form of negligence, as in manslaughter. In attempting a crime, however, a person must intend to perpetrate the full offence. It is a measure of the difficulty with the law in relation to attempt that rather than relying solely on this inchoate crime to stave off the unwanted effect of preparation for crime, that the Oireachtas have, in recent times, consistently adopted legislative strategies for circumventing it. Broadly, these involve three models:

1. Intent crimes

Making an intention to commit a crime the primary focus of criminal responsibility. This involves outlawing a set of circumstances subject only to the prosecution being able to prove that within the commission of those circumstances the accused had an intention to perpetrate a criminal offence. An example would be an assault with intent to rob contrary to s 23(2) of the Larceny Act 1916 as inserted by s 5 of the Criminal Law (Jurisdiction) Act 1976. If the law as to attempts were sufficiently clear, then there would be no necessity to aggravate an assault with the addition of the further mental element of an intention to rob. Yet, as we shall see, there is good reason so to do. Another example would be the offence of entering a building with intent to commit an offence contrary to the Criminal Justice (Public Order) Act 1994, s 11. In that section the requirement of intent displaces the weakness in the law as to attempts. Any rational analysis would tend to see circumstances whereby an intent to commit an offence within a building might be equated with, for example, attempted burglary. This is not always so. Similar reasoning led to the creation of the offence of possession of a firearm, or imitation firearm, with intent to commit an indictable offence contrary to s 27(B) of the Firearms Act 1964 as inserted by s 9 of the Criminal Law (Jurisdiction) Act 1976 and as amended by s 14(5) of the Criminal Justice Act 1984.

2. Possession crimes

The second strategy involves the creation of simple possession offences. Again, this was inspired by the multitude of potential legal arguments that can be focused on any given set of circumstances on a charge of attempt. Possession offences have therefore come to the fore. These avoid the attempt debate by setting within simple and defined circumstances the objects and materials which a citizen may lawfully have in his possession. So, a citizen cannot have controlled drugs in his possession and the law therefore does not necessarily have to proceed to a consideration as to what wrong is proposed to be affected with them; Misuse of Drugs Act 1977, s 3. Where the charge is of possession with intent to supply a statutory presumption aids the prosecution in establishing the accused's mental state; Misuse of Drugs Act 1977, s 15. Guns are items with which criminal offences, such as murder and robbery, are commonly effected. The possession of firearms is therefore outlawed by the Firearms Acts 1925, 1964, 1971, 1990 and 2000. The law allows the exception of sporting firearms being possessed subject to a licence. Similarly, offensive weapons such as knives, spikes, swords, flying stars, crossbows and the like are outlawed by the Firearms and Offensive Weapons Act 1990. The possession of explosives has long been an offence; the

[936] See further Brent Fisse and Colin Howard, Howard's Criminal Law (5th ed, Law Book 1990) 384-417; and Don Stuart, Canadian Criminal Law (3rd ed, Carswell 1995) 593-621.

Explosives Act 1875 as amended by the Criminal Law (Jurisdiction) Act 1976. On the simple proof that a given person had an outlawed substance in his possession, and that the substance or article was the item proscribed by law, the accused is guilty of an offence. More serious offences carry aggravating factors, and increased penalties, where the possession takes place in particular circumstances, such as in the course of a burglary or in hijacking a car.

3. Blanket ban

The final statutory formulation is to take a situation or substance that is regarded as being particularly dangerous and to bombard every conceivable activity in relation to it with the creation of criminal offences. A central example is the Misuse of Drugs Acts 1977 to 2017. Not only is possession outlawed, but so is the production and cultivation of drugs, the supply of drugs and the toleration of any illegal activity in relation to drugs where the accused has any authority over the premises in which that activity is taking place; Misuse of Drugs Act 1977, s 19. It is also an offence to encourage the taking of drugs; s 5. Other examples of this strategy would include the Animal Remedies Act 1993, The Offences Against the State Acts 1939-1998 and The Official Secrets Act 1963. Two other examples may assist. They are s 1078 of the Taxes Consolidation Act 1997 which literally makes into a criminal offence every possible breach of the many disparate Revenue obligations of the citizen. The last is the regulation of companies which, apart from giving rise to civil liability, has been overlain with a superstructure of criminal law enforcement. This extends into competition law and is dealt with in a separate chapter.

In modern times, Irish law has moved forwards from the commission of the offence to removing the benefit, in as much as that is possible, of the criminal activity from its perpetrator. This has involved outlawing the handling of the Proceeds of Crime (Criminal Justice Act 1994, ss 31 and 32); following the profits of crime in measures dependant upon a conviction (Criminal Justice Act 1994) and seizing the proceeds of crime independent of any conviction (Proceeds of Crime Act 1996).

Wariness

As the foregoing illustrates there is a certain wariness by the Oireachtas in relying upon the law of attempts to solve the problems associated with the socially undesirable conduct of preparing to commit criminal offences.[937] The problem with which courts have wrestled is the formulation whereby it is decided when the accused's conduct is sufficiently menacing to society to justify that conduct being the subject of a criminal offence.

Common Law Attempts

Since the most menacing form of crime is that which is organised, it is clear that there has to be a point at which society can intervene, prior to the commission of a crime, in order not simply to prevent it, but to criminalise the conduct that is involved in preparing for committing a crime. The 1922 Archbold, addressing attempt to commit crimes, devotes all of three pages to the subject, while modern academic authors can devote hundreds.[938] Using brevity as a virtue, the essence of the law remains as stated in that 1922 volume: "Mere intention to commit an offence is not indictable".[939] In terms of proof: "Mere intention to commit an offence does not constitute an attempt; some act must be proved to have been done by the defendant immediately connected with the offence."[940]

The modern law on criminal attempt springs from the judgment of the Court for Crown Cases Reserved in Eagleton in 1855.[941] The accused had an agreement with the local Poor Law Authority

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937 Brent Fisse and Colin Howard, Howard's Criminal Law (5th ed, Law Book 1990) 385.
938 Antony Duff, Criminal Attempts (OUP 1996).
939 Archbold, *Archbold's Pleading, evidence & practice in criminal cases* (26th ed, Sweet and Maxwell 1922) 1431.
940 ibid 1432.
941 169 ER 766; [1845-60] All ER 363; 6 Cox CC 559.

to supply bread at a standard weight to disadvantaged people holding the appropriate vouchers. Eagleton was entitled to a credit of two pence for each such loaf on presenting the vouchers to the authority. After his account had been credited, but before payment had been made, it was discovered that the loaves he had supplied were under the weight agreed. He was charged with attempting to obtain money by false pretences. The jury found as a fact that Eagleton had intended to represent that the loaves had achieved the necessary weight. His conviction was upheld but, in formulating the test of what is and what is not an attempt to commit a crime, Parke B set in train fundamental tests of mere preparation being insufficient but of proximity to what would have become the completed crime being required:

> The mere intention to commit a misdemeanour is not criminal. Some act is required; and we do not think that all acts towards committing a misdemeanour are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are; and if in this case, after the credit of the relieving officer for the fraudulent over-charge, any further step on the part of the defendant had been necessary to obtain payment, as the making out of a further account, or producing the vouchers to the Board, we should have thought that the obtaining credit in account with the relieving officer would not have been sufficiently proximate to the obtaining of the money. But on the statement in this case, no other act on the part of the defendant would have been required. It was the last act depending on himself towards the payment of the money and therefore it ought to be considered as an attempt.[942]

The test could not be regarded as successful. In cases where it could not be usefully applied it has been rejected; an example would be where the accused intends to accomplish his object by degrees such as slowly murdering a relative by putting a small potion of poison in their food over an extended period. To constitute a criminal attempt, the first step along the way of criminal intent is not necessarily sufficient, but neither is the final step necessarily required.[943] Nor do most modern authorities support the proposition that an action towards the commission of a crime cannot constitute an attempt unless it was "the last act" before the attempt became the substantive offence.

Preparation merely

What is an attempt and what is merely preparatory? Some would argue that the question should not be asked at all provided the accused has embarked on a course of conduct which shows him to have a settled purpose in the commission of a criminal offence.[944] That, however, might be putting on a windcheater with the secret intention of getting a gun from an accomplice on the way to the bank which the accused intends to rob. Reliance on the idea of proximity means that early intervention that prevents a crime may result in a situation which obviously wards off the commission of an offence, but leaves the accused that has clearly embarked upon a course of conduct leading to crime, free of the stigma of conviction and the deterrence of a penalty. A few examples as to the application of the proximity rule will suffice.[945] In People v Rizzo[946] an armed gang drove through the streets of New York looking for a man whom they planned to rob. The police arrested them before they found their intended victim. Their acquittal of attempted robbery was justified on the ground that although they had planned a robbery, they were still looking for the opportunity to commit it and had not, as a matter of law, started to execute the robbery itself. However, commencing the substantive offence cannot be the test since, in many offences,

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942 ibid 571.

943 *Barker* [1924] NZLR 865 at 874; and see *The People (DPP) v Kelly* (Court of Criminal Appeal, unreported, 13 December 1999).

944 Howard and Fisse suggest a test involving an attempt being any conduct that, on the accused's view of the facts, a crime could have been committed or it was conduct towards the commission of a crime from which the accused would probably not have desisted; Brent Fisse and Colin Howard, Howard's Criminal Law (5th ed, Law Book 1990) 608.

945 These examples are drawn from ibid 395-401.

946 (1927) 246 NY 334; 158 NE 888.

embarking on the conduct may be criminal in itself. In Wilcox[947] the accused bought weapons for the purpose of robbing a post office and set out to conduct the robbery. He was intercepted one kilometre from the post office. The Court of Appeal of New Zealand held that the accused's conduct was merely preparatory and did not involve an act immediately connected with the commission of the robbery.[948] It would be reasonable to wonder what more was needed? It is therefore important for the law to move forward to seek to find some definitional formulation of attempt that would accord more with a commonsense view as to when a criminal attempt had been committed.

Sufficient proximity may be found where an accused has embarked irrevocably on the purpose of committing a crime. Apart from possible infringements of the law through, for instance possession of firearms or poison, preparation for an intended crime, even through the commission of overt acts such as selecting or sharpening a knife at home, do not constitute an attempt. This should not be conflated with evidence. An attempt requires an overt action sufficiently proximate to the commission of the substantive offence to be rationally regarded as an attempt to commit it. This is about extrinsic conduct, not the accused's state of mind. Walking along a street with matches and a firelighter is not an attempt to commit arson, even though the accused may confess to having intended to burn down a public building. Lighting a packet of firelighters intending to throw the accelerant into a window nearby or placing them at a door is an attempt even though the fire burns out harmlessly. In modern English law the statutory formulation[949] requires an overt action "with intent to commit an offence" and which "is more than merely preparatory". Lord Bingham LJ's formulation in Geddes[950] reasonably reflects the common law as applied in this jurisdiction: "whether the available evidence, if accepted, could show that a defendant has done an act which shows that he has actually tried to commit the offence in question, or whether he has only got ready or put himself in a position or equipped himself to do so." There the accused was not guilty through being found on a school premises in possession of a knife, rope and duct tape. The inference was of intention to abduct a student. This demonstrates the utility of both burglary and possession offences. Campbell[951] had a similar result where a man had an imitation gun outside a post office but was arrested before entering. Here the utility of statutory formulations of possession of articles with intent is shown. The overt action is then the possession of the article and the intent necessary to prove the offence is inferred from the circumstances.

Overt actions amounting to an attempt in the English formulation were held to include throwing a woman on the ground and the assailant producing his engorged penis in A-G's Reference (No. 1 of 1992),[952] concealing metal cutting equipment and then examining a padlock of a premises in Tosti.[953] A bit luckier was the man, on one view, who staggered out intending to drive home drunk but had his car stolen on unlocking it.[954]

In Coleville[955] the accused and others were seen "playing" with the door of a car. The police arrived and found various tools in the possession of the accused. The accused was charged with attempted theft of a vehicle. The Quebec Court of Appeal held that it was unnecessary to prove precisely what the accused would have stolen had he succeeded in breaking into the vehicle. In attempted theft the necessary intent was the intent "to do those acts which, if carried out to their completion,

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947 [1982] 1 NZLR 191.

948 See similarly Robinson [1915] 2 KB 342 and the decision is described by Brent Fisse and Colin Howard, Howard's Criminal Law (5th ed, Law Book 1990) as surprising; *R v Chellingworth* [1954] QWN 35 (disapproved in Williams [1965] Qd R 86) and Grogan (1889) 15 VLR 340.

949 Criminal Attempts Act 1981 s 1.

950 [1996] Crim LR 894 at 895.

951 [1990] 93 Cr App R 350.

24 [1992] 96 Cr App R 298.

953 [1997] Crim LR 746.

954 Mason v DPP [2009] EWHC 2198 (Admin).

955 (1988 CanLII 686 (QC CA).

would have deprived the victim of something in which he had a special property or interest."[956] The prosecution had to prove that the accused, "did acts which assisted in the attainment of his purpose and that this purpose was to steal the property of another person".[957]

The Physical Element

Since the gravamen of attempt cannot be the mere holding of an intent to commit a crime, overt action is required to meet the definition of criminal attempt. If this were not so then, implicitly and dangerously, a person could be found guilty of a crime simply on the basis of his thoughts. For example in Cline[958] Laidlaw JA, speaking in the Ontario Court of Appeal, stated that:

> Criminal intention alone is insufficient to establish a criminal attempt. There must be a mens rea and also an actus reus. But it is to be observed that whereas in most crimes it is the actus reus which the law endeavours to prevent and the mens rea is only a necessary element of the offence, in a criminal attempt the mens rea is of primary importance and the actus reus the necessary element.[959]

However, in many cases where someone is found guilty of an attempt it is not clear what the act is that is criminal. Thus, it may be legitimate to keep foremost the question of whether the courts are, in reality, holding an individual responsible for his or her intention rather than the act itself.[960] The inquiry leads us to the question as to whether, in the absence of any external harm, it is socially desirable to punish an individual through the criminal law process for what is merely intention rather than action.[961] The answer is that any such intention if manifested in proximate actions to the commission of crime or by the possession of articles that the law outlaws, or in entering a premises with intent, sufficiently and justly addresses the tension between individual freedom and social protection.

In considering next the theories constructed for the analysis of setting attempts within rational limits that preserve those merely preparing, without the commission of any other offence, for a criminal enterprise they might think the better of, this jurisdiction's response has been to leave mere preparation outside the ambit of attempt but to include "acts immediately connected with" the substantive crime as criminal attempts.[962] This fits within the proximity theory, though working out the fit of the facts proven with that test is another matter.

Theories of Attempt

It has been rightly commented that while "it is not difficult to define the mens rea of an attempt, a precise and satisfactory definition of the actus reus is perhaps impossible."[963] Suppose a person is lying in bed one day and because the sun is shining decides to rob a post office. He lies in bed and contemplates this plan for a while, gets up, has some breakfast, looks up the address of the nearest post office in the telephone directory, asks a neighbour for the loan of a car, searches for a stocking which fits over his head, selects a knife from the kitchen, drives to the selected establishment, gets out of the car, paces up and down for a while to ensure the coast is clear, enters the post office, waves the knife in the air and finally takes money and stamps from the attendant through threats of violence. It is clear that the final event is a completed crime and is unlawful. It is equally clear that the initial idea that occurred whilst in bed is not a crime, for there is no physical

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956 ibid. Original text reads as <<s'ils sont poursuivis jusqu'à leur résultat ultime, priveront la victime d'une chose dans laquelle elle possède un droit de propriété ou un intérêt special.>>

957 ibid. Original text reads as <<il fallait donc que l'appelant prouve que l'intimé a posé des gestes utiles à la réalisation de son dessein et que ce dessein était de s'emparer du bien d'autrui.>>

958 (1956) 115 CCC 18 (Ont CA).

959 ibid 27.

960 This argument comes from Alan Mewett and Morris Manning, Mewett and Manning on Criminal Law (3rd ed, Butterworths 1994) 311.

961 ibid.

962 See Walsh J in *The People (AG) v Sullivan* [1964] IR 169, 195-6.

963 Per Laidlaw JA in *Cline* (1956) 115 CCC 18 (Ont CA).

act. What is not so clear is at what stage an attempt begins. Clearly some of the preparatory acts are not proximate enough to the completed crime to constitute an offence. For example, no one could seriously suggest that searching for the addresses of post offices in the telephone directory could be punished as a criminal offence, no matter what the underlying intention was. On the other hand, pacing up and down outside a post office whilst in possession of a stocking and a kitchen knife could very well be argued to be either the last stage of preparation or actions sufficiently proximate to constitute attempted robbery.

The basic principle is clear. So long as a crime exists solely as an idea in someone's mind, there is no guilty act and so no offence committed. The law requires that a solitary citizen manifest his intention to commit a crime by some overt act. Were it otherwise a person would be punishable on the basis of his bad thoughts. Beyond this, the distinction between mere preparatory acts and an actual attempt is not easy to draw. Before considering the Irish cases on attempt, some mention should be made of the theories prevalent in attempting to intellectualise the point at which an intention becomes manifest in a criminally punishable external act.

Probable desistance

In America the theory of probable desistance indicates that conduct will amount to an attempt if it would have resulted, in the ordinary and natural course of events, in the completion of the crime if there had been no interruption from an outside source.[964] Holmes J authored the dangerous proximity doctrine under which the act done must come pretty near to accomplishing the result before the law will take notice; Commonwealth v Kennedy.[965] The theory has been criticised as being objective in looking at the circumstances from their external viewpoint and not from the point of view of the personality of the offender and that any objective assessment of future conduct is by definition "a highly artificial device".[966] On this theory, according to one group of American cases, the accused is not guilty of an attempt if some action by another person, over which he has no control, is necessary for the completion of his plans or if he needs some weapon, tool, or substance which he does not yet have.[967]

Equivocality

Another test suggested became known as the equivocality theory. This theory was advocated by Sir John Salmond based on the tort concept of res ipsa loquitur. An act would suffice for an attempt if it bore criminal intent upon its face. In other words, if one were to look at the act objectively it could have no explanation other than it was directed towards the fulfilment of a crime. In Barker,[968] Salmond explained this as:

> An act done with intent to commit a crime is not a criminal attempt unless it is of such a nature as to be in itself sufficient evidence of the criminal intent with which it is done. A criminal attempt is an act which shows criminal intent on the face of it. The case must be one in which res ipsa loquitur.

He went on to defend this approach in his text-book on jurisprudence: Salmond on Jurisprudence.[969] This test was finally abolished in New Zealand by legislation in 1961. Unfortunately, this test placed the external element within potentially ill-defined boundaries and confused the proof of intent, which is necessary to a conviction, with the external act from which it may or may not be inferred.

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964 Herbert Wechsler, William Kenneth Jones and Harold Korn, 'The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute' (1961) 61 Col LR 571.

965 (1897) 170 Mass 18.

966 Brent Fisse and Colin Howard, Howard's Criminal Law (5th ed, Law Book 1990) 603.

967 ibid 395.

968 (1924) 43 NZLR 865, 874.

969 Sir John Salmond, Jurisprudence (7th ed, Sweet and Maxwell 1924) 404.

It has been suggested that any jurisdiction which has a rule that the proof of an offence may be established by an uncorroborated confession alone may not adopt the doctrine.[970] This, however, confuses a test for defining a crime with a rule as to what evidence can be admitted in proving it.

Last act

The last act doctrine was superficially attractive. It required the accused to have done the last act prior to the completion of the offence. If applied logically it would produce strange results. Someone points a loaded gun at the victim but does not pull the trigger. That would not be the "last act" which the accused could do. It would be if he pulled the trigger and the bullet missed its target. This test was decisively rejected in the Canadian case of James.[971] The accused was caught rifling through a glove compartment in a car in order, as he confessed, to find the keys so that he could steal it. His argument that his acts only amounted to preparation was rejected by Gale CJO:

> An accused can be found guilty of an attempt if he does any act in furtherance of the commission of an offence beyond mere preparation, regardless of whether it is the last act in his attempt to commit the offence. In our view, in this particular case the accused's actions were not merely by way of preparation, but were acts in furtherance of his intent to steal the car.[972]

Chain of acts

Similar to the American doctrine of dangerous proximity was the reasoning invented by Sir James Stephen. This test required the accused to do some act which formed part of a series of acts which could constitute the actual commission of a crime if it had not been interrupted.[973] The test lacks precision in defining the point at which the series of acts begins and places human actions on a par with physical happenings as if, in the preparation to commit a crime, a point of no return is reached beyond which reversal is impossible. The English Law Commission also rejected the test:

> This approach would not be generally acceptable as it would be feared that it would lay such stress upon the proof of intention as establishing the commission of an attempt, rather than on proof of activities, that it might lead to a miscarriage of justice.[974]

The proximity theory

Perhaps most satisfactory is a test simply requiring that the act of the accused should not be remote from the crime and leaving the test of proximity to commonsense judgement. This has been the preferred approach of the Canadian Supreme Court. In Deutsch[975] the accused was charged with attempting to procure female persons to have illicit sexual intercourse. He had placed advertisements in a newspaper for sales assistants and during the job interview had indicated to the applicants (one of whom was an undercover police officer) that they would be expected to have sexual intercourse with prospective clients. The trial judge acquitted, but the prosecution successfully appealed to the Supreme Court, Le Dain J stating:

> In my opinion the distinction between preparation and attempt is essentially a qualitative one, involving the relationship between the nature and quality of the act in question and the nature of the complete offence, although consideration must necessarily be given, in making that qualitative distinction, to the relative proximity of the act in question to what would

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970 Brent Fisse and Colin Howard, Howard's Criminal Law (5th ed, Law Book 1990) 394.

971 [1971] 1 OR 661 (CA).

972 ibid.

973 JF Stephen and LF Sturge, Stephen's digest of the Criminal Law (9th ed, Sweet and Maxwell 1950) article 29.

974 Law Commission, Codification of the Criminal Law – General Principles – Inchoate Offences (LCCP50–1973) 49 (https://www.lawcom.gov.uk/project/codification-of-the-criminal-law-general-principles-inchoate-offences-conspiracy-attempt-and-incitement/#codification-of-the-criminal-law-general-principles-inchoate-offences-conspiracy-attempt-and-incitement).

975 (1986) 52 CR (3d) 305, 401.

> have been the completed offence, in terms of time, location and acts under the control of the accused remaining to be accomplished. I find that view to be compatible with what has been said about the actus reus of attempt in this Court and other Canadian decisions that should be treated as authoritative on this question.[976]

The reasoning in Deutsch was affirmed by the Canadian Supreme Court in Gladstone.[977] The accused had taken 35 pounds of herring spawn on kelp seaweed to a fish store and asked the owner if he was interested in purchase. They had another 4,200 pounds of fish roe nearby. They were convicted of attempting to sell herring spawn on kelp contrary to fisheries legislation.[978] Lamer CJC addressed the facts on the basis of the proximity theory:

> The basis of the appellant's position is that because the Crown only provided evidence to show that the appellants asked Mr Hirose if he was 'interested' in herring spawn on kelp, without providing any evidence that the appellant's had discussed the quantity, quality, price or delivery date of the herring spawn on kelp with Mr Hirose, the Crown only demonstrated that the appellants had engaged in preparation for an attempt to sell; the Crown did not demonstrate that the appellants had actually attempted to sell herring spawn on kelp to Mr Hirose.
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> This argument is without merit. In R v Deutsch, [1986] 2 SCR 2, 30 DLR (4th) 435, 27 CCC (3d) 385 (SCC), Le Dain J, writing for a unanimous Court on this issue, discussed the distinction between an attempt and mere preparation at pp 22-23:
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> > 'It has been frequently observed that no satisfactory general criterion has been, or can be, formulated for drawing the line between preparation and attempt, and that the application of this distinction to the facts of a particular case must be left to common sense judgment … Despite academic appeals for greater clarity and certainty in this area of the law I find myself in essential agreement with this conclusion.'
>
> In my opinion the distinction between preparation and attempt is essentially a qualitative one, involving the relationship between the nature and quality of the act in question and the nature of the complete offence, although consideration must necessarily be given, in making that qualitative distinction, to the relative proximity of the act in question to what would have been the completed offence, in terms of time, location and acts under the control of the accused remaining to be accomplished.[979]

The obtaining of a genuine signature for the purpose of later forging it is insufficiently proximate to be attempted forgery. In Leakey v Attorney General[980] the accused was charged with forgery. He had approached his brother-in-law, a Mr Dunn, and asked him if he was interested in a position as a director of certain companies that the accused contemplated forming. Pursuant to this enquiry, Mr Dunn signed a letter. A further three letters were signed with a forgery of Mr Dunn's name. The letters purported to confirm that jobs were available in New Zealand for persons resident in Hong Kong who were named in the letters. The question arose as to whether the actions of the accused in obtaining the signature of Mr Dunn was mere preparation or whether it was part of the act of forgery. In the High Court, Hillyer J held that:

> obtaining a genuine signature for the purpose of later creating a forgery is not part of the making of a false document and that the making of a false document could not be until the printing, typing or writing process commenced. Therefore, any acts prior to that – at the worst – would be acts of preparation and, as such, not acts forming part of the offence.

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976 ibid [27].
977 (1996) 137 DLR (4th) 648.
978 For a criticism and analysis of this decision see Don Stuart, Canadian Criminal Law (3rd ed, Carswell 1995) 605-609.
979 Gladstone (1996) 137 DLR (4th) 648 [18]-[19].
980 [1993] 1 NZLR 98.

Entire circumstances

In deciding whether an attempt has been committed, the court should look at all the circumstances of the case. It will be recalled that in Tosti[981] the accused were convicted of attempted burglary. They had been seen by the owners of a farm, just before midnight, walking to the door of a barn, and examining the padlock. The accused saw that they were being watched, took fright and ran off. A car was parked in a nearby lay-by and hidden in a hedge was some oxyacetylene equipment. The Court of Appeal stated that the question was whether it could be said that the appellants, in providing themselves with oxyacetylene equipment, driving to the scene, concealing the oxyacetylene equipment in a hedge, approaching the door of the barn and bending down to examine how best to go about the job of breaking into the barn, had committed acts which were more than merely preparatory, and which amounted to acts done in the commission of the offence. The question was essentially one of degree and the test was to ask whether the evidence if accepted could show that the defendant had done an act which showed that he had actually tried to commit the offence, or whether he had got ready or put himself in a position or equipped himself to do so. This result can be supported on policy grounds. The appellants had set out to commit the offence and would no doubt have done so if they had not been thwarted. They were as dangerous to society and as deserving of punishment as if they had succeeded.[982]

The proximity theory in Irish case law

In The People (Attorney General) v England[983] the accused was convicted of attempting to procure the commission, by a young man of 18 years, of an act of gross indecency with another man. The young man was employed at a nursery garden in Dublin where the accused had become acquainted with him. One evening he joined him on an evening walk and reminisced over his sexual exploits and described the attractions of a place of sexual conduct known to him in Dublin. He immediately enquired as to whether there was any secluded spot nearby to which they would both go and, on receiving a positive answer, offered the young man ten shillings to accompany him there. Gavin Duffy J considered whether this "curious evidence disclosed an attempt in law" and decided that it did not.

> The extreme difficulty of attaining precision in the conception of an attempt at crime has baffled many a court and this is one of the rare offences that has defied scientific definition in exact language. The prosecution asks the Court to go very far indeed. Hitherto there seems to have been no reported case of a conviction for an attempt to commit a crime grounded solely upon words, setting before one who did not know the attractions and facilities of and for that crime at a particular place, where the words, making no appointment to co-operate, did not amount to a deliberate effort to induce the person addressed to commit the crime and that person could not, for all his newly acquired knowledge, perpetrate the crime depicted without further aid from the talker or tempter. There are numberless ways in which a man may describe the attractive facility for crime to another in lurid terms without incurring a charge of attempting to turn the hearer into a criminal; everyone has come across instances both in literature and on the screen. And something more beyond description is reasonably required by the law for an attempt to procure the commission of a crime.[984]

In Attorney General v Richmond[985] the appellant was charged with attempting to set fire to two buildings. Evidence was given that he had broken into the loft common to both premises, laid a

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981 [1997] Crim LR 746.
982 This argument is made by JC Smith, [1997] Crim LR 746; See also Geddes [1996] Crim LR 894.
983 1 Frewen 81 (1947).
984 ibid 83.
985 1 Frewen 28 (1935).

trail of wood shavings, and placed in position a bottle of paraffin oil and a wick. An investigating garda heard what he alleged was the sound of the wick being removed; the wick, in fact, was never found. On appeal it was held that the trial judge had been correct in letting the case go to the jury as there was evidence on which they could conclude that the appellant had attempted to set fire to the premises. In The People (Attorney General) v Thornton[986] the Court of Criminal Appeal held that a jury should be informed by the trial judge that a mere desire to commit a crime, or a desire followed by an intention to do so, is not sufficient to constitute an attempt. In that case the prosecution evidence was of a conversation alleged to have taken place between the accused and a medical doctor. The doctor was treating a girl whom the accused had made pregnant. He asked the doctor whether he would prescribe to this girl a drug to interfere with pregnancy. His request was refused, and he asked the doctor "wasn't there some drug named ergot?"

The leading case remains The People (Attorney General) v Sullivan.[987] Mary Sullivan was a midwife who was contracted to provide her services to women expecting babies in accordance with the terms of the South Cork Board of Public Assistance. She was paid a basic salary but where she attended more than 25 cases, she became entitled to an additional allowance in respect of every such case beyond that number. Mary Sullivan prepared forms in respect of fictitious patients. No evidence was presented as to the number of patients she attended in the relevant year. There was thus no evidence that she would exceed her 25 cases and become entitled to the extra allowance. Obviously, however, every fictional case would help her towards that goal. A case was stated to the High Court, and that decision was appealed to the Supreme Court. Walsh J analysed whether the invention of the fictitious patients and the filing of forms in respect of them constituted preparation or was a proximate action to fraud on the health board.

> There are many cases dealing with this subject, some of which were cited during the argument in this Court, and it is clear from all of these cases that mere preparation for the crime is not enough. This has been stated in various forms, as, for example, 'acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are': R v Eagleton Dears CC 515, at p 537, which is one of the cases cited in this Court. That quotation is, of course, a statement in the negative form of what is referred to as 'the proximity rule'. The cases provided many examples of acts which were considered sufficiently proximate and those which were considered not sufficient to constitute an attempt, but they do not formulate any exhaustive test.[988]

The reasoning was based on the idea that if a particular standard is to be reached, then like a person standing on a series of book to make themselves the requisite height for entry into a military job, the addition of each level constituted the attempt:

> Every false report made during the first twenty-five cases and not detected would amount to a case credited to the person making the report and would bring that person a step nearer to actual payment of fees. If twenty-five false reports were made one might say that the twenty-fifth was a good deal closer than the first, but in my view each one is distinguishable from the other and, while the effect of all of them may be cumulative in the sense that they were all aimed at the same object and the more there were the quicker the object would have been attained, it cannot be said that number twenty-five is more proximate than number one. Each one is a complete act in itself, and is in itself in a position to cause the fee to be paid if there is a sufficient number of other cases to the credit of the accused. In that event each such false report would in itself be sufficient to achieve the desired result. For example, if the false report was the twenty-sixth one, no further act would be necessary to enable the

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986 [1952] IR 91.
987 [1964] IR 169.
988 ibid 195-196.

> person 'claiming' to be paid the money and thus commit the substantive offence. Instead, if the first 'claim' be the false one, no further criminal or illegal act would be necessary to achieve a similar payment because the first fraudulent report could be followed by twenty-five which could be perfectly truthful. If the first fraudulent report were to be followed by twenty-five other fraudulent ones it would, in my view, be fallacious to suggest that all the following reports save the first one were necessary links in the chain of causation and that therefore at least the first twenty-five of all the fraudulent reports must be regarded merely as preparations and that only the last one would constitute the actual attempt…In my view each false 'claim' put in, whether it be the first or the twenty-sixth, would, in law, be an act sufficiently proximate to constitute an attempt to commit the substantive offence of obtaining by false pretences a sum of £4 4s 0d, the fee for each case.[989]

The Law Reform Commission report on inchoate offences, upholds the proximity test as the best devised to reach a correct result:

> In this Report the Commission makes final its recommendation that the language of proximity be used to define a criminal attempt. It expresses most simply and most faithfully the concept used at common law to identify the notion of closeness, the Commission considers that the phrase that best captures the desired position on the threshold of attempt is "closely proximate". This echoes the Irish Supreme Court's use of "sufficiently proximate" [in the Sullivan case]. Furthermore, the phrase "closely proximate" can usefully be supplemented with the addition of the "more than merely preparatory" formula albeit in a slightly condensed form. Thus describing the attempt act as "closely proximate and not merely preparatory" can be recommended for use in defining the objective part of criminal attempt. The addition of "not merely preparatory" has the benefit of ruling out an offence of criminal preparation, which the Commission recommends against introducing.[990]

Mental Element

It is impossible in law to attempt a crime without intending that it be committed. The mental element of an attempt therefore requires that the accused act with the purpose of accomplishing that which that accused is alleged to be attempting. Crimes have different definitional elements, however, both as to the external element, theft or murder, and as to the mental element, intention to deprive or intention to kill or cause serious injury, and some of these may not require intention or its equivalent of knowledge. Rape, for instance, requires a voluntary action to have sexual intercourse with a woman who is not consenting. For attempt, that is the crime that is to be completed but the accused is not guilty of the substantive crime or of the attempt unless he knows or is reckless as to whether the woman is consenting. Some crimes may be so defined as to be conceptually difficult to fit with attempt. Manslaughter is an example, for how can you attempt to unlawfully kill someone by criminal negligence without at the same time committing murder? The answer to these potential anomalies is to focus on the external action that constitutes the crime and to ask whether the accused intended that this be brought to completion. Hence, the accused intended to steal if the intention was to permanently deprive the owner of the property. Where, the offence incorporates a suspicion element, attempting to possess drugs, the fault is the intention to take the drugs under control while knowing or suspecting that the nature of the goods is drugs. Focus on the completed act and the accused being required to intend the completion of that act with the mental element necessary to be found guilty of the definitional elements of the crime is surely the answer. Some more difficult issues may remain, despite this, but seem resolvable on this approach.

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[989] ibid 196-198.
[990] Report on Inchoate Offences (LRC 99-2010) 41.

Intent in attempted murder

The crime of murder involves the death of the victim. By definition, murder requires that the accused act with the mental element of intending to kill or cause serious injury to the victim: s 4 of the Criminal Justice Act 1964. Since the crime of murder requires that the victim die, the accused, to be acting purposefully, must do more than intend to cause serious injury, that would be the mental element for the crime of assault with intent to commit serious harm. Instead the accused must intend to kill the victim. That is proof of the external element of the crime; a dead person. In The People (DPP) v Douglas and Hayes[991] the accused had been convicted of shooting with intent to murder, contrary to s 14 of the Offences Against the Person Act 1861. It was submitted that the only intention sufficient to commit the charge was the intention to kill and that an intention to cause serious injury was insufficient. The judgment of the Court of Criminal Appeal, through McWilliam J, focuses on the completed action as the basis of any analysis of whether the accused can be taken to have attempted it through the relevant and proximate overt steps. Section 14 of the 1861 legislation required an "intent … to commit murder" while s 4 of the Criminal Justice Act 1964 merely required an intent "to kill, or cause serious injury". Thus, the completed act in the former requires an intent to kill but the completed act in itself can be based on an intent to do serious harm:

> This leads to an anomalous situation which has been discussed in a number of English cases, in that where a person shoots at another intending to cause only serious injury to that person and that other person dies the offence of murder has been committed, whereas, if that other person does not die, the offence of shooting with intent to commit murder has not been committed: see Rex v Whybrow (1951) 35 Cr App R 141; Reg v Mohan [1976] QB 1.[992]

McWilliam J regarded the action which was the substantive crime as the basis of a requirement that this result be brought about through the accused's attempt. A charge of attempted murder thus could not be based upon an intent that the victim be harmed but stay alive:

> The judgment in the present case suggests that the court of trial was or may have been influenced by the fact that the offence of murder would have been committed had one of the guards died. As already stated, it is the opinion of this Court that such a consideration is not relevant to a charge under s 14 of the 1861 Act. The judgment also suggests that the court was or may have been influenced by the fact that it must have been apparent to the accused that the natural consequence of the shooting would be to cause personal injury. Again, it is the opinion of this Court that an intention to cause serious personal injury only, if that were the correct inference to be drawn, would not be sufficient to support a conviction on a charge under this section. Although it may be accepted that it is not necessary to constitute an intent to kill that that should be the desired outcome of what was done, a reckless disregard of the likely outcome of the acts performed is not of itself proof of intent to kill but is only one of the facts to be considered in deciding whether the correct inference is that the accused had an actual intent to kill. Again, the judgment suggests that the court did not consider or may not have considered whether reckless disregard of the outcome of his acts by the accused did in fact lead to the inference that he had an intent to kill.
>
> Although the evidence might properly have supported an inference of an intent to murder on the part of the accused, the form of the judgment indicates that the decision was or may have been based on one or more of the considerations which have been discussed above rather than on a consideration of whether the evidence established an actual intent to

991 [1985] ILRM 25.
992 ibid 27.

> commit murder. Accordingly this Court considers that the conviction on the first count should be quashed.[993]

The same conclusion has been reached by the High Court of Australia. In McGhee v The Queen[994] Brennan J said that:

> the crime of attempted murder at common law has uniformly been held to require an attempt to kill. The same view has been taken under the Tasmanian Code. In principle, that must be so. Not because an attempt to kill is a mental element in the crime of murder but because the causing of death is a physical element in the crime of murder and an attempt to commit that crime must have, as its mental element, an intention that death be caused. The crime of murder, defined by s 157 of the Code, has a number of alternative mental elements only one of which is an intention to cause death. The specific intent required in attempted murder is not derived from s 157(1)(a); it is derived from the requirement that the offender intends that there should be a series of events culminating in the death of another person. Of course, if the death of a person were to occur as intended by an offender, the substantive offence would be murder precisely because the intent required for the attempt is the same as the intent prescribed by s 157(1)(a).[995]

In Knight v The Queen,[996] Mason CJ, Dawson and Toohey JJ's analysis was to the same effect:

> The appellant sought leave to appeal to the Full Court of the Supreme Court against his conviction of attempted murder on the ground that the verdict was unsafe and unsatisfactory. Upon that count, the prosecution bore the onus of proving beyond reasonable doubt that the appellant fired the shot alleged to constitute the attempt with intent to kill. This is because the intention which must accompany the inchoate crime of attempt is an intention to commit the complete offence. (see DPP v Stonehouse [1978] AC 55 at 68). It follows that an accused is not guilty of attempted murder unless he intends to kill. (see Alister v The Queen (1984) 154 CLR 404 at 401-423). An intention to cause grievous bodily harm may constitute the malice aforethought required for murder where death ensues, but for there to be attempted murder there must be an intention to cause the death which is an essential element of the completed crime of murder.[997]

The same test applies in England,[998] and in Canada.[999]

What is of importance here is that attempted murder as a crime which requires that the accused intend the death of the victim establishes the principle that the purpose of the accused must be towards the completed act. That completed act may be a dead victim, as in murder, or a woman violated through sexual violence, as in rape. In each case, however, the purpose of the accused is to bring about the substantive crime. That may be done through his intention to effect this being accompanied as regards crimes defined by recklessness by an advertent state of mind as to such circumstances as the absence of consent by the woman.

Consequences and circumstances

A distinction is drawn between an intention as to the consequence of a crime and an intention as regards its circumstances. The accused must intend the consequence of a crime, such as death in murder, but the better view is that he or she need not necessarily intend its surrounding

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993 ibid 28-29.
994 (1995) 183 CLR 82.
995 ibid.
996 (1992) 66 ALJR 860.
997 ibid.
998 Walker & Hayles (1990) Cr App R 226; Fallon [1994] Crim LR 519; Whybrow (1951) 35 Cr App R 141; Pearman (1984) 80 Cr App R 259.
999 *Ancio* (1984) 10 CCC (3d) 385, overruling the Supreme Court's previous decision in Lajoie [1974] SCR 399.

circumstances. There is authority to the contrary. In Pace[1000] the charge was of attempting to receive stolen property, attempted because the police were conducting a sting operation and the scrap metal being sought to be procured by the accused was their property. The view of the English Court of Appeal was that to be liable in attempt, the accused had to intend all the elements of the crime. This interpretation was based on the relevant statute. From the point of view reason, while attempt must incorporate the purpose of committing the completed offence, since what is involved is an inchoate form of the actual crime, the mental element of that attempt should be aligned with that of the substantive offence.[1001] The classic example is attempted rape. The accused must intend to have sexual intercourse with the victim, who as a matter of fact is not consenting, but the definition of the crime contained in s 2 of the Criminal Law (Rape) Act 1981 requires that he act with either knowledge or recklessness that she does not consent. In Khan and Others[1002] the Court of Appeal in England defined the elements of the crime of attempted rape as requiring an intent to have sexual intercourse with recklessness as to the circumstances of the victim not consenting. Russell LJ analysed the substantive and inchoate elements as comprising intention to penetrate, where the woman does not consent, and the accused knows or is reckless as to the absence of consent:

> The only difference between the two offences is that in rape sexual intercourse takes place whereas in attempted rape it does not, although there has to be some act which is more than preparatory to sexual intercourse. Considered in that way, the intent of the defendant is precisely the same in rape and in attempted rape and the mens rea is identical, namely an intention to have intercourse plus a knowledge of or recklessness as to the woman's absence of consent. No question of attempting to achieve a reckless state of mind arises; the attempt relates to the physical activity; the mental state of the defendant is the same. A man does not recklessly have sexual intercourse, nor does he recklessly attempt it. Recklessness in rape and attempted rape arises not in relation to the physical act of the accused but only in his state of mind when engaged in the activity of having or attempting to have sexual intercourse.
>
> If this is the true analysis, as we believe it is, the attempt does not require any different intention on the part of the accused from that for the full offence of rape. We believe this to be a desirable result which in the instant case did not require the jury to be burdened with different directions as to the accused's state of mind, dependent on whether the individual achieved or failed to achieve sexual intercourse.[1003]

Crimes of circumstance would include rape, where the intention is towards an action lawful in itself, but the circumstance of lack of consent takes a recklessness element. In a way, academic discussion of this leads nowhere. The rape example could be restated as an intention to have sexual intercourse with a woman whom the accused is wilfully blind as to her consent or not. An example was given in Pearman[1004] of a person attempting to escape a police car chase who drives fast into an oncoming patrol car. His purpose may be artificially severed so as to claim that it is to escape, but in doing that the action is that of a person who is acting in a homicidal fashion. Thus, to say that the consequences differ from the intent is a factual argument. In terms of law, the death of the police in the car may be a consequence, but it is within the realm of assessing the evidence as to whether the accused intended to kill. As in every facet of the criminal law, in so far as a consequence becomes increasingly obvious in the circumstances, the more readily may an advertent and culpable disregard, recklessness, be inferred or an intention to do what was brought about.[1005]

1000 [2014] EWCA Crim 186.

1001 Andrew Simester, John Spencer, Findlay Stark, GR Sullivan and Graham Virgo, Simester and Sullivan's Criminal Law (7th ed, Hart Publishing 2019) 365.

1002 [1990] 2 All ER 783; [1990] 1 WLR 813; (1990) 91 Cr App R 29; [1990] Crim LR 519.

1003 [1990] 1 WLR 813, 819.

1004 (1984) 80 Cr App R 259.

1005 *Woollin* [1999] 1 AC 82.

Then it can also be argued that some intention may be conditional. Classically, the thief goes into the house to steal if there is something both valuable and portable. He is a burglar because that intention is readily inferred against him on the evidence. He is less readily guilty of attempt to steal perhaps because of just having entered, rather than being found with his head in a drawer rifling through the contents. It undermines sense in the criminal law for it to be said that a person on the point of opening a holdall with diving equipment in it is not attempting the theft of what is inside it; the defence being his plea that all that was involved was an intent conditional on finding valuable items.[1006] More sensibly, it has also been held that a conditional intent suffice, though the problem of showing a sufficient proximity to the completed crime remains.[1007]

Attempting crimes of recklessness

As we saw in Chapter 1, crimes are capable of commission by a mental state other than intention. Most are capable of commission by recklessness. Manslaughter can be committed by criminal negligence and lesser categories of crimes can be committed by negligence or by simply causing the external element of the offence to occur. The better theory holds that the mental element required for an attempt should merely mirror that required for the completed crime. This view can be justified on the basis that the requirement for a more blameworthy state of mind than the completed offence is balanced by the fact that the accused need not have done so much, or indeed any, harm in order to be convicted. In Giorgianni v The Queen[1008] the High Court of Australia expressed, obiter, the opinion that offences involving attempt, conspiracy and complicity all require an intention to commit the crime as opposed to recklessness as to its occurrence.

In Attorney General's Reference (No 3 of 1992)[1009] the complainants were keeping watch from a car, following previous attacks on their property, when D came along and threw a lighted petrol bomb towards them. It missed the car and smashed against the garden wall of a house. The prosecution's case was that it was thrown at the car and its occupants. The question arose as to whether on a charge of attempted aggravated arson it was sufficient to prove that D was reckless as to whether life would thereby be endangered. It was clear that recklessness would suffice for the completed offence. The Court of Appeal held that on a charge of attempting to commit the offence, if the prosecution could show not only the requisite state of mind for the completed offence but also that the accused intended to supply the missing physical element, that would suffice for a conviction. This could not be done by merely showing the accused to be reckless, he must intend to damage property. Thus, to succeed in a prosecution for attempt in the present case, it had to be shown that D intended to achieve what was missing from the full offence. Unless that was shown, the prosecution had not proven that D intended to commit the offence. The prosecution had to show an intention to damage the property, and the remaining state of mind required for the offence of aggravated arson.

This principle can be criticised. Had the culprits succeeded in destroying property. recklessness would have been sufficient, but as they failed in their objective the prosecution had to show an intention to damage property. Such consequence crimes may involve an over-elaborate discussion as to purpose and consequences, disguising the fact that a mental element of consequence can proceed from inference out of the primary fact of what was attempted.

Change of heart

Change of heart does not cause the same problems in attempt as it does in incitement, where the offence is completed on the accused coercing or persuading another, successfully or not, into a crime, or in conspiracy where the agreement completes the crime. This is again because of the

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[1006] *Husseyn* (1977) Cr App R 131.
[1007] A-G's Reference (Nos 1&2 of 1979) [1980] QB 180 and see Smith and Hogan, *Criminal Law* (15th ed, OUP 2018) 421.
[1008] (1985) 156 CLR 473.
[1009] [1994] Crim LR 348.

pervasive problem of proximity. Once the accused changes his mind on the way to rob the bank, it is unlikely unless he reaches the premises or parks nearby that there is a sufficient external element to constitute attempt. Having loaded guns and nearby accomplices may supply that necessary proximity. Has an attempt already happened? That is the central question for abandonment or change of heart. The circumstances will dominate any such question. As in *Page*[1010] who, in Victoria, climbed a ladder and on being observed prising a crowbar under a window claimed to have thought of his dear mother and climbed down having, allegedly, thought the better of it.

A strong argument has been made in favour of applying a defence of voluntary desistance similar to that applying to accessories to crime.[1011] In Canada abandonment is not a defence in itself but may be used as evidence to support the view that the accused did not intend to complete the crime. In the United States free and voluntary desistance, not due to an outside cause, constitutes a defence to a charge of attempt at common law.[1012] The reasoning behind rejecting the defence of voluntary desistance was stated by Culliton CJ for the Saskatchewan Court of Appeal in Kosh:[1013]

> In my view, once the essential element of intent is established, together with overt acts towards the commission of the intended crime, the reasons why the offence was not committed becomes immaterial. Once these elements are established it makes no difference whether non-commission was due to interruption, frustration or a change of mind.[1014]

An example of the Canadian law is *Goodman*.[1015] In that case the accused was charged with attempted arson as being a party to the offence committed by one Waters. From the evidence it appeared that Waters had lit a match in order to set alight some materials. As Waters bent down the match was extinguished. Waters then decided to leave without trying a second time. The Court of Appeal held that the attempt had been completed the first time and that no subsequent change of mind could alter the character of the offence. However not all authorities point in the same direction. In the American case of *Weaver v State*,[1016] the accused was observed by the police throwing kerosene on the side of the house but then turning away and walking off. At this point the police emerged from their hiding place and arrested the accused. He stated that he had desisted out of conscience and had been unaware of the presence of the police. The appeal court affirmed his conviction for attempted arson on the basis that it was a question for the jury whether the accused had been frightened off by the presence of the police or had been deterred by his own conscience, implying that this would make a difference.

In *Franklind*[1017] **t**he accused gave a lift to a hitch-hiker. He attempted to have intercourse with her but claimed that he had desisted from his efforts as soon as she began to cry. Dubin J in the Ontario Court of Appeal held that there was a mis-instruction to the jury if the defence of desistence was not put before them on the charge of attempted rape was whether the appellant intended to have intercourse without the consent of the complainant. It was his intent which was pivotal. The court approved of the following proposition, though the application may be doubted:

> Upon an indictment for an assault with intent to commit a rape, Patteson J. in summoning up, said: "In order to find the prisoner guilty of an assault with intent to commit a rape, you must be satisfied that the prisoner, when he laid hold of the prosecutrix, not only

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[1010] [1933] Argus LR 374.

[1011] KJM Smith, 'Withdrawal from Criminal Liability for Complicity and Inchoate Offences' (1983) 12 Anglo-Am LR 200.

[1012] Paul Kichyun Ryu, 'Contemporary Problems on Criminal Attempts' (1957) 32 NYULR 1170, 1197-2060, cited in and Don Stuart, Canadian Criminal Law (3rd ed, Carswell 1995) 611.

[1013] (1965) 44 CR 185.

[1014] ibid 235.

[1015] (1872) 22 UCCP 338.

[1016] 42 SE 745 (1902); discussed by Alan Mewett and Morris Manning, Mewett and Manning on Criminal Law **(**3rd ed**,** Butterworths 1994**)** 327.

[1017] (1985) 23 CCC (3d) 385.

> desired to gratify his passions upon her person but that he intended to do so at all events, and notwithstanding any resistance on her part.[1018]

Full offence

While attempt is a lesser included offence which, at common law and pursuant to several statutory formulae, the jury may return on the substantive charge, it is illogical to argue that the commission of the full offence consumes the attempt. Thus, in Cox[1019] a doctor was charged with attempted murder notwithstanding the death of his patient by poisoning. This was a case of extreme pain and the administration of a dosage to more than ease the passing but to kill. That is not wrong since the form of charge is at the prosecutor's discretion. Further, at the point where the evidence stops, whether in reality matters went further or not, criminal liability is to be assessed. Thus, if the doctor gave a dosage intending to kill, that is attempt and if the state of the evidence is that the patient's condition was so bad that certainty could not be established as to the cause of death, attempt as a charge fits the particular circumstances. It can also be argued that an attempt is the point in the commission of a chain of events leading to a crime that later may become the full offence. Looked at that way, all crimes are both an attempt and the substantive commission of the offence.

A similar comment might be made as to manslaughter, though attempted manslaughter has not been charged in this jurisdiction. Pursuit of dangerous and unlawful actions, though avoiding death, may be an attempted unlawful killing.[1020]

Attempt implies failure. A criminal attempt is not defined in terms of a failure to commit the crime but in terms of an act proximate to the crime. It would, however, be strange if an accused had to be acquitted in the event of an uncertainty as to whether he had succeeded or not. It can be argued that for a person who has committed a crime to be liable for both the substantive offence and the attempt would render him open to punishment twice over for the same wrong. This problem is not uncommon and arises every day in the courts. An accused may be convicted of burglary but at the same time might be guilty of carrying house-breaking implements and of larceny. The prosecution deals with this sensibly by accepting a plea of guilty on only one offence. In *The People (Attorney General) v Dermody*,[1021] the Court of Criminal Appeal held that if the jury accepted that the appellant was guilty of the substantive offence of rape or of unlawful carnal knowledge, it was not properly open to them to convict the appellant of attempted carnal knowledge in respect of the same incident. A person found guilty on several concurrent offences receives a sentence commensurate with the actual wrong he has done. A complete absurdity arises where an accused is entitled to defend himself on a charge of one crime on the basis that he has committed another; see for example s 4 of the Criminal Law Amendment Act 1935 which has now been abolished. At common law there was a doctrine of merger; where the same facts constitute both a felony and a misdemeanour, the misdemeanour merges in the commission of the felony and ceases to have a separate legal existence. This cannot have survived the abolition of the distinction between felonies and misdemeanours.

In Australia it has been accepted by the Victorian Full Court that merger is still a part of the common law: *Welker*.[1022] In England, a Divisional Court has held that there was no separate doctrine of merger of an attempt in the full offence but that it was restricted to the merger of misdemeanours in felonies: *Webley v Buxton*.[1023] It has been persuasively argued that this latter

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[1018] JW Cecil Turner, Russell on Crime (12th ed, Sweet & Maxwell Ltd 1964) 718.
[1019] (1992) 12 BMLR 38.
[1020] Andrew Simester, John Spencer, Findlay Stark, GR Sullivan and Graham Virgo, Simester and Sullivan's Criminal Law (7th ed, Hart Publishing 2019) 361.
[1021] (1956) 1 Frewen 507.
[1022] [1962] VR 244.
[1023] [1977] QB 481.

doctrine never existed at all.[1024] As the doctrine depended on the distinction between felonies and misdemeanours that has been abolished by the Criminal Law Act 1997, the merger doctrine as based on this distinction has lapsed since the passing of the Act.

Uncertainty could be removed from the law if each time a new offence was created, the legislation specified a separate offence of attempt. At common law all attempts to commit a crime are, in themselves, common law misdemeanours. In the case of summary offences this can mean that an attempt, being a misdemeanour, would carry a higher unlimited penalty than the substantive offence; in a grave case this higher penalty can be imposed; *The People (AG) v Giles*.[1025]

Jurisdiction

Jurisdiction of the criminal courts is territorial: *Sanders*.[1026] If a person abroad initiates an offence, part of the essential elements of which take place within Ireland, he is amenable to our jurisdiction. There is an attempt triable within Ireland despite all of the acts of the accused being perpetrated abroad, if those acts have an effect here: *DPP v Stonehouse*.[1027] On another view, it is immaterial that no effect occurs within the jurisdiction provided what the accused does is an act sufficiently proximate to the commission of an offence in Ireland.

External and mental elements together

In reality it may not be possible to divorce the concept of the guilty act from the concept of the mental element. It is unreal to define an act as guilty without considering the mental element. For example, even causing the death of someone is not, in itself, a guilty act; it becomes the guilty act for murder only because it is accompanied by the intention to cause the victim's death.[1028] What turns an ordinary act into a guilty act is the requisite mental element. A good example of this can be seen in the Canadian case of *Cline*.[1029] The accused, who was wearing dark glasses approached a young boy. He asked the boy to carry a suitcase for him up an alley, even though he had no suitcase. Looking at this act objectively it appears to be a harmless, though bizarre, act. If one looked at the act alone it would be difficult to say that the accused had attempted to commit a crime. But evidence was led that on a number of previous occasions the accused had approached young boys in a like manner and on at least one occasion had gone on to commit an assault. Given this information as to the accused's intention, the Ontario Court of Appeal held that his acts in putting on dark glasses and hanging around a street corner may have been only mere preparation, but approaching the young boy was a criminal attempt. Laidlaw JA offered the following analysis:

> The consummation of a crime usually comprises a series of acts which have their genesis in an idea to do a criminal act; a plan may be made for putting that decision into effect; the next step may be preparation only for carrying out the intention and plan; but when that preparation is in fact fully completed, the next step in the series of acts by the accused for the purpose and with the intention of committing the crime as planned cannot, in my opinion, be regarded as remote in its connection with that crime. The connection is in fact proximate.

Laidlaw JA then went on to offer six guiding propositions in analysing conduct for the purpose of determining whether or not it is an attempt:

(1) There must be a mens rea and also an actus reus to constitute a criminal attempt, but the criminality of the misconduct lies mainly in the intention of the accused.

[1024] Peter Glazebrook, 'The Merging of Misdemeanours' (1962) 78 LQR 560.
[1025] [1974] IR 422.
[1026] [1984] 1 NZLR 636.
[1027] [1978] AC 55.
[1028] Alan Mewett and Morris Manning, Mewett and Manning on Criminal Law **(**3rd ed**,** Butterworths 1994**)** 320-21.
[1029] (1956) 115 CCC 18 (ON CA).

(2) Evidence of similar acts done by the accused before the offence with which he is charged, and also afterwards if such acts are not too remote in time, is admissible to establish a pattern of conduct from which the Court may properly find mens rea.

(3) Such evidence may be advanced in the case for the prosecution without waiting for the defence to raise a specific issue.

(4) It is not essential that the actus reus be a crime or a tort or even a moral wrong or social mischief.

(5) The actus reus must be more than mere preparation to commit a crime. But

(6) When the preparation to commit a crime is in fact fully complete and ended, the next step done by the accused for the purpose and with the intention of committing a specific crime constitutes an actus reus sufficient in law to establish a criminal attempt to commit that crime.

The recognition by Laidlaw JA that one cannot divorce the characterisation of the act from the intent is to be welcomed. However, this does not bring us much further in our attempt to distinguish between an attempt and an act that is merely preparatory. This analysis is of assistance.

Conclusion

Many attempts to commit an offence will be conditional: the guns will be used if there is resistance, the thief will steal if there is anything worth taking. Thus, being resolved to commit the crime is of the essence of attempt. Where there is a consequence, that can be found as a fact if the circumstances give rise to that inference in a sufficiently compelling manner. Where the mental element is partly suspicion or recklessness, then the accused is guilty provided he or she intends the completed crime and carries the requisite mental element for any definitional element less than intention. Overall, however, the accused must intend to bring the crime to completion and act in a manner beyond preparation which is sufficiently proximate to the commission of the offence.[1030]

In the result, the Irish law on criminal attempts embraces the proximity theory. To intend the commission of an offence is insufficient. There must be an embarkation upon it. That embarkation must be more than preparation. It is not necessarily enough that the accused gathers in a place the instruments that he needs for the commission of an offence, or that he or she forms a settled plan with confederates to perpetrate the crime (this may be charged as a criminal conspiracy). He or she must, in furtherance of his intention, proceed upon an act or acts close to the commission of the crime that would have resulted in his intention to commit it being proximately fulfilled had the event which caused it to fail, or which interrupted it, not occurred.

The Trial Judge's Summing Up

Guidance as to how the trial judge should instruct the jury was provided by Kennedy CJ in *Attorney General v Richmond*:[1031]

> The objection was that the Judge in his summing up did not explain to the jury the distinction which has been drawn in recent years between an attempt in law to commit a criminal act and acts leading in that direction but which strictly speaking amount to no more than what might be called preparation to do the act. It is perfectly clear on reading the summing up. The Judge is bound to explain the legal position, as regards the evidence, to the jury so they may come to a correct conclusion. There is no doubt in this case that the Judge intended to do so and actually began the explanation but equally it is clear whatever distracted his mind from pursuing it, that the charge does not contain such exposition as the jury were entitled to have and as counsel were entitled to require. There should have been a clear exposition

[1030] See the analysis of Andrew Simester, John Spencer, Findlay Stark, GR Sullivan and Graham Virgo, Simester and Sullivan's Criminal Law (7th ed, Hart Publishing 2019) 370.
[1031] 1 Frewen 28 (1935).

> of what in law constituted an attempt to commit a criminal act and of the difference between an attempt and mere preparation to do a criminal act when he decided and the occasion arose for him to do it. Therefore the Court will hold that that point upon which objection has been taken to the summing up, namely, that it does not contain such an explanation of the law which explanation must always be applicable to the particular case before the Court and is therefore very difficult, is sustained.

The elements required in a summing up on attempt thus include that the jury must look into the accused's mind to see whether, in all the circumstances, an intent to commit the crime of which the attempt is charged, was present. They should be told that a mere intention is insufficient without action; that mere preparation by gathering tools and organising confederates is not an attempt but that an act or acts that are proximate to the fulfilment, if not interrupted, of the accused's intention to commit the crime are what the law requires.

Sentence

In sentencing the accused, it should be born in mind that what was intended was the complete offence, but of course the consequences of the crime will not be the same for the victim. What is part of that is the shock to the victim, as in a murder that goes wrong from the point of view of the accused, and with lesser offences encompasses the chance that changed what would have been violence or theft, into a deflection. In *The People (DPP) v Larkin*[1032] Kearns J found that the judge had erred in his distinction between attempted murder and murder when sentencing the accused, stating:

> Finally, the learned trial judge carried out a careful exercise in weighing both mitigating and aggravating factors in relation to the offence before concluding that:
>
> > Had Darren Larkin been convicted of murder, the mandatory sentence would have been life imprisonment, and it would, in my view, be a logical absurdity to avoid a life sentence merely because Darren Larkin is a bad shot.
>
> The Court believes that the learned trial judge was mistaken in approaching the matter of sentence in the manner which these final sentencing remarks suggest. It is, in effect, to elide the difference between attempted murder and murder itself. Fortunately, [the victim] did manage to avoid the loss of his own life in this incident and while this does not lessen the culpability of the applicant, it is nonetheless a factor which the Court believes should resonate in a somewhat lesser sentence. The Court will accordingly vary the sentences imposed by the learned trial judge, imposing a sentence of fifteen years for attempted murder and ten years for each of the firearms offences, all three sentences to run concurrently and from the same date as specified by the learned High Court judge.[1033]

Probably the correct approach to sentencing is to start with the completed offence and to consider how close to completion the attempt came, what preparation went into that attempt, the moral conduct of the accused and the effect on the victim.[1034]

Impossibility

The defence of impossibility is peculiar to the inchoate offences of attempt, conspiracy and incitement. It can thus usefully be dealt with now. Any issue as to attempt being decided as a criminal enterprise outside of Ireland through intent and then followed through with an overt act within the jurisdiction should not cause problems. The attempt is the overt action, the external

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[1032] [2008] IECCA 138

[1033] ibid [40]-[41].

[1034] Recent examples include *The People (DPP) v BF* [2017] IECA 219 which concerned an attempted rape where issue of law related to a claim that the finding of attempted rape was inconsistent with verdicts delivered on the other counts, and *The People (DPP) v K(B)* [2000] 2 IR 199 concerning attempted buggery and a successful claim that the joinder of attempted buggery and indecent assault counts was incorrect.

element of the offence, and if committed in the jurisdiction must surely be accompanied by the intention that the offence be completed according to the mental element which it requires. After all, an action may take seconds, as in shooting with intent to kill, but where the accused misses the victim, but the intention may be formed several months previously and be continued over elaborate planning or preparations. Conspiracy may yield a more complex academic analysis, which is considered later in this chapter.

Sherlock Holmes, in 'The Adventure of the Empty House'[1035] fears assassination and rigs a wax bust of himself near a window to simulate his presence. It is regularly moved from below to simulate movement. From across the street, a shot is fired, shattering the dummy. Holmes is not even in the room. If a crime has been committed, it is at the least the reckless discharge of a firearm,[1036] but is it also attempted murder, or is it instead the case that the impossibility of the commission of the offence negatives the crime? There is an intention to kill Holmes, it is to be inferred, as the villain would hardly bother to shoot a mannequin. The means used were capable of effecting that end, since were the target correctly selected, the shot would have been lethal. Finally, murder is a crime and attempting it is an offence. With the chaos of human circumstance, such a simple analysis is not always available.

(i) Imaginary crimes

All the authorities agree that where the accused attempts, or conspires with another, to perpetrate a situation which does not amount to a crime at law, he cannot be guilty of any offence. An example is *Taaffe*[1037] where the accused imported cannabis resin, which he genuinely but mistakenly believed to be currency, into the United Kingdom. As currency is not subject to any restriction on importation and, under the Customs and Excise Management Act 1979, the accused is to be judged on the facts as he reasonably believes them to be, he successfully appealed his conviction. It is possible to argue that where the objective of the accused is impossible, nothing he ever does can be proximate to the substantive crime. That argument has not been accepted as the basis of the defence of impossibility as it applies to inchoate crimes. An appreciation of the senselessness of convicting persons who do something that could never lead to a crime seems, instead, to inform the law.

Beyond this, the position is not so clear. Earlier cases drew a distinction between factual and legal impossibility. The distinction is not clear cut, and it is not always possible to determine into which category a given fact situation falls. Lord Widgery in *Haughton v Smith*[1038] described legal impossibility as occurring "where the accused has meticulously and in detail followed every step of his intended course believing throughout that he was committing a criminal offence and when in the end it is found that he has not committed a criminal offence because in law that which he planned and carried out does not amount to a criminal offence at all."[1039] Apart from the entrenched view that it is impossible to commit an imaginary crime, any further distinction between categories of impossibility as a defence to crime is falling into disrepute. Howard explains[1040] :

> Conviction of an attempt is not precluded by reason of the fact that what D is attempting is under the circumstances impossible, but the meaning of 'impossible' in this context is far from clear. On one approach D is not liable if it was "factually impossible" to commit the offence allegedly attempted. On another approach D is liable regardless of the notion of actual impossibility if, on the facts as he believed them to be, he intended to commit the

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[1035] Arthur Conan Doyle, The Return of Sherlock Holms (George Newnes 1905).
[1036] Firearms and Offensive Weapons Act 1990, s 8.
[1037] [1984] AC 539.
[1038] [1975] AC 476.
[1039] ibid 481.
[1040] Brent Fisse and Colin Howard, Howard's Criminal Law (5th ed, Law Book 1990) 401-402.

> offence allegedly attempted. The latter approach is gaining ascendancy, largely because the doctrine of factual impossibility is incoherent. Indeed as two distinguished American writers observed long ago, 'the doctrine of impossibility is one of the biggest red herrings ever drawn across the path of criminal law'.[1041]

(ii) Factual impossibility

Suppose the accused tries to rob an empty safe or pull the trigger of a gun that does not work. The completion of the accused's intended objective is impossible because of surrounding factual circumstances that are unknown to the accused; that the safe is empty or that the gun is defective. The accused may still be guilty of an attempt even though under the circumstances actually existing he cannot complete the offence. The reality is that a pickpocket who puts his or her hand in a bag or a pocket and finds it empty (or, more realistically, in circumstances where the prosecution are not able to prove there was anything to steal in that place) is targeting the person and not the pocket: the accused would just as easily try another pocket to fulfil the intended purpose. Of course, if he or she knows that completion is impossible, they cannot intend the purpose and would not be liable because the mental element would there be lacking. But if the actor does not know of the impossibility, he or she has performed the acts that is thought will lead to a successful conclusion.

The accused will be guilty where the object he or she is intent on achieving would be a crime, if he or she was successful, but it either fails or cannot be achieved because of the use of means inadequate to accomplish his purpose. Examples include an attempt to break into a house using a glass cutter which merely scratches the window, an attempt to obtain by false pretences which does not deceive, shooting the intended murder victim with a dart smeared with an ineffective poison or using a spoiled explosive in an attempt to wreck a building.[1042] In *Detering*[1043] the Supreme Court of Canada held that even though the victim of a fraud was not deceived by the accused's acts, the accused could be convicted of attempted fraud. To return to the Holmes example, if the gun used was insufficiently powerful to even penetrate the glass of the window, if in firing the gun the accused intended murder, inadequacy of means would make no difference to liability. This cannot be taken to far since if the means used are pathetically inadequate, an issue arises as to whether the inference of intent may or may not be drawn.

(iii) Legal impossibility

Suppose the accused does all the acts he intends to perform but those acts are not in law characterised as an offence. An attempt requires not only a mental element but also a physical action, and if there is nothing that can be characterised as a physical element, then however much of a mental element the accused may have had he or she cannot be convicted of an attempt.[1044] The classic example is that of a man resolving to steal an umbrella only to discover when he gets home that it is his own. Another example is where the victim of a police "sting" operation attempts to launder money which he believes to be the proceeds of crime, but which in reality is government money.[1045]

In England Lord Widgery CJ in *Haughton v Smith*[1046] divided the defence of impossibility into the two aspects outlined above, namely, physical impossibility and legal impossibility and concluded that only the latter is a defence to a charge of attempt. In the words of one text:

> The distinction between legal impossibility and factual impossibility was thus based upon the notion that in cases of legal impossibility, since the accused has done all that he set out

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1041 Paulsen and Kadish, Criminal Law, Its Procedures (Little Brown 1962) 482.
1042 For examples see, *Collinridge* (1976) 16 SA 117; Kristis (1989) 39 A Crim R.
1043 [1982] 2 SCR 583.
1044 Alan Mewett and Morris Manning, Mewett and Manning on Criminal Law **(**3rd ed**,** Butterworths 1994**)** 323.
1045 *Anderton v Ryan* [1985] 1 AC 560; *Haughton v Smith* [1975] AC 476.
1046 [1975] AC 476, 481 (CA).

> to do only to find that, in the end, no offence has been committed, there can be no actus that is reus, whereas if the accused is prevented from completing his purpose by some circumstance rendering completion impossible, there is an actus that is reus because his act is directed towards a purpose that, if completed, would have been an offence.[1047]

This logic has not gone uncriticised. As discussed above, many criminal acts are not in themselves "guilty". They only take on the character of being guilty acts because an act, which when viewed objectively appears quite harmless, is accompanied by a particular mental element. If this analysis is correct, then in all these cases we have an act that is accompanied by a criminal intent and it should make no difference whether fulfilment cannot be accomplished because no offence materialises or because fulfilment is frustrated by circumstances. In both cases, there is a physical act and a mental element.

In response to such criticisms, the English Parliament passed the Criminal Attempts Act 1981 providing at s 1 that a person may be guilty of attempting "to commit an offence … even though the facts are such that the commission of the offence is impossible" provided that an intention to commit the offence must be present and "if the facts of the case had been as he believed then to be, his intention would be so regarded" as enabling the completion of the offence.

However, despite the passing of this Act the distinction between legal and factual impossibility was surprisingly maintained by the House of Lords in *Anderton v Ryan*.[1048] This decision was criticised and in *Shivpuri*[1049] the House of Lords expressly overruled their own judgment in Anderton and acknowledged that there was no distinction between cases of legal impossibility and those of factual impossibility.[1050]

In Canada the Supreme Court rejected any distinction between legal and factual impossibility in a landmark ruling; *United States of America v Dynar*.[1051] The case concerned an application by the United States to extradite a fugitive who was in Canada. The fugitive, a Canadian citizen, was indicted in the United States, together with another Canadian citizen, on charges of attempting to launder money and conspiracy to do so. The fugitive had been the subject of a failed "sting" operation attempted by the FBI in America which began when he telephoned from Canada a former associate who unknown to him had become a police informant. Thereafter in telephone conversations between the fugitive and an undercover agent, all of which were intercepted and recorded, the fugitive had agreed regularly to launder large sums of money which, it was made clear, had been obtained as a result of drug trafficking. However, the money was not the proceeds of crime but government money. Initially the United States authorities planned to set up the transfer of funds to the fugitive in the USA but he refused to go there to obtain the funds from the agent's associate and it was therefore arranged for C to collect the money instead. The FBI later aborted the operation by pretending to arrest the associate prior to the transfer of the money and allowed C to return to Canada. The United States government requested the extradition of both the fugitive and C from Canada to answer the charges of attempt and conspiracy to launder money. The question arose as to whether an accused who attempted to do the impossible could be guilty of an attempt under Canadian law. The Supreme Court held that the fugitive's conduct would have amounted to a criminal attempt and a criminal conspiracy under Canadian law. It further held that the Canadian Criminal Code only excluded from its ambit attempts to commit imaginary crimes and did not distinguish between the varieties of factually impossible attempt. Most importantly of all the Supreme Court decided that there was no distinction between factual and legal impossibility.

[1047] Alan Mewett and Morris Manning, Mewett and Manning on Criminal Law **(**3rd ed**,** Butterworths 1994**)** 325. See also Simester and Sullivan. Simester and Sullivan's Criminal Law (7th edn. Hart Publishing 2019) 379-380.

[1048] [1985] 1 AC 560.

[1049] [1987] AC 1.

[1050] Simester and Sullivan. Simester and Sullivan's Criminal Law (7th edn. Hart Publishing 2019) 382-383.

[1051] [1997] 3 LRC 265.

Lamer CJ held that there was no difference between acts thwarted by attendant circumstances: distinctions as to there being a physical impossibility, where the crime could not be executed by the means at hand, or the absence of a crime, no goods available to steal, made no difference but he went on:

> There is, however, a relevant difference between a failed attempt to do something that is a crime and an imaginary crime: see Pierre Rainville 'La gradation de la culpabilite morale et des formes de risque de prejudice dans le cadre de la repression de la tentative' (1996) 37 C de D 909 at 954-955. It is one thing to attempt to steal a wallet, believing such thievery to be a crime, and quite another thing to bring sugar into Canada, believing the importation of sugar to be a crime. In the former case, the would-be thief has the mens rea associated with thievery. In the latter case, the would-be smuggler has no mens rea known to law. Because s 24(1) clearly provides that it is an element of the offence of attempt to have 'an intent to commit an offence', the latter sort of attempt is not a crime.
>
> Nor should it be. A major purpose of the law of attempt is to discourage the commission of subsequent offences: see Glanville Williams Textbook of Criminal Law (2nd edn, 1983) pp 404-405; see also Barry Brown 'The attempt, and not the deed, Confounds us': Section 24 and Impossible Attempts' (1981) 19 UWOLR 225 at 232, Eugene Meehan 'Attempt – Some Rational Thoughts on Its Rationale' (3rd edn, 1995) p 594. But one who attempts to do something that is not a crime or even one who actually does something that is not a crime, believing that what he has done or has attempted to do is a crime, has not displayed any propensity to commit crimes in the future, unless perhaps he has betrayed a vague willingness to break the law. Probably all he shown is that he might be inclined to do the same sort of thing in the future; and from a societal point of view, that is not a very worrisome prospect, because by hypothesis what he attempted to do is perfectly legal.
>
> Therefore, we conclude that s 24(1) draws no distinction between attempts to do the possible but by inadequate means, attempts to do the physically impossible, and attempts to do something that turns out to be impossible 'following completion'. All are varieties of attempts to do the 'factually impossible' and all are crimes. Only attempts to commit imaginary crimes fall outside the scope of the provision. Because what Mr Dynar attempted to do falls squarely into the category of the factually impossible – he attempted to commit crimes known to law and was thwarted only by chance – it was a criminal attempt within the meaning of s 24(1). The evidence suggests that Mr Dynar is a criminal within the contemplation of the Canadian law and so the double criminality rule should be no bar to his extradition to the United States.[1052]

Haughton v Smith has also been overruled in Victoria: *Britten v Alpogut*.[1053] In that case the accused was charged with attempting to import cannabis in contravention of s 233 of the Customs Act 1901. He arrived in Australia with a suitcase in his possession believing it contained cannabis, but in fact the substance was a permitted import, procaine. The Supreme Court of Victoria overruled the magistrate of trial who had held that, on these facts, there was no case to answer. Impossibility does not debar a conviction for attempt in circumstances where, judging the matter on the facts as the accused believes them to be, he intends to commit an offence that is outlawed by the criminal law. Thus a charge of attempt is not defeated by the objective innocence of the accused's conduct provided he set about perpetrating a crime with the intention of completing it and that the acts or omissions of the accused are not merely preparatory but sufficiently proximate to the commission of the crime. The only impossibility to be recognised in law was therefore those involving a crime which at law is not a crime:

[1052] ibid [65]-[67].
[1053] (1987) 11 Crim L J 182; [1987] VR 292.

> It would also be to recognise that at common law a criminal attempt is committed if it is proven that the accused had at all material times the guilty intent to commit a recognised crime and it is proven that at the same time he did an act or acts (which in appropriate circumstances would include omissions) which are seen to be sufficiently proximate to the commission of the said crime and are not seen to be merely preparatory to it. The 'objective innocence' or otherwise of those acts is irrelevant.
>
> Impossibility is also irrelevant, unless it be that the so-called crime intended is not a crime known to the law, in which case a criminal attempt to commit it cannot be made.

For a review of New Zealand law on this topic see Sew Hoy.[1054]

What cannot be attempted

It is impossible to commit crimes such as perjury, riot, criminal libel, and the offering of bad money.[1055] You either do these things or you do not. Many of these situations are covered by other offences. Indeed, these possession-based crimes, in many instances, replace the law of attempts in controlling the mischief which is almost always clearly in the mind of a person who has control of an explosive, a drug or an offensive weapon. The rationale behind such tight regulation is obvious and the necessity to create a separate category of possession offences is that the circumstances of possession will rarely be sufficient to allow for proof of criminal intent or an act proximate to the commission of another crime.[1056]

Code Options

The Model Penal Code provides at 5.01:

> (1) Definition of Attempt. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:
>
> (a) purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be; or
>
> (b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or
>
> (c) purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.
>
> (2) Conduct That May Be Held Substantial Step Under Subsection (1)(c). Conduct shall not be held to constitute a substantial step under subsection (1)(c) of this section unless it is strongly corroborative of the actor's criminal purpose. Without negativing the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose. shall not be held insufficient as a matter of law:
>
> (a) lying in wait, searching for or following the contemplated victim of the crime;
>
> (b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
>
> (c) reconnoitring the place contemplated for the commission of the crime;
>
> (d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;

1054 [1994] 1 NZLR 257.
1055 James Fitzjames Stephen, A History of the Criminal Law of England (Macmillan 1883) Vol 11, 227.
1056 Peter Charleton, Offences Against the Person (Round Hall Press 1992), Chs 9, 10 and 11.

(e) possession of materials to be employed in the commission of the crime, that are specially designed for such unlawful use or that can serve no lawful purpose of the actor under the circumstances;

(f) possessions collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, if such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;

(g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

(3) Conduct Designed to Aid Another in Commission of a Crime. A person who engages in conduct designed to aid another to commit a crime that would establish his complicity under section 2.06 if the crime were committed by such other person, is guilty of an attempt to commit the crime, although the crime is not committed or attempted by such other person.

(4) Renunciation of Criminal Purpose. When the actor's conduct would otherwise constitute an attempt under subsection (1)(b) or (1)(c) of this section, it is an affirmative defence that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. The establishment of such defence does not, however, affect the liability of an accomplice who did not join in such abandonment or prevention.

Within the meaning of this Article, renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.

The Canadian Criminal Code provides:

24(1) Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out the intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.

(2) The question of whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law.

463 Except where otherwise expressly provided by law the following provisions apply in respect of persons who attempt to commit or are accessories after the fact to the commission of offences:

(a) every one who attempts to commit or is an accessory after the fact to the commission of an indictable offence for which, on conviction, an accused is liable to be sentenced to death or imprisonment for life is guilty of an indictable offence and liable to imprisonment for a term not exceeding 14 years;

(b) every one who attempts to commit or is an accessory after the fact to the commission of an indictable offence for which, on conviction, an accused is liable to imprisonment for 14 years or less is guilty of an indictable offence and liable to imprisonment for a term that is one-half of the longest term to which a person who is guilty of that offence is liable;

(c) every one who attempts to commit or is an accessory after the fact to the commission of an offence punishable on summary conviction is guilty of an offence punishable on summary conviction;

(d) every one who attempts to commit or is an accessory after the fact to the commission of an offence for which the offender may be prosecuted by indictment or for which he is punishable on summary conviction

(i) is guilty of an indictable offence and liable to imprisonment for a term not exceeding a term that is one-half of the longest term to which a person who is guilty of that offence is liable or

(ii) is guilty of an offence punishable on summary conviction.

Similar provisions as to sentence apply in respect of counselling and conspiracy in ss 464 and 465.

660 Where the complete commission of an offence charged is not proved but the evidence establishes an attempt to commit the offence, the accused may be convicted of the attempt.

661(1) Where an attempt to commit an offence is charged but the evidence establishes the commission of the complete offence, the accused is not entitled to be acquitted, but the jury may convict him of the attempt unless the judge presiding at the trial, in his discretion, discharges the jury from giving a verdict and directs that the accused be indicted for the complete offence.

(2) An accused who is convicted under this section is not liable to be tried again for the offence that he was charged with attempting to commit.

[B] Conspiracy[1057]

Introduction[1058]

The application of a rule of proximity in relation to the acts alleged to constitute an attempt is not part of conspiracy. In contrast to attempt, where an overt action is the crime, conspiracy in making no such requirement becomes an offence of flexible application. Historically, it is possible to argue that its current status as an all-encompassing inchoate offence both in respect of every crime and, it can be argued, every action which the law as interpreted by judges do not approve of, is a historical mistake.[1059] There was no general offence of conspiracy at common law. By a series of statutes in the reign of Edward I, particularly Ordinacio de Conspiratoribus,[1060] conspiracy to procure false indictments, bring false appeals or maintain vexatious suits were outlawed. In the seventeenth century it was established as a rule by the Court of Star Chamber that no overt act in furtherance of a conspiracy was required; the agreement constituted the crime. In the nineteenth century the crime of conspiracy was extended to agreements to commit all misdemeanours and felonies. There was then no generalised doctrine whereby a conspiracy to commit a non-criminal act was by reason of the agreement to commit that action an offence. The exception was a conspiracy to defraud which, in itself, possibly arose from the general common law doctrines relating to fraud and cheating.[1061] Arising from a dictum by Lord Denman in *Re Jones* that a conspiracy indictment must "charge a conspiracy, either to do an unlawful act or a lawful act by

[1057] See generally: Goode, Criminal Conspiracy in Canada (Carswell 1975); Law Commission (UK), Report No 76: Criminal Law: Report on Conspiracy and Criminal Law Reform (HC 176) 1976; Criminal Law Act 1977 (UK) discussed by Smith [1977] Crim LR 598, 638; Hunt, 'Evidentiary Rules Peculiar to Conspiracy Cases' (1974) 16 CLQ 307; Dennis, 'The Rationale of Criminal Conspiracy' (1977) 93 LQR 39; Wechsler, Jones and Korn, 'The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Criminal Conspiracy' (1961) 61 Col LR 657; Orchard, 'Agreement in Criminal Conspiracy' [1974] Crim LR 297-335; Lanham, 'Complicity, Concert and Conspiracy' (1980) 4 Crim LJ 276; Neal Kumar Katyal 'Conspiracy Theory' (2003) Yale Law Journal 1307.

[1058] See generally, Barbara Ann Hocking 'Conspiracy as a very Enduring Practice' (1998) 8 ICLJ 1 and 121]

[1059] This argument is made by Francis Sayre, 'Criminal Conspiracy' (1922) 35 Harv LR 393, relying on Robert Samuel Wright, The Law of Criminal Conspiracies (Butterworths 1873).

[1060] Archbold, *Archbold's Pleading, evidence & practice in criminal cases* (26th ed, Sweet and Maxwell 1922) 1415.

[1061] Andrew Simester, John Spencer, Findlay Stark, GR Sullivan and Graham Virgo, Simester and Sullivan's Criminal Law (7th ed, Hart Publishing 2019) 326.

an unlawful means" the doctrine of conspiracy was broadened whereby this statement could apply literally to any agreement to do something unlawful.[1062] As Sayre points out, this dictum was later withdrawn in *Peck*.[1063] Sayre comments:

> It enabled judges to punish by criminal process such concerted conduct as seemed to them socially oppressive or undesirable, even though the actual deeds committed constituted of themselves no crime, either by statute or by common law. And in cases where the actual deeds were of doubtful criminality, it saved the judges from the often embarrassing necessity of having to spell out the crime.[1064]

It is now uncertain if agreements to pursue unlawful objects become criminal even though the object is merely tortious. In broader terms, organised crime is much feared as a threat to society involving the exploitation of young people in pornography and prostitution or the spread of drug dependence since inevitably gangs protect themselves and enforce internal discipline through the most ruthless means. Hence, an agreement to pursue a criminal enterprise by agreement is markedly more dangerous than an individual effort. In *United States of America v Dynar*[1065] the Supreme Court of Canada justified the continuance of conspiracy as a crime because the combination of two or several individuals in pursuit of a public wrong is inherently criminal:

> The crime has a long and malevolent history. Conspirators have plotted to overthrow monarchs from biblical times through the time of the Plantaganets and Tudors. Guy Fawkes conspired with others to blow up the Parliament buildings. Today conspirators plot to carry out terrorist acts, to commit murders or to import forbidden drugs. Society is properly concerned with conspiracies since two or more persons working together can achieve evil results that would be impossible for an individual working alone. For example, it usually takes two or more conspirators to manufacture and secrete explosives or to arrange for the purchase, importation and sale of heroin. The very fact that several persons in combination agree to do something has for many years been considered to constitute 'a menace to society': see *R v O'Brien* [1954] SCR 666 at 669. In fact the scale of the injury that might be caused to the fabric of society can be far greater when two or more persons conspire to commit a crime than when an individual sets out alone to do an unlawful act.[1066]

No requirement of proximity

The 1922 edition of Archbold delineated the elements of conspiracy thus:

> Conspiracy is an indictable misdemeanor, consisting in the agreement of two or more persons (I Hawk. C. 72, s. 8) to do an unlawful act, or to do a lawful act by unlawful means. Unless two persons are found to have combined there can be no conviction. … So long as such a design rests in intention only it is not indictable. When two agree to carry it into effect, the very plot is an act itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced if lawful, is punishable if for a criminal object or the use of criminal means. …The offence cannot exist without the consent of two or more persons … and their agreement is an advancement of the intention which each has conceived in his mind, which then passes from a secret intention to the *overt* act of mutual consultation and agreement. … Thus an engagement by two or more is conspiracy, even if the conspirators do nothing in pursuance of the engagement.[1067]

[1062] *Jones's Case* (1832) 110 ER 485.
[1063] (1839) 9 A and E 686.
[1064] Francis Sayre, 'Criminal Conspiracy' (1922) 35 Harv LR 393, 406.
[1065] [1997] 2 SCR 462.
[1066] ibid [89].
[1067] Archbold, *Archbold's Pleading, evidence & practice in criminal cases* (26th ed, Sweet and Maxwell 1922) 1516-7. See also O'Connell v R (1844) 11 Cl & Fin 155; 8 ER 1061.

The absence of a requirement that the prosecution prove that the accused acted in a manner proximate to the commission of a crime allows the courts to avoid the confusion which has arisen in an effort to define the concept of proximity in concrete fact. It should therefore be easier to prove a conspiracy than to prove an attempt. In reality this is not so. An attempt is rarely charged because of the disquiet surrounding its definition. Conspiracy is an indictable offence at common law for two or more persons to agree to commit an unlawful act. It is immaterial whether the act in question constitutes the object of the agreement or is merely one of the steps along the way to achieving that object. Both are agreements to do an unlawful act; to do a lawful act by unlawful means contemplate the perpetration of an unlawful act. The essence of the crime is the agreement, which is complete upon the parties becoming of one mind that the crime should be perpetrated. What the conspirators have agreed is to be proven by what they have said and done while the conspiracy was in progress. In order to secure a conviction on these acts and statements, absent confessions by each conspirator admissible only against the maker, they must, in terms of practicality, be proximate to the crime in order to be inconsistent with any other rational explanation than the existence of the agreement charged. Walsh J was of the view that a substantive offence and a conspiracy to commit that offence ought not to be charged in the same indictment. However, there is no reason in law why that should not be done. In *The People (AG) v Keane*[1068] he said:

> Those whose duty it is to determine the issue of fact, whether they be jurors or, in the case of non-jury trials, Judges, must always keep uppermost in their minds that the liability of the person accused of conspiracy is limited to the common purpose while he remains in it. The question is whether the facts are such that they cannot fairly admit of any other inference being drawn from them save that of conspiracy and whether the person accused is a party to the criminal agreement and, if so, whether he was a party to it at the time in question. If the conspiracy is shown to exist then evidence may be given that the defendant acted upon it as evidence that he was a party to it. But a conspiracy cannot be established by evidence which is only admissible after the conspiracy itself is shown to exist.[1069]

Nature of Conspiracy

While a conspiracy is an agreement to do an unlawful act, principles of contract law have no applicability to the understanding of the concept of agreement here.[1070] People do not have to sit down together and draw up a definite plan executed in predefined terms in order to enter into a conspiracy. Nor do they even have to meet; *The People (Attorney General) v Keane*.[1071] A conscious understanding of a common design is sufficient; *Orton*.[1072] This essentially means that the parties are pursuing the same unlawful purpose in combination. A slight rearrangement of words changes the thrust of the definition and Stuart suggests that the law can be captured "by saying that there must be a firm decision as to a joint venture."[1073] Thus the gravamen is a common criminal project,[1074] intended to be carried out through the mutual support of the conspirators.[1075] However, mere negotiations and discussions do not amount to an agreement and will not suffice to ground a charge of conspiracy.[1076] Nor is it a conspiracy to act in concert to undo a legal problem.

[1068] [1976] 109 ILTR 1.
[1069] ibid 5.
[1070] For example, see The *People (DPP) v Murphy*, Special Criminal Court 22 January 2002.
[1071] [1976] 109 ILTR 1, 3.
[1072] [1922] VLR 469, 673.
[1073] Don Stuart, Canadian Criminal Law (2nd ed, Carswell 1987) 571.
[1074] Andrew Simester, John Spencer, Findlay Stark, GR Sullivan and Graham Virgo, Simester and Sullivan's Criminal Law (7th ed, Hart Publishing 2019) 328.
[1075] *Yip Chiu Cheung v R* [1995] 1 AC 111, 118 per Lord Griffiths.
[1076] *Mills* [1963] 1 QB 522.

In *Michael Hegarty v The Governor of Limerick Prison*[1077] the applicant applied for an Article 40 inquiry with a view to establishing that he was in the unlawful custody of the respondent. A committal warrant had been made in respect of him by the Special Criminal Court. It later transpired that the Court had not been properly constituted in that Judge Dominic Lynch, at his own request, had previously been removed but never told. When the blunder became apparent there was communication between the Chief State Solicitor's office, the DPP's office, the Department of Justice, the Governor and staff of Limerick Prison and the Garda Síochána. The conclusion was that the applicant was released from Limerick Prison and immediately re-arrested by the gardaí so that he could be charged again before a properly constituted Special Criminal Court. One of the applicant's claims in the Article 40 hearing was that there was a conspiracy between the notice parties to infringe his constitutional right to personal liberty by concocting his release from custody but ensuring at the same time that he would never actually be given his liberty. The alleged plan was to bring him to the gates of the prison where he would be delivered into the custody of the gardaí. Conspiracy involves proof of an agreement to perpetrate an illegal act. This case is a classic example of what is not a conspiracy. According to the Divisional Court, a coincidence of aims by several people does not establish a conspiracy. This is especially so where several parties realise an independent illegality has occurred and set out to do all in their power to set it to rights.

> In the tortious conspiracy case of *Connelly v Lochney and McCarthy* (1953) 87 ILTR 49, Dixon J defined a conspiracy as being the agreement or combination of two or more people to carry out an unlawful object or to carry out a lawful object by unlawful means. A similar definition runs through all the relevant case law. The first question to be considered therefore is, was there an agreement? Counsel for the applicant … more or less concedes that there is no evidence of an agreement in express terms. But he argues that the mere co-ordination of plans as between the Department of Justice, the office of the DPP, the gardaí and the respondent should be regarded as an agreement or combination sufficient to form the ingredient of a conspiracy. I cannot agree. It is true that there was a passing of information and an element of co-operation with a view to each carrying out their lawful functions but that is far removed from an agreement express or implied to deprive the applicant of his constitutional rights. But even if I were wrong about that, I am of opinion that such co-operation as there was could not be construed as being an implied agreement to do anything unlawful or to do anything lawful by unlawful means.[1078]

Parties and evidence

It was formerly thought that where A was charged with conspiring with B, then the acquittal of B requires that A should also be acquitted.[1079] The modern application of the theory is that conviction for conspiracy depends upon the state of the evidence and not upon the state of the record. An example is *Darby*.[1080] The accused and another were charged with and convicted of conspiracy to rob. The co-accused appealed successfully against conviction on the basis that there was insufficient evidence to prove that he had entered into any agreement to perpetrate a robbery. Darby then appealed and was successful before the Court of Criminal Appeal of Victoria.[1081] The prosecution appealed to the High Court of Australia which held that whether on joint or separate trials the acquittal of one conspirator does not necessitate the acquittal of the other unless in all the circumstances of the case such a conviction would be inconsistent with that acquittal. In this case Darby had confessed to conspiring to rob whereas his co-accused had not. The correct rule is as set out in *Longman and Cribben*[1082] by the Court of Criminal Appeal in England. The essence

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1077 [1998] 1 IR 412.
1078 ibid [26].
1079 *Dharmasena v The King* [1951] AC 1.
1080 (1982) 148 CLR 668. See also *The People (DPP) v Shannon* [1975] AC 717.
1081 ibid.
1082 (1981) 72 Cr App R 121.

of the crime of conspiracy is an agreement. A can conspire with B and with C but there may only be enough evidence to convict B, this despite the fact that the indictment charges an agreement with them all. If the state of the evidence is that it suffices only to convict B, because for example of a confession or corroborative evidence, it is not wrong to convict B alone. In this jurisdiction, experience shows that it is by inference from overt acts that such charges as 'conspiracy to cause an explosion' or 'conspiracy to murder' are laid. In consequence of a raid on a premises, components may be found which do not in themselves constitute an explosive, enabling a possession of explosives charge, but which allow the inference that a workshop over which the accused presided was dedicated to the making of bombs. Thus, that particular accused may be proven by proximity or fingerprint evidence, to be engaged in the manufacture of items which will turn into bombs. Here, common sense should be engaged. People do not construct bombs to facilitate agriculture but to perpetrate terrorist acts. Acting alone in such a context is such a remote and fanciful possibility that it may be discounted. Hence, but by proof of working on bomb manufacture it may be legitimately inferred that the person in the workshop was pursuing a venture to cause explosions.

In order to prove an agreement there must be at least two parties to it. It is proper, where the other party is unknown, to proceed with an indictment alleging a conspiracy by the accused with "a person or persons unknown".[1083]

Evidence

The evidence of acts and declarations in furtherance of a conspiracy is admissible against each of the parties to the conspiracy, while the conspiracy is being put into effect and prior to completion in the commission of the substantive offence. The acts and declarations of a party following upon his arrest are never admissible against a co-accused, but only admissible against the man or woman making such admissions. At that stage, any acts and declarations cannot be in furtherance of the conspiracy and are therefore inadmissible against any other person who may have been a party to it. Joint trials occur for administrative convenience and require an express instruction to the jury that each accused is to be tried only on the evidence admissible against that accused separately from the trial of any other accused.

Reservations

An agreement may amount to a conspiracy in certain circumstances even if it contains some reservation. For example if a group of people agree to rob a bank, unless a garda should be standing at the door when they get there, there will be an agreement amounting to a conspiracy to commit the crime. If the reservations are more substantial in nature, however, there may only be in existence negotiations falling short of a conspiracy. English cases to have considered this issue include: *Mills*,[1084] *O'Brie*n,[1085] and *Reed*.[1086] In *O'Hadhmaill*[1087] members of a terrorist group agreed and prepared for a bombing campaign in Britain. Their grouping, however, was at that time on ceasefire pending political negotiations. Even still, a contingency being overcome, the ceasefire ending, there was an agreement to carry out bombings.[1088]

Coincidence and conspiracy

[1083] See the discussion in *Dharmasena v The King* [1951] AC 1.
[1084] [1963] 1 QB 522.
[1085] (1974) 59 Cr App R 222 (CA).
[1086] [1982] Crim LR 819.
[1087] [1996] Crim LR 509.
[1088] But see *Reed* [1982] Crim LR 819 which unconvincingly holds that a lawful object to be carried out if necessary in an unlawful manner, such as breaking to speed limit in order to get to a meeting on time, has such conditionality as to not amount to a criminal conspiracy.

In *Cotroni and Papalia*[1089] Dickson J for the majority of the Supreme Court of Canada explained the essence of conspiracy:

> The word 'conspire' derives from two Latin words, 'con' and 'spirare', meaning 'to breathe together'. To conspire is to agree. The essence of criminal conspiracy is proof of agreement. On a charge of conspiracy the agreement itself is the gist of the offence: Paradis v The King (1933), 61 CCC 184 at p 186, [1934] 2 DLR 88 at p 90, [1934] SCR 154 at p 168. The actus reus is the fact of agreement: Director of Public Prosecutions v Nock [1978] 3 WLR 57 at p 66 (HL). The agreement reached by the co-conspirators may contemplate a number of acts or offences. Any number of persons may be privy to it. Additional persons may join the ongoing scheme while others may drop out. So long as there is a continuing overall, dominant plan there may be changes in methods of operation, personnel, or victims, without bringing the conspiracy to an end. The important inquiry is not as to the acts done in pursuance of the agreement, but whether there was, in fact, a common agreement to which the acts are referable and to which all of the alleged offenders were privy. In R v Meyrick and Ribuffi (1929), 21 Cr App R 94 at p 102 (CCA), the question asked was whether 'the acts of the accused were done in pursuance of a criminal purpose held in common between them', and in 11 Hals, 4th ed., at p 44 it is said: 'It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place, it is necessary to show a meeting of minds, consensus to effect an unlawful purpose'. There must be evidence beyond reasonable doubt that the alleged conspirators acted in concert in pursuit of a common goal.[1090]

Essentially, what is sought to be distinguished is a coincidence of actions from an agreement. Clearly, persons who are not in combination with one another, but are coincidentally working towards a shared goal are not fulfilling an agreement. People may converge on the same place for the same hurling game but only those on the teams and their support group are in agreement that they should be there. There has been no understanding, or meeting of minds, between individual spectators that they should combine to effect a particular purpose. What is done to prove a conspiracy is to show that the way in which the parties behaved was consistent only with the pursuit of a common object and indicates co-ordination of effort consistent only with an agreement beforehand. This is a matter of inference from all of the circumstances.[1091] In *The People (Attorney General) v O'Connor and O'Reilly*[1092] the Court of Criminal Appeal held that while, on the facts of the case, there was no evidence of an express agreement, the evidence afforded ample grounds to justify the inference of a conspiracy. It is equally a conspiracy for A and B, or for A alone, to commence an unlawful enterprise and then to be joined in their actions by C. In such circumstances C has entered into the understanding which moves towards a common purpose; that is a conspiracy. But it must be the same agreement.

Wheels and chains

In such spirit the law has recognised "wheel conspiracies" where a number of accused persons act through a middle man knowing that they are part of a larger design.[1093] In a "chain conspiracy" the conspirators are acting in a line linked up to each other by their understanding with the person interacting immediately with them, but conscious of their part in a larger design leading ultimately to the unlawful purpose. These types merely illustrate methods and do not substitute for the basic law requiring an overall design common to the parties, although it can be uncertain in the detail to be used to accomplish it. There must not be wrapped up in one conspiracy charge what is, in fact,

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1089 [1979] 2 SCR 256.
1090 ibid 276.
1091 *The People (DPP) v O'Brien* (Court of Criminal Appeal, unreported, 22 January 2002).
1092 1 Frewen 42 (1943).
1093 *US v Bruno* (1939) 105 F 2d 921.

two or more conspiracies.[1094] In *Cotroni & Papalia*[1095] where there were two competing and mutually exclusive objects, the Supreme Court of Canada held that there was no conspiracy. All must have the completion of the same offence, or series of offences such as bombing outrages, in mind.[1096]

In order to keep the law logically consistent no analysis of a conspiracy should depart from its fundamental characteristic of requiring "a conscious understanding of a common design".[1097] Often the difference between what is, or what is not, a conspiracy depends upon an analysis of the facts as led by the prosecution. In some instances the authorities may be caught on the horns of a dilemma. If they charge what appears to be a single overall conspiracy involving a large number of defendants, it may be possible for the defence to attack that proposition by putting forward the hypothesis that what was involved was, in fact, several individual agreements coupled with an unconscious co-incidence of purpose. If, on the other hand, the prosecution charge a number of individuals accused with the minor agreements which make up the part of what they allege to be the overall plan, they may fail to pursue the true seriousness of what they allege. Further, they may be involved in a number of separate trials pleading separate issues where by reason of the absence of the overall picture an unjustified acquittal may result. In *United States v Bruno*[1098] 88 defendants were tried on a charge of conspiracy to import and distribute drugs. The prosecution alleged a systematic organisation of the crime which involved: the importers of the drug; the wholesalers who, in turn, distributed it to two distinct retailers in New York and in Texas and Louisiana; and the final group who in turn would sell the drugs to users. The argument on appeal was that the evidence, taken at its height, proved three distinct sets of conspiracies, but not an overall general conspiracy. The contention was that to support a conviction on the indictment as charged, communications would have to be proved between all the parties and that such proof was absent. The essential ground for rejecting the appeal was that in the circumstances proved each of the conspirators could not have failed to have known that they were part of a larger system. There was sufficient knowledge of their individual roles where the nature of the trade required each party to be aware that the drugs had to be imported, warehoused and distributed for sale and then sold to retailers.

Where, on the other hand the system proved by the prosecution does not allow an inference of knowledge of the overall plan, the prosecution will fail. If a central figure makes arrangements through a separate and distinct business transaction with individual groups of parties to effect an unlawful act then, if each of the groups of parties knows nothing more than the fact that they have entered into an agreement with the central figure, there is a conspiracy with that central figure alone.[1099] In other words conspiracies by A with B, by A with C, and by A with D constitute just that and do not make up a conspiracy between A, B, C and D unless there is an overall understanding between the parties for the perpetration of the unlawful act charged.[1100] Were the law to be otherwise then every separate and distinct party who steals a car knowing that A is in the business of buying it in order to deface its serial numbers and sell it as an honestly procured pre-owned car, will be effecting a conspiracy with every other party who acts likewise. A and the car thief engage in a conspiracy to effect their own individual business.[1101] It would be proper to charge them with conspiracy to defraud. Simply because, co-incidentally, A enters into a similar arrangement with other car thieves does not constitute a conspiracy. The exception is where all of them act, with the express or necessarily implied knowledge of each other to effect a common

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1094 *Ardalan* [1972] 2 All ER 257.
1095 [1979] 2 SCR 256; (1979) 45 CCC (2d) 1.
1096 *Broad* [1997] Crim LR 666.
1097 Per Cussen J in *Orton* [1922] VLR 469, 473.
1098 (1939) 105 F 2d 921.
1099 *Kotteakos v United States* (1946) 328 US 750.
1100 Andrew Simester, John Spencer, Findlay Stark, GR Sullivan and Graham Virgo, Simester and Sullivan's Criminal Law (7th ed, Hart Publishing 2019) 331-332.
1101 *Mehta* [2012] EWCA Crim 2824; D [2009] EWCA Crim 584.

purpose in conjunction with A. An opposite view was taken in *Meyrick and Ribuffi*[1102] which case concerned police corruption in London. Following an investigation it was found that Sergeant Goddard had been bribed by a number of night-club operators, including the accused, to enable them to avoid complying with licensing laws. The "wheel conspiracy" theory was upheld by the court on the basis that "each well knew what the other was doing." It may be reasoned that the overall calm from police interference could not be a coincidence since each nightclub owner might be inferred to have entered into concerted agreement to keep the law at bay. The conspirators, hence, do not need necessarily to know the other parties if there is a shared criminal purpose in which all have joined, rather than a series of parallel arrangements.[1103]

Meyrick and Ribuffi was distinguished in *Griffiths*[1104] where, on facts differing in less than convincing detail from *Meyrick and Ribuffi* the court indicated that the evidence disclosed a number of different conspiracies instead of one overall conspiracy.[1105] Howard criticises the wheel and chain conspiracy theory as follows:

> Although the distinction between tacit agreement and mere coincidence of aims can be difficult to draw, the task is confused rather than assisted by the habit of describing the structure of alleged conspiracies metaphorically in terms of 'wheels' and 'chains'. The danger of such metaphorical thinking is that it places undue emphasis on the apparition of spokes or links and neglects the mental element required for a conspiratorial agreement. If the orthodox meaning of 'agreement' is accepted, there can be no conspiratorial agreement to commit an unlawful object unless there is a common intention or purpose to achieve that object.[1106]

The theory of "wheel" and "chain" conspiracies is only supportable on the basis of a sufficiency of a mental element consisting of an intention to effect an unlawful act coupled with a conscious understanding of the joining of others in an overall enterprise. An intent to enter into a joint venture incorporating an unlawful element coupled with recklessness as to the role or identity of other participants is, it is submitted, a sufficient mental element for conspiracy. However, an intent to enter into a joint venture with A, being reckless as to whether A may be entering into similar joint ventures with B or C is inconsistent with the fundamental element of common purpose in a conspiracy. This requires a common intention between the parties, in other words a mutually shared agreement to bring about the relevant wrong contemplated by the conspiracy. It is submitted that it is only where each of the parties enters into the agreement being aware that he is part of an overall and larger plan and proceeds to agree his precise role with that knowledge in order to effect the wider purpose, that he becomes part of any wider agreement.

Unlawful Element

If there is an agreement to do an unlawful act then there is a conspiracy. The definition of what is "unlawful" for these purposes requires to be re-cast by statute. In its current form it allows for the application of a wide principle to varying situations which have nothing more in common than the fact that they are unlawful.[1107] It is submitted that it would greatly simplify the law in relation to conspiracy if it were declared by statute that only an agreement to commit a criminal offence could amount to a conspiracy. Perhaps the Constitution demands this? In the absence of such a rule, it is arguable that the law is at large, the definition of the element of unlawfulness being decided as

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[1102] (1929) 21 Crim App R 94.

[1103] *Griffiths* (1965) 49 Cr App R 279; Shillam [2013] EWCA Crim 160.

[1104] [1966] 1 QB 589.

[1105] Similarly see *McDonald* (1963) 10 CCC (2d) 488 and *Kotteakos* (1946) 328 US 750.

[1106] Brent Fisse and Colin Howard, Howard's Criminal Law (5th ed, Law Book 1990) 369.

[1107] This has been done in the Canadian Criminal Code, s 465. In Australia, the Queensland Code retains this extraordinarily wide ambit, the Tasmanian Code retains a conspiracy to affect a public mischief and "to do any act without lawful justification or excuse with intent thereby to injure any person". Further see Brent Fisse and Colin Howard, Howard's Criminal Law (5th ed, Law Book 1990) 356-363.

cases arise and in accordance with prevailing judicial views. In the past the crime of conspiracy was used against the trade union movement and statutory intervention was needed in the form of s 3 of the Conspiracy and Protection of Protection of Property Act 1875, as amended by the Trade Disputes Act 1906, in order to end judicial activism. The circumstances of Parnell's case shows how an agreement to withdraw rents can be construed to be a criminal conspiracy where the failure to pay rent would, of itself, merely have been one which attracted the civil remedy of distress or ejectment.

In *Parnell,*[1108] Charles Stewart Parnell and others were charged with various counts of soliciting tenants to refuse to pay their rent by using the unlawful means of "boycotting" those who did not join in this policy. Fitzgerald J, in his charge to the jury, indicated to them that a conspiracy was an agreement between two or more persons to do that which was unlawful and that it was unlawful to agree to accomplish an injury to a third person, or body of persons. In requisitions to the judge counsel for the accused indicated that such a proposition was so vague and broad as to leave a discretion in the hands of the judges to declare it to be a crime to combine to do almost anything which they regard as morally wrong or politically or socially dangerous. The trial was before Fitzgerald and Barry JJ and the latter upheld the form of direction given by his brother judge:

> I should be clearly of opinion that a combination to do an act innocent in itself by innocent means does not constitute an indictable conspiracy. As regards the second proposition, however, which has been so often mooted, namely, that the thing to be done must be criminal, or the means to be used must be criminal. With reference to that I am not prepared to adopt that view of the law, because I think the weight of modern authority is against it. I shall not refer any further to the cases cited by my brother Fitzgerald, and again referred to by Mr Macdonogh …

Fitzgerald J simply stated "I would only add to what my learned brother has said, as the objections were very much an appeal from what I have said, I entirely concur in what he has said."

A possible systemization

Attempting a categorisation of the forms of unlawful conduct which the courts have, traditionally, acted on as sufficient to find a criminal conspiracy, these would be:

(1) An agreement involving the commission of a crime.[1109] This is beyond doubt.

(2) An agreement involving the commission of a summary offence.[1110] This is also unassailable.

(3) An agreement to defraud.[1111] An example is *Cooke*[1112] where stewards employed by British Rail sold their own refreshments on trains instead of the company fare. A conspiracy to defraud may extend to the making of devices which only serve the purpose of defrauding others.[1113] The result of the application of conspiracy is to extend criminal liability beyond activities which involve the perpetration of stealing or any of the other offences of dishonesty. This category reverts to the earliest days of criminal conspiracy.[1114]

(4) An agreement to pervert the course of justice. This may simply reflect the substantive common law offence of perverting or attempting to pervert the course of justice.[1115] While these may have first arisen under statute, or become clarified thereby, it has never been

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[1108] (1881) 14 Cox 508.
[1109] *Porter* [1980] NI 18.
[1110] Blamires Transport Services Limited [1964] 1 QB 278.
[1111] *Scott v Metropolitan Police Commissioner* [1975] AC 819.
[1112] [1986] AC 909.
[1113] *Hollinshead* [1985] AC 975.
[1114] Archbold, *Archbold's Pleading, evidence & practice in criminal case*s (26th ed, Sweet and Maxwell 1922), 1419 and see the section on mock auctions as fraud conspiracies at 1420.
[1115] Andrews [1973] QB 422. Archbold, *Archbold's Pleading, evidence & practice in criminal cases* (26th ed, Sweet and Maxwell 1922) 1422.

doubted that a concerted effort to convict the wrong person of a crime is a crime, whether this proceeds to indictment of the victim or further.[1116]

(5) An agreement to effect a public mischief has been held by the House of Lords not to amount to a conspiracy.[1117] This category does not appear in the 1922 edition of Archbold but the manner of execution of the agreement or the object may be criminal in themselves. In *Boston*[1118] the High Court of Australia held that acceptance of money by a member of the New South Wales legislative assembly in return for the use of his influence to procure the purchase of land by the government was such a public mischief as to make an agreement to that end a conspiracy. Similarly, in *Howes*[1119] the Supreme Court of South Australia held that it was a conspiracy to effect a public mischief for the accused to conspire with a person unknown to cause a false examination to be entered in the public records whereby he could claim to have fulfilled university matriculation requirements. Howard comments that these decisions create a logically inconsistent position whereby the courts have renounced any common law power they may have had to punish actual conduct tending to the commission of a public mischief, but retain a power to punish mere agreements to effect such conduct.[1120]

(6) An agreement to commit a tort is sufficient according to the House of Lords.[1121] This conspiracy requires an invasion of the public domain or that more than minimal damage be inflicted. Possibly this comes with the category of conspiracy to injure individuals by wrongful acts other than fraud.[1122]

(7) More problematic is the acceptance as a criminal offence of a conspiracy to corrupt public morals and a conspiracy to outrage public decency.[1123] The public morals in question may arise from the self-executing nature of the Constitution but the appetite for such exercises may now have waned. The question as to whether a conspiracy to infringe constitutional rights is criminal or not has been expressly left open by the High Court.[1124]

(8) There are no recent examples of the successful use of breach of contract as the unlawful element in a criminal conspiracy. Older cases, however, encompass conspiracy to affect trade but these are possibly now replaced by competition law offences under the Competition Law Act 2002.[1125]

(9) There seems to be decisive rejection of the idea that an immoral act suffices as the unlawful element in conspiracy.[1126]

Public morals

In the case of *AG (SPUC) v Open Door Counselling Ltd*[1127] the defendants advised pregnant women from a clinic in Dublin in relation to their options on being pregnant. Abortion was one of the options open for discussion in the course of this counselling. The defendants admitted that if a pregnant woman wished to consider the abortion option further, they would arrange to refer her to a medical clinic in Great Britain for that purpose. The Eighth Amendment to the Constitution then guaranteed the right to life of the unborn in the following form in Article 40.3.3°: "The State

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1116 Archbold, *Archbold's Pleading, evidence & practice in criminal cases* (26th ed, Sweet and Maxwell 1922) 1422.
1117 *DPP v Withers* [1975] AC 842.
1118 (1923) 33 CLR 386.
1119 [1971] 2 SASR 293.
1120 Brent Fisse and Colin Howard, Howard's Criminal Law (5th ed, Law Book 1990) 263.
1121 *Kamara v DPP* [1974] AC 104.
1122 Archbold, *Archbold's Pleading, evidence & practice in criminal cases* (26th ed, Sweet and Maxwell 1922) 1421.
1123 *Shaw v DPP* [1962] AC 220 and *Knuller v DPP* [1973] AC 435.
1124 *Hegarty v The Governor of Limerick Prison* [1998] 1 IR 413.
1125 Archbold, *Archbold's Pleading, evidence & practice in criminal cases* (26th ed, Sweet and Maxwell 1922) 1423.
1126 *Cahill* (1978) 22 ALR 361.
1127 [1988] IR 593.

acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right." The trial judge granted a declaration that the activities of the defendants were unlawful having regard to the provisions of this Article of the Constitution. This, however, did not amount to a criminal conviction and in any event, in the normal course of events a jury would be required.

Conspiracy to corrupt public morals is not mentioned in the 1922 Archbold though the range and minability of former authority enabled the erection of this category in England. In the High Court Hamilton P relied on the English case of *Knuller v DPP*[1128] as authority for the existence of the offence of conspiracy to corrupt public morals:

> As late as 1983, the people enacted the Eighth Amendment to the Constitution. Consequently, there can be no doubt but that abortion, which is an interference with and destruction of the right to life of the unborn, is contrary to national policy, pubic morality, contrary to law, both common law and statute law, to the fundamental right of the unborn and contrary to that right to life as acknowledged by the Eighth Amendment to the Constitution.
>
> Both defendants, their servants or agents, know that a significant number of the pregnant women who sought their counselling and who were referred to a medical clinic in Great Britain would be contemplating an abortion. The action of the defendants in referring them to such clinics, after they had satisfied themselves that the said clinics operated at the highest standard, could amount to an assent to the pregnant women obtaining an abortion, if the conditions set forth in s 1, sub-s 1 of the Abortion Act 1967, were complied with and the abortion was legal, to the provision of assistance and encouragement to procure an abortion and an agreement with the pregnant woman to procure an abortion.
>
> Such an agreement could constitute a conspiracy to corrupt public morals as the defendants' services are available to the public and well advertised. In a prosecution alleging a conspiracy to corrupt public morals, it would however be a matter for a jury to decide whether the activities of the defendants amounted to a conspiracy to corrupt public morals and whether in fact public morals were corrupted.[1129]

The judgment was appealed to the Supreme Court where this issue was not dealt with.

A different view

In *Cahill*[1130] the notion of using a conspiracy to corrupt public morals was rejected. Each of the appellants to the Court of Appeal of New South Wales had been convicted on account of conspiracy to prevent the enforcement of a law of the commonwealth contrary to the Crimes Act s 86(1)(b). Three of the appellants were Chinese men and three were Australian women. The Australian women agreed to marry the Chinese men on the understanding that this would improve their chances of being allowed to remain in Australia. Only the first marriage took place and the other two were stopped by the police. The plan was to proceed with the ceremonies, but not to consummate the marriages which were later to be dissolved. Nonetheless, the ceremonies amounted to the contraction of an effective marriage which involved no deception or misrepresentation. The Minister for Emigration and Ethnic Affairs retained a complete discretion under the Migration Act to allow the men to stay in Australia or to deport them. The argument for the prosecution was that there was a general law of conspiracy that was applicable. If the jury found that there was an agreement between the accused which contemplated conduct which was so offensive to public morality that it could be said to be unlawful, then, it was argued, they were

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[1128] [1973] AC 435.
[1129] [1988] IR 593, 614.
[1130] (1978) 2 NSWLR 453.

entitled to a conviction because of those unlawful means. In the result the court rejected the argument. All that had been done was an agreement to organise the affairs of individuals in a manner designed to have a favourable effect on the exercise of ministerial discretion. Even if the argument was accepted that the exercise of such a discretion was the enforcement of a law, namely the Migration Act, the enforcement of that Act was not thereby prevented. The Court rejected a consideration that the intention of the "conspirators" with regard to public morality effected the offence as charged. The court left open the notion that a conspiracy to corrupt public morals might be made out at common law. As the judgment of Street CJ shows, the public morality argument was to be rejected as being basically dependent upon religious belief. Religious precepts are not to affect the application of the ordinary criminal law until they find expression in an actual legal prohibition that is constitutionally effective. The difference, therefore, between the *Cahill* case and the *SPUC* case is that in the latter the people passed a law giving effect to their will through the self-executing legal mechanism of the Constitution. Street CJ stated:

> It has always been permissible in many fields so to order one's affairs as to avoid attracting the operation of a law, whether it be a law of the Commonwealth or a law of the State. Equally, it has always been permissible to bring about circumstances which will create a climate favourable to the person concerned in respect of a statutory discretion which might be exercised for or against his interests. It is not necessary to canvass the many areas where such planning and action is both commonplace and legitimate, but the revenue field comes at once to mind. For these reasons I would regard the present convictions as unfounded.[1131]

Street CJ rejected the contention that the court should use the criminal law so as to protect the perceived religious or moral requirements of the community:

> I fail to see what justification there is for the criminal law thus seeking to lift what might be described, borrowing from another field, as the bridal veil. The law prescribes in considerable detail the formal requirements which must be met in order to achieve the change of status consequent upon two persons marrying. The law regulates the marriage relationship in well recognised aspects both during its currency as well as in making provision for its termination. Active misrepresentations regarding a marriage, or for that matter active misrepresentations regarding anything else, are capable of giving rise in appropriate circumstances to criminal as well as civil liability. But there were present here no active misrepresentations. The Crown's case involved an assertion that, over and above the relevant statutory provisions, the criminal law has a legitimate concern with what was described as the purpose for which the institution of marriage was designed. This postulates some recognition of a moral significance of the institution of marriage superseded to its legally prescribed significance. The moral repugnance suggested in this case is that the intentions of the appellants involved a repudiation of this moral significance. … Quite apart from matters of religious teaching, it is known that marriages are at times contracted for reasons falling short of the more generally recognised purposes of entering into that relationship. In England in bygone days there were instances of celibate marriages being contracted for the purpose of affecting rights of inheritance of titles. The same situation exists both here and elsewhere in relation to marriages affecting rights of property succession. At times marriages were or are entered into in connection with legitimisation of existing or imminent issues of a since-terminated intimate relationship. The purposes and motives, equally as the hopes and anticipation's, affecting two people when they enter into a marriage, are susceptible of too wide a variation to render it possible for the criminal law to classify some as offending and the others as according with what is meaninglessly

[1131] ibid 456.

> described as 'community expectation' in so far as this may travel beyond the specifically prescribed concomitants of a marriage.[1132]

An Unconstitutionally Vague Doctrine?

The reasoning of Hamilton P in concluding that an offence of conspiracy to corrupt public morals was known to Irish law has been criticised for its failure to take account of other constitutional norms such as the requirement that criminal offences should be clearly and specifically defined.[1133] One might usefully refer to a couple of United States authorities in this context. In *Krulewitch v US*[1134] Jackson J described conspiracy as an "elastic, sprawling and pervasive offence … so vague that it almost defies definition [and] chameleon-like [because it] takes on a special coloration from each of the many independent offenses on which it may be overlaid." Judge Leonard Hand has described conspiracy as "the darling of the modern prosecutor's nursery."[1135] Nobody denies that, provided it is democratically agreed that it is a crime, that combinations to contravene the law are unlawful. But critics argue that it would be better to create a specific, clearly-defined offence of conspiracy; and that is indeed the trend in modern statutes[1136] In the words of one author, "Under the law as it now stands, a person charged with one of the conspiracies under consideration will not know until the moment of the jury verdict if the conduct of which he stands accused is actually an offence, let alone if he is guilty of it."[1137] It is impossible to predict what will be held to be a conspiracy to corrupt public morals; in *Shaw v DPP*[1138] the particulars helpfully alleged a conspiracy "to debauch and corrupt the morals as well of youth as of divers other liege subjects of our Lady the Queen and to raise and create in their minds inordinate and lustful desires."

Mental Element

What end result do the conspirators aspire to? That is the key question. That may be drugs, for instance, and the fact of mistaking the chemistry of one illegal drug for another may make no difference.[1139] In a conspiracy, the parties intend both to agree and to carry out the object of their agreement. Such is the mental element suggested for conspiracy by Stuart,[1140] among others, relying on *O'Brien*.[1141] Hence, the necessary mental element is in addition the external element of the offence since you can't agree with someone to murder the victim without agreeing that the victim will be killed.[1142] In *Anderson*[1143] Lord Bridge stated that beyond the "mere fact of the agreement" the necessary mental element of the crime is "established if, and only if, it is shown that the accused, when he entered into the agreement, intended to play some part in the agreed course of conduct in furtherance of the criminal purpose which the agreed course of conduct was intended to achieve. Nothing less will suffice; nothing more is required." This is not to say, as that case establishes, that mere agreement is enough without that consensus being to carry out the offence. There must be both. But it is not necessary for a conspirator to intend that he or she personally will participate in the offence. For instance, A may engage B and C to murder the victim but may be uninvolved beyond hearing the news of the death on the radio. It is enough that the agreement encompasses that the object of the criminal scheme be carried out.[1144] While it is unlikely in

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1132 ibid 458; Concurring judgments were delivered by Reynolds and Mahoney JJ.
1133 O'Malley, Sexual Offences: Law, Policy and Punishment (1996) 173.
1134 336 US 440 (1949).
1135 *Harrison v US* 7 F 2d 259 (2nd Cir 1925).
1136 O'Malley, Sexual Offences: Law, Policy and Punishment (1996).
1137 ibid 173.
1138 [1962] AC 220.
1139 *Broad* [1997] Crim LR 666.
1140 Don Stuart, Canadian Criminal Law (3rd ed, Carswell 1995) 578.
1141 (1954) 110 CCC 1.
1142 Andrew Simester, John Spencer, Findlay Stark, GR Sullivan and Graham Virgo, Simester and Sullivan's Criminal Law (7th ed, Hart Publishing 2019) 338.
1143 [1986] 1 AC 27, 39.
1144 *McPhillips* [1989] NI 360; Edwards [1991] Crim LR 45.

organised crime, a person, such as a police spy, may agree on a course of criminal conduct with others but with the intention of informing the authorities in order to thwart its fulfilment.

Similar arguments can be advanced here, in line with those on the law of attempt, that intention is required in respect of offences capable of being committed by recklessness, or those of strict or absolute responsibility. The question has lacked rigorous analysis and, as we have seen, the courts, by relying on "chain" and "wheel" conspiracies, would seem to have indicated a kind of mental element which is less than intent and is certainly less than knowledge in relation to the role or identity of the other participants. It has been argued that in the case of a conspiracy to commit an offence that may, itself, be committed recklessly, negligently, in the absence of due diligence or strictly, there must be knowledge on the part of the conspirator, at the time of the agreement, that the facts or circumstances that make the subsequent act an offence will exist at the time that act is to take place.[1145] Thus the conspirator will have to know that what is to be done in pursuance of the conspiracy will amount to a criminal offence or know that the actor will be reckless or careless or lack due diligence as the case may be.[1146] Knowing such, he then becomes part of an agreed plan that such offence, with such mental element be committed. His purpose in entering the agreement is that the offence is to be committed: *O'Brien*.[1147]

In *Porter*[1148] the mental element was briefly discussed in the context of an accused charged with various conspiracies in relation to the possession of explosives and of making available to terrorists material which would be likely to be useful in carrying out acts of terrorism. The accused made a statement indicating that he had picked up a parcel at the behest of a member of the Ulster Volunteer Force. The issue for Lord Lowry LCJ, speaking for the Court of Appeal of Northern Ireland, was when the conspiracy had been entered into. This, in turn, depended on what the accused assented to. He could not have assented to any more than he was aware of in relation to the facts in respect of which he was proved to have entered into an agreement. It follows that a deliberate shutting of one's eyes to the truth cannot be equated with ignorance.[1149] While failing to make enquiries can be a factual base for inferring wilful blindness, that is not a rule of law.[1150] In the Canadian case of *O'Brien*,[1151] Taschereau J offered the following general principles:

> I think there has been some confusion as to the element of intention which is necessary to constitute the offence. It is, of course, essential that the conspirators have the intention to agree, and this agreement must be complete. There must also be a common design to do something unlawful, or something lawful by illegal means. Although it is not necessary that there should be an overt act in furtherance of the conspiracy, to complete the crime, I have no doubt that there must exist an intention to put the common design into effect. A common design necessarily involves an intention. Both are synonymous. The intention cannot be anything else but the will to obtain the object of the agreement. I cannot imagine several conspirators agreeing to defraud, to restrain trade, or to commit any indictable offence, without having the intention to reach the common goal.[1152]

Conspiracy and a Duty of Disclosure

1145 Alan Mewett and Morris Manning, Mewett and Manning on Criminal Law **(**3rd ed**,** Butterworths 1994**)** 343-44; see also Andrew Simester, John Spencer, Findlay Stark, GR Sullivan and Graham Virgo, Simester and Sullivan's Criminal Law (7th ed, Hart Publishing 2019) 344.

1146 Alan Mewett and Morris Manning, Mewett and Manning on Criminal Law **(**3rd ed**,** Butterworths 1994**)** 343-344.

1147 [1954] SCR 666.

1148 [1980] NI 18.

1149 *Southern Cement v Cooper* [1974] AC 623, 638.

1150 *Maxwell* [1978] NI 42, 54; *Porter* [1980] NI 18.

1151 [1954] SCR 666.

1152 ibid 668-9; and see the summary as to the mental element as summarised in the English statutory context by Andrew Simester, John Spencer, Findlay Stark, GR Sullivan and Graham Virgo, Simester and Sullivan's Criminal Law (7th ed, Hart Publishing 2019) 346.

An agreement dishonestly to conceal information from another, where there is a duty of disclosure or where the other is entitled to truth, can amount to a conspiracy to defraud. A failure to disclose to the backers of a business scheme to acquire a company, that a major backer has withdrawn his financial support is a fraudulent misrepresentation, as is a direct deceit as to the state of that backer's contribution: *Northern Bank Finance Corporation v Charlton*.[1153] In *Adams*[1154] the appellant was a director and deputy chairman of a holding company and a director of some of its subsidiary companies. With five co-defendants he managed the group's major investment projects as an investment team. He was charged with four counts of conspiracy to defraud contrary to the Crimes Act 1961 (NZ); s 257 of which states "Conspiracy to defraud – Every one is liable to imprisonment … who conspires with any other person by deceit or falsehood or other fraudulent means to defraud the public, or any person ascertained or unascertained …". Count 1 alleged that he had conspired with one or more of his co-defendants to defraud any one or more of the holding company, its subsidiaries and others by agreeing to use dishonestly a system for disguising the source and utilisation of moneys from legitimate inquiry by means of offshore companies, bank accounts and a law firm. Count 4 alleged that the appellant had with one or more of his co-defendants conspired to defraud the holding company, a subsidiary and another company in that they agreed dishonestly to obtain for themselves, shares and warrants in K Ltd, and the benefits of their realisation. The trial judge found that the purpose of the overseas structures was to conceal the payments that were intended to be, and were, made, and to make it difficult for any person who had cause to inquire, to find out what the payments were and their source and convicted the appellant on counts 1 and 4. The appellant unsuccessfully appealed to the Privy Council. The judgment of Lord Jauncey was based on the existence of a solemn duty of disclosure, the breach of which could give rise to liability for conspiracy to defraud where this was a concerted scheme by directors:

> A director is in the same position as an agent (Aberdeen Rain Co v Blaikie Bros (1854) 1 Macq HL 461, 471) and it is trite law that:
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> > 'No agent may enter into any transaction in which his personal interest might conflict with his duty to his principal, unless the principal, with full knowledge of all the material circumstances and of the exact nature and extent of the agent's interest consents.' Bowstead on Agency (15th ed, 1985), p 164.
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> ... Furthermore, an agent has a duty to obtain his principal's informed consent before he uses the latter's property for his own personal benefit: Bowstead on Agency, (15th ed), p 175. In applying these principles to conspiracy to defraud, regard must be had to the following dictum of Viscount Dilhorne in Scott v Metropolitan Police Comr (1974) 60 Cr App R 124, 131; [1975] AC 891, 840:
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> > 'It is clearly the law that an agreement by two or more by dishonesty to deprive a person of something which is his or to which he is or would be or might be entitled and an agreement by two or more by dishonesty to injure some proprietary right of his, suffices to constitute the offence of conspiracy to defraud.'
>
> Since a company is entitled to recover from directors secret profits made by them at the company's expense, it would follow that any dishonest agreement by directors to impede a company in the exercise of its right of recovery would constitute a conspiracy to defraud. In their Lordships' view a person can be guilty of fraud when he dishonestly conceals information from another which he was under a duty to disclose to that other or which that other was entitled to require him to disclose. It was the element of dishonest concealment which was absent in Tarling's case (1978) 70 Cr App R 77.[1155]

[1153] [1979] IR 149.
[1154] [1995] 1 WLR 52.
[1155] ibid 64-65.

The Sale of Drugs

When a purchaser buys a proscribed drug from a supplier, can it be said that they are liable as conspirators? In *Carvery*[1156] the Nova Scotia Court of Appeal held that a sale of narcotics does not necessarily involve a conspiracy between vendor and purchaser. In order to prove a conspiracy the prosecution would have to show proof of an agreement and a common object to act upon that agreement. Even where there are purchases of large amounts of drugs the Canadian courts differentiate between mere purchasers and co-conspirators.[1157] At issue is the nature of the agreement in each case. A purchaser and a vendor, on the face of it, agree only to a sale from one to the other. Surrounding circumstances may indicate that, by reason of the state of knowledge of the vendor of the ultimate purpose of the purchaser, perhaps coupled with sales of commercial amounts of a drug, the agreement goes beyond a purchase contract and becomes an agreement to traffic in narcotics.

In *Sokoloski*[1158] the accused purchased a pound of methamphetamine. At the time under Canadian law, possession of this drug was not illegal, but trafficking in it was outlawed. The seller was clearly guilty of trafficking, but a question arose as to whether the purchaser was guilty of an offence. He was charged with conspiring with the seller to traffic. The Supreme Court of Canada split 5-4 on the issue, with the majority holding that the purchaser was guilty. The majority held that in view of the amount of drugs involved, the seller knew that the purchaser was going to traffic in them by distributing them to other people. Therefore, there was an agreement between the seller and the purchaser that the purchaser would traffic the drugs that the seller was selling to him. The majority, therefore, did not hold that every time a buyer buys drugs from a seller he conspires to traffic – only that if the seller knows that the buyer is going to re-traffic in the drugs, then there is a conspiracy between the two to commit this subsequent offence.[1159] The minority disagreed, holding that there was no agreement to a common purpose, the seller being only interested in trafficking and the purchaser being interested only in gaining possession. In their view, to hold the purchaser guilty would mean that although Parliament had not made it an offence to buy or be in possession of the controlled drug, any time a person agreed to buy such a drug he would be guilty of conspiring with the seller to traffic.

Undercover Police Operations

We have seen that in the absence of an agreement there can be no conspiracy. So what happens where one party to the alleged conspiracy only pretends to agree, for example where an undercover police officer 'agrees' with someone else to commit an offence having no intention that the offence ever be committed? The answer is fact-dependant. In *O'Brien*[1160] the Supreme Court of Canada held that under these circumstances there can be no conviction since there has been no agreement. In *Yip Chiu-Cheung*[1161] the Privy Council held that an undercover agent who agreed with others to commit a crime had the necessary mental element for conspiracy as he intended to commit the crime, ie to export heroin from Hong Kong to Sydney. His good motives, in that he was trying to break a drugs ring, could not alter this. The Court emphasised that the position of an undercover agent who has no intention of committing the intended crime would be different, as he would lack the necessary mental element to be a conspirator. In essence, the law has made conspiracy a crime by reason of the danger from a shared common purpose to perpetrate an unlawful act. This involves mutual participation in a plan that a wrong should ultimately be committed and joint

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1156 (1991) 10 CR (4th) 228.
1157 *Rowbotham* (1988) 41 CCC (3d) 1 (Ont CA).
1158 (1977) 33 CCC (2d) 496. The description of the case that follows is taken from Mewett and Manning on Criminal Law **(**3rd ed**,** Butterworths 1994**)** 332-333.
1159 See Andrew Simester, John Spencer, Findlay Stark, GR Sullivan and Graham Virgo, Simester and Sullivan's Criminal Law (7th ed, Hart Publishing 2019) 329.
1160 [1954] SCR 666.
1161 (1994) 99 Cr App R 406.

encouragement in that purpose. A sham entering into such a plan is not a conspiracy. Where there are overt acts of a criminal kind committed by the sham conspirator it becomes less credible that he did not have the purpose of the ultimate completion of the offence.

Spouses and companies

There is an old common law rule to the effect that spouses cannot commit conspiracy with only each other.[1162] This is because in law spouses were considered to be one person and, having but one will, cannot conspire. However if three persons are involved, each spouse may be guilty of conspiring with the third person.[1163] Given that the special position of spouses at common law has been abrogated in so many other areas of the law, for example the rape of one spouse by another, the survival of the rule in the law of conspiracy may be doubted.[1164] In *Byast*[1165] the Queensland Court of Appeal held that the appellant could not rely on the common law exception for spouses as she was not married to her co-accused. The fact that she was living with him in a de facto marriage relationship was insufficient to invoke the common law rule that a husband and wife cannot be guilty of conspiracy.

While it seem odd, the trend in the law is that a member of a company can conspire with an artificial person, provided the individual with whom the accused deals is sufficiently bedecked with authority as to represent the company.[1166] But the law would descend into foolishness unless two minds were involved. Thus, a director cannot conspire with himself or herself on behalf of a company to evade the corporation's tax liability.[1167]

Impossibility

Since the definition of a conspiracy is an agreement between two or more parties to effect an unlawful object, impossibility would seem to have no role to play in removing any element of the offence. It cannot, of course, be a conspiracy to effect a lawful act. Thus, if two parties, agree to take a walk on a beach believing this to be an unlawful act, their belief does not turn a friendly excursion into criminal conspiracy. Similarly, it had been the case in Ireland in the 1980s that taking more than £1,000 out of the country was an offence.[1168] On the exchange-control law being changed, two people agreeing to take that amount out of the country did not convert a lawful bargain into a criminal conspiracy by reason of their ignorance of the law being changed. The offence of conspiracy is complete upon the parties entering into their agreement. If what they intend is illegal, their absence of means to complete the substantive offence is not relevant:

> [T]here is much force in the view that conspiracy is properly to be seen as an act inherently culpable. The essence of conspiracy is an intention to agree coupled with a common design to commit an offence, that is, to put the design into effect. The mens rea is the intention to achieve the common design, the actus reus is the fact of agreement, the translation of that intention into agreement; *R v Gemmell* [1985] 2 NZLR 740, 743-744. The offence is therefore complete when the agreement is made. It is the making of the agreement itself that is seen as inimical to the public good, whether it proceeds further or not. It should therefore be irrelevant that it may not be possible in fact to carry out the agreement. This does not mean

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1162 *Kowbel* [1954] SCR 498. In England, the rule has a statutory basis: Criminal Law Act 1977, s 2(2)(a).
1163 *Rowbotham* (1988) 41 CCC (3d) 1 (Ont CA); Chrastny 94 Cr App R 283.
1164 See Alan Mewett and Morris Manning, Mewett and Manning on Criminal Law **(**3rd ed**,** Butterworths 1994**)** 334-35; *The State (DPP) v Walsh and Conneely* [1981] IR 412.
1165 (1997) 96 A Crim R.
1166 *McDonnell* [1966] 1 QB 233; *AAH Pharmaceuticals v Birdi* [2011] EWHC 1625, 31.
1167 *Lee v Lee's Air Farming* [1961] AC 12. For the alternative opinion Andrew Simester, John Spencer, Findlay Stark, GR Sullivan and Graham Virgo, Simester and Sullivan's Criminal Law (7th ed, Hart Publishing 2019) 351. But prosecutions in these circumstances are more than unlikely since it is a substantive offence to evade tax unlawfully and adding in a conspiracy would be a recipe for confusion if not mirth.)
1168 Contrary to the Exchange Control Act 1954, s 16.

> that the parties are punished on the basis of guilty intention alone. They will have gone further, and have acted upon their intention by making their agreement.[1169]

Means should not matter. In a surprising decision the House of Lords in *Nock*[1170] held otherwise. The two accused conspired to manufacture cocaine by using ingredients which they believed could be chemically combined to manufacture that drug. As it turned out their knowledge of chemistry was inadequate and the materials they used were incapable of producing cocaine. The House of Lords quashed the conviction on the ground that it was factually impossible for cocaine to be produced as contemplated by the agreement. On the other hand, if the agreement was to manufacture cocaine, and there had been a mere failure to hit upon the correct ingredients, a conspiracy would be made out. It is submitted that the decision was incorrect. The House of Lords seemed to be intent on pursuing at all costs a supposedly logical application of their prior ruling in Smith[1171] which, as we have seen, is increasingly doubted.

In *United States of America v Dynar*[1172] the Supreme Court of Canada held that impossibility is not a defence to conspiracy. The judges concluded that the distinction between legal and factual impossibility could no longer be justified. For an effective law of conspiracy, the conduct of the parties in pursuing incompetent means in fulfilment of a crime should be irrelevant to their criminal liability by reason of their agreement.[1173]

Abandonment

Since the law views conspiracy as a completed offence from the moment when there is an agreement, abandonment of the purpose does not affect liability. In the Canadian case of *O'Brien*,[1174] Taschereau J stated that once people agree on a criminal act "and later, after having had the intention to carry it through, refuses to put the plan into effect, that person is nevertheless guilty, because all the ingredients of conspiracy can be found in the accused's conduct."[1175]

Stuart argues that if withdrawal under clear and convincing circumstances can exculpate the accused from complicity in an offence, the same ought to apply to conspiracy. Conceptually, assistance in a crime with the intention of aiding its commission and an agreement to commit a crime are different. The essence of complicity is the willing offering of assistance to further the commission of a criminal offence. This could be said to be little to differentiate it from conspiracy. This is especially so if the "wheel" and "chain" conspiracy theories are accepted. Since conspiracy can be construed as being a continuing offence, and is charged as such, it is logical to argue that it can be discontinued when a party ceases to further its objects. In the law as to complicity an accused participates in a crime where, intending to further its object, he lends his aid or encouragement to the perpetration of the offence. At that point, the complicity is affected and the crime is committed. Where a party to a conspiracy has furthered its objects, it may be regarded as going to mitigation that he is then withdrawn.

Merger

There seem to be no Irish authority to support the idea that where a conspiracy is fulfilled by the achievement of its object it is subsumed in the substantive offence. Canadian authority holds that there is no merger[1176] and the arguments against merger in this context are even stronger than those applicable to the law on attempt. The objective of conspiracy is to bring within the criminal

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[1169] Sew *Hoy* [1994] 1 NZLR 257.
[1170] [1978] AC 979.
[1171] [1975] AC 476.
[1172] [1997] 3 LRC 265.
[1173] *Bolton* (1992) 94 Cr App R 74 and see Andrew Simester, John Spencer, Findlay Stark, GR Sullivan and Graham Virgo, Simester and Sullivan's Criminal Law (7th ed, Hart Publishing 2019) 336.
[1174] [1954] SCR 666.
[1175] ibid 669.
[1176] *Brodie* (1936) 65 CCC 289 (SCC).

net those concerned in the perpetration of a crime, but who have sought to limit their vulnerability by furthering their purpose through the hands of others. It is a singularly unattractive argument that persons who have behaved in a manner consistent only with an intention of furthering an unlawful act should escape liability because of the success of those with whom they acted in fulfilling that objective.

Suppose A and B conspire to kill C. Pursuant to the agreement B kills C. A will be liable as a party to the murder. If however A did nothing else beyond entering into the agreement, in pursuance of which the offence was committed by B, it is suggested that A may be liable as a party to the offence. Because A and B have agreed to a plan to murder C, each is guilty of a conspiracy. [1177]

Advantage to the Prosecution

Here, much judicial concern has been manifested in Ireland in circumstances where the object of worry simply does not materialise. It is a rule of the law of evidence that the actions and statements of a conspirator done or made in pursuance of the conspiracy are admissible against his co-conspirators. This is an exception to the general rule that an act or statement by an accused is only admissible against a co-accused if done or said in his presence, in other words the same rule that applies in respect of what any person said or did in the presence of the accused.[1178] The conspiracy rule would appear to work to the advantage of the prosecution. Joinder of a conspiracy count, where two or more accused are being charged with the substantive offence, would appear therefore to operate gravely to the detriment of the accused. Hence, the suggestion that conspiracy and the substantive offence are better kept apart in an indictment.[1179]

Traditionally, the courts have indicated that the prosecution should first establish a prima facie case of conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all.[1180] The rule was stated as follows in the 1994 edition of Archbold: "Before the evidence given of the acts or declarations of one conspirator may be said to be evidence against the other alleged conspirators, the existence of the conspiracy must be proved and also the fact that the parties were members of the same conspiracy, and that the act in question was done in furtherance of the common design."[1181]

This appears to tell the prosecutor that he must "… prove the conspiracy before he can introduce, or at least invite the court to rely on, the evidence which, in the great majority of cases, is necessary to prove it".[1182] The requirement has been condemned as irrational and self-contradictory by Professor JC Smith.[1183] Irish cases, according to the experience of the authors, do not proceed on that basis but on the basis of proof through inference from overt actions; control over an explosives manufactory or possession of guns or other contraband.

It appears that the trial judge may have regard to the disputed declarations or documents when determining whether there was a sufficient common purpose in existence to make them admissible. However the declaration or document can only be held to be admissible against a co-accused if there is some further evidence beyond the declaration or document that he was a party to the conspiracy alleged against him.[1184] To be admissible the act or declaration must be in furtherance of the conspiracy. Matters recorded by one conspirator for his convenience, or a

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[1177] Alan Mewett and Morris Manning, Mewett and Manning on Criminal Law **(**3rd ed**,** Butterworths 1994**)** 339-340, suggest that A may either be liable as a conspirator or as a party, but not liable on both approaches. This may be doubted.

[1178] *Christie* [1914] AC 545; 24 Cox 249; 10 Cr App R 141.

[1179] *The People (AG) v Keane* (1975) 1 Frewen 392

[1180] *Krulewitch v US* (1949) 336 US 440, 453.

[1181] Archbold, *Archbold's Pleading, evidence & practice in criminal cases* (26th ed, Sweet and Maxwell 1922) [33]-[50].

[1182] JC Smith, 'Proving Conspiracy' [1996] Crim LR 386.

[1183] *Smith* [1996] Crim LR 386.

[1184] *Donat* (1986) 82 Cr App R 173; *Windlass* (1989) 89 Cr App R 258; *Devonport and Pirano* [1996] 1 Cr App R 221.

record made after the conclusion of the conspiracy are not therefore admissible against persons other than the maker under this principle.[1185]

Where the conspiracy has been fulfilled by commission, acts and declarations of the former participants, cannot be in furtherance of the conspiracy, and therefore cannot be admissible under this rule.[1186] It remains the law for conspiracy, as for other offences, that where A confesses to a crime and in the text of that confession implicates B and C, such confession is admissible only against A and is not evidence against B and C. This is so even on a joint trial of A, B and C.[1187]

In *Devenport and Pirano*[1188] the appellants were two of five people convicted of conspiracy to defraud the National Westminster Bank of £310,000. The prosecution relied on a document dictated by one defendant, as evidence of conspiracy against all the defendants. The document showed the proposed division of the proceeds of the conspiracy among all five defendants. The document was admitted although there was no evidence that the appellants had prepared the document or had been a party to its preparation and there was no link or connection between either of them and the document. This decision was upheld by the Court of Appeal:

> The only remaining question therefore was whether or not the document was prepared in furtherance of the conspiracy. We do not accept that it should only have been admitted if every other possible explanation for it had been excluded. We do not see Steward [1963] Crim LR 697 as supporting that proposition as advanced by Mr Bright. In our judgment a realistic or reasonable inference that it was prepared in furtherance of the conspiracy would be sufficient for these purposes.

In *The People (Attorney General) v Keane*,[1189] the Court of Criminal Appeal indicated that charges of conspiracy ought not, in practice, to be laid when the substantive offence can be proved. This is also the position in Canada.[1190] In England, Lord Widgery issued a Practice Direction in 1977,[1191] which provides that:

(i) In any case where an indictment contains substantive counts and a related conspiracy count, the judge should require the prosecution to justify the joinder, or, failing justification, to elect whether to proceed on the substantive or on the conspiracy counts.

(ii) A joinder is justified for this purpose if the judge considers that the interests of justice demand it.

Possible circumstances when joinder might be permissible include: [1192]

1. Cases of complexity in which the interests if justice can only be served by presenting to a jury an overall picture which cannot be achieved by charging a relatively small series of substantive offences.[1193]

2. Cases in which a general conspiracy, eg to steal, is likely to be inferred by the jury from the evidence but in which the particular acts constituting the thefts may only be supported by rather nebulous evidence.[1194]

1185 *Blake* (1844) 6 QB 126; *Steward* 107 SJ 738.
1186 Phipson on Evidence, (14th edn, Sweet and Maxwell 1990), [25-11].
1187 ibid [27-23].
1188 [1996] 1 Cr App R 221.
1189 (1975) 1 Frewen 392.
1190 See *Graham* (1954) 108 CCC 153 (BC, CA).
1191 [1977] 1 WLR 537.
1192 Archbold, *Archbold's Pleading, evidence & practice in criminal cases* (26th ed, Sweet and Maxwell 1922) [33]-[42].
1193 *Hammersley* 42 Cr App R 207; *Simmonds* [1969] 1 QB 685, 690.
1194 *Cooper and Compton* 32 Cr App R 102.

> In *Ellis v O'Dea and DJ Shiels*,[1195] a case concerning extradition, Walsh J not only reiterated this view but went on to question the constitutionality of the special rules of evidence which apply to conspiracy trials. The courts will be vigilant, however, to protect the rights of the defendant. In *Nichols*[1196] the accused was charged with offences under the Animals Act 1967 (NZ). The Act had a two year limitation period. The prosecution sought to add conspiracy charges to avoid this time period. The New Zealand High Court held that a conspiracy to commit an offence under the Animals Act was subject to the limitation period therein as conspiracy was parasitic on the primary offence and the purpose of time limits for prosecutions applied with equal force to primary offences and conspiracies.

Inside and outside the jurisdiction

What is the position where a conspiracy is formed outside of the jurisdiction to commit a crime within the jurisdiction? In *Doot*[1197] the House of Lords held that such a conspiracy is indictable if acts in furtherance of it are committed within the jurisdiction. *Doot* also established the principle that an act committed within the jurisdiction, on behalf of conspirators outside of the jurisdiction, involves the commission by all of them of that conspiracy in the jurisdiction. Lord Pearson stated that:

> On principle, apart from authority, I think … that a conspiracy to commit in England an offence against English law ought to be triable in England if it has been wholly or partly performed in England. In such a case the conspiracy has been carried on in England with the consent and authority of all the conspirators. It is not necessary that they should all be present in England. One of them, acting on his own behalf and as agent for the others, has been performing their agreement, with their consent and authority, in England. In such a case the conspiracy has been committed by all of them in England. Be it granted that 'All crime is local' and 'The jurisdiction over the crime belongs to the country where the crime is committed …' per Lord Halsbury LC in Macleod v Attorney General for New South Wales [1891] AC 455, 458. The crime of conspiracy in the present case was committed in England, personally or through an agent or agents, by all the conspirators.[1198]

English law now carries the matter further. In *Samson*[1199] four persons were arrested on board vessels which were stopped and arrested, one in Plymouth Harbour and the other in the English Channel. The prosecution proved that half a ton of cannabis was being transported from Morocco in the first vessel and transferred to the second vessel in the Channel. The accused were charged with conspiring to import a drug. It was held by the Court of Appeal that an extra-territorial conspiracy to commit a criminal offence in England whether under statute or common law, was triable in England notwithstanding that no overt act pursuant to the conspiracy took place in England. The dictum of Lord Griffiths in *Liangsiriprasert v Government of the United States of America*[1200] was accepted:

> But why should an overt act be necessary to found jurisdiction? In the case of conspiracy in England the crime is complete once the agreement is made and no further overt act need be proved as an ingredient of the crime. The only purpose of looking for an overt act in England in the case of a conspiracy entered into abroad can be to establish the link between the conspiracy and England or possibly to show the conspiracy is continuing. But if this can be established by other evidence, for example by the taping of conversations between the conspirators showing a firm agreement to commit the crime at some future date, it defeats

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1195 [1989] IR 530, 538.
1196 [1998] 1 NZLR 608.
1197 [1973] AC 807.
1198 ibid 827.
1199 [1991] 2 QB 130.
1200 [1991] 1 AC 225.

> the preventative purpose of the crime of conspiracy to have to wait until some overt act is performed in pursuance of the conspiracy.
>
> Unfortunately, in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality. Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England. Accordingly, a conspiracy entered into in Thailand with the intention of committing a criminal offence of trafficking in drugs in Hong Kong is justiciable in Hong Kong even if no overt act pursuant to the conspiracy has yet occurred in Hong Kong.[1201]

Section 465(4) of the Canadian Criminal Code states this principle as follows:

> Every one who, while in a place outside Canada, conspires with anyone to do anything referred to in subsection (1) in Canada shall be deemed to have conspired in Canada to do that thing.

What about where persons conspire within Ireland to commit an offence outside of the jurisdiction? In Canada the situation is provided for in s 465(3) of the Criminal Code:

> Every one who, while in Canada, conspires with anyone to do anything referred to in subsection (1) in a place outside Canada that is an offence under the laws of that place shall be deemed to have conspired to do that thing in Canada.

Offence abroad

It might be asked, what is Ireland's interest in punishing a conspiracy made in Ireland to effect harm that is to occur in another jurisdiction? The answer is that Ireland has an interest in ensuring that it is not used as a base for conspiring to commit offences elsewhere.[1202] Although the carrying out of the projected harm might not directly affect our interests, the fact that the conspiracy is carried out in Ireland does affect our interests. This is even more so in conspiracies involving drugs, given the international nature of the drugs "trade". A conspiracy in Ireland to import drugs into Amsterdam from Asia directly affects Ireland in that a proportion of those drugs are more likely than not to end up on the streets of Dublin. However in *Board of Trade v Owen*[1203] the House of Lords held that a charge of conspiracy did not lie as the object of the conspiracy was to be carried out in Germany. This was distinguished or elided in *Abu Hamza*[1204] where incendiary sermons to commit terrorist actions outside the jurisdiction were regarded as coming within the jurisdiction of conspiracy. It is submitted that the matter of conspiracies in Ireland to carry out offences abroad requires statutory reform. An example is s 20 of the Misuse of Drugs Act 197 which provides that any "person who aids, abets, counsels or induces the commission in a place outside the State of an offence punishable under a corresponding law in force in that place shall be guilty of an offence." It was held in *Abu Hamza* that, generally, to conspire to do something abroad that would be an offence in the jurisdiction was not extra-territorial.

In furtherance of this principle, but without any real analysis as to the legal basis for it, it has been held that an intent to do outside Ireland a deed that would be criminal here fulfils the elements of the offence. Where an Act specifies that it is unlawful to have an object with intent to do some act, it has been held that it is immaterial to the definition of the offence that the intent is to be fulfilled abroad. In *The People (DPP) v Loopmans and Van Onzen*[1205] the appellants were found on board a ship off Kerry in possession of about €25 million worth of cannabis. They were charged

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[1201] ibid 251.
[1202] See Alan Mewett and Morris Manning, Mewett and Manning on Criminal Law **(**3rd ed**,** Butterworths 1994**)** 338.
[1203] [1957] AC 602.
[1204] [2006] EWCA Crim 2918,; [2007] 2 WLR 226; [2007] 3 All ER 451; [2007] 1 Cr App R 27.
[1205] [1996] 2 ILRM 387.

with possession with intent to supply but claimed that the drugs were not for supply to people within the jurisdiction. The judgment of O'Flaherty J for the Court of Criminal Appeal perhaps indicates the inevitable role of policy in the analysis of principle:

> In principle, aside from authority, it would be very strange … that it would be an offence for someone to have these drugs with intent to supply persons in this State but not persons abroad. For this Court so to hold would show a lack of concern, to say the least, for persons in other jurisdictions who would be exposed to the dreadful consequences of drug trafficking.
>
> However, counsel attempts to counter this by submitting that since there is a maximum penalty of seven years imprisonment for simple possession under s 3 of the Misuse of Drugs Act, 1977, the Oireachtas must be taken to have intended that such a severe punishment would meet a case such, as he submits, this is.
>
> The Court is unable to accept this submission. It is unnecessary, not to say impossible, to detail all the circumstances that would aggravate an offence of simple possession: circumstances which give a bad example to those who are vulnerable by one who is in authority or by reason of whose age and position better might be expected is one, obvious, example that would aggravate the offence and might call for the imposition of the maximum penalty.[1206]

Explosions and shootings abroad

Section 3 of the Explosive Substances Act 1883, as substituted by s 4 of the Criminal Law (Jurisdiction) Act 1976 provides:

> A person who in the State or (being an Irish citizen) outside the State unlawfully and maliciously –
>
> (a) does any act with intent to cause, or conspires to cause, by an explosive substance an explosion of a nature likely to endanger life, or cause serious injury to property, whether in the State or elsewhere, or
>
> (b) makes or has in his possession or under his control an explosive substance with intent by means thereof to endanger life, or cause serious injury to property, whether in the State or elsewhere, or to enable any other person to do so,
>
> shall, whether any explosion does or does not take place, and whether any injury to person or property is actually caused or not, be guilty of an offence and, on conviction on indictment, shall be liable to imprisonment for a term not exceeding twenty years, and the explosive substance shall be forfeited.

The restrictive definition of the crime of attempt caused the legislature to shy away from that concept and instead include in the wording of s 3 many acts which would traditionally be regarded not as attempts but as merely preparatory. Thus in subs (a) the words "does any act with intent to cause" captures any act by the accused the purpose of which is ultimately to cause an explosion likely to endanger life or cause serious injury to property.

Section 15 of the Firearms Act 1925 as substituted by s 42 of the Criminal Justice Act 2006 provides:

> Any person who possesses or controls any firearm or ammunition
>
> (a) with intent to endanger life or cause serious injury to property, or

[1206] ibid [62]-[64].

(b) with intent to enable any other person by means of the firearm or ammunition to endanger life or cause serious injury to property, shall, whether any injury to person or property has or has not been caused thereby, be guilty of an offence.

The Firearms Act 1971 provides at s 4:

> For the removal of doubt it is hereby declared that in section 15 of the Principal Act references to life and property include references to life and property outside the area of application of the laws enacted by the Oireachtas.

In *Ellis v O'Dea and Governor of Portlaoise Prison*[1207] the appellant was challenging an extradition order issued on foot of two warrants from the United Kingdom. The first alleged that the appellant conspired with others to cause an explosion likely to endanger life or cause serious injury to property in the UK. The second warrant alleged possession of explosives with intent to endanger life or cause serious injury to property in the UK. The alleged offences were contrary to s 3(1)(a) and s 3(1)(b) of the Explosive Substances Act 1883 and s 7 of the (UK) Criminal Jurisdiction Act 1975. The corresponding Irish offences were identified as offences contrary to s 3 of the Explosive Substances Act 1883 as amended by s 4 of the Criminal Law (Jurisdiction) Act 1976. Having examined both statutory provisions, the court held that it was "clear that a corresponding offence would appear to exist". However, on the basis of his assertion of never having been in the United Kingdom during the period alleged in the warrants, the appellant argued that, notwithstanding this similarity, there was no doctrine of extra-territorial jurisdiction in Irish law and therefore no corresponding Irish offences. In the Supreme Court Finlay CJ (Griffin, Hederman and O'Flaherty JJ concurring) firmly rejected this argument:

> Thus, in the particular example, it is suggested as a matter of English law that a person outside the United Kingdom, who has never entered the United Kingdom, is capable of being in control of an explosive substance within the United Kingdom if his accomplice in the crime of possessing and controlling it for the purpose of causing an explosion is with the explosives in the United Kingdom.
>
> It was submitted that neither of these two principles applies in Irish law, and that, therefore, notwithstanding the close similarity between the terms of the English and Irish statute creating the offences involved in this case, there is no corresponding offence to that contained in Irish law. I am satisfied that this submission must fail because it is a fundamental principle of the Irish common law, applicable to the criminal jurisdiction of the Irish courts, that a person entering into a conspiracy outside Ireland in furtherance of which an overt act is done in Ireland is amenable to trial in the courts of Ireland. I am equally satisfied that a person who, though located outside Ireland, does an act which either in itself or by reason of the conduct of an accomplice has the effect of completing a criminal offence in Ireland, is amenable to the Irish courts.
>
> The broad reason underlying these two principles is, of course, that the criminal law must take cognisance of any crime committed within the State and must make persons, if charged before it, amenable for that crime, irrespective of where they were located at the time of its commission. It would be the very negation of an adequate criminal jurisdiction and an absurdity if a person joining in a criminal act being either a conspiracy or a joint venture could escape responsibility by reason of the fact that he has committed no overt act within the jurisdiction.[1208]

Procedure

[1207] [1991] ILRM 365.
[1208] ibid 258.

In general, at common law, a person charged with the commission of a felony could be found guilty of a misdemeanour where the misdemeanour is contained within the felony. The law on attempts is cast in statutory form. Section 9 of the Criminal Procedure Act 1851 provided:

> … if on the trial of any person charged with any felony or misdemeanour it shall appear to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanour charged, but is guilty of an attempt to commit the same, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanour charged in the said indictment, and no person so tried as herein lastly mentioned shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanour for which he was so tried.

Section 9 of the 1851 Act is repealed by the Criminal Law Act 1997. However it is submitted that a jury could still find an accused guilty of an attempt on a charge of a substantive offence, as this principle has nothing to do with the felony/misdemeanour distinction which is abolished by the 1997 Act. An attempt is, by definition, a lesser included offence at common law.

Code Options

Section 5.03 of the Model Penal Code provides as follows:

> (1) Definition of Conspiracy. A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
>
> (a) agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or
>
> (b) agrees to aid such other person or persons in the planning or commission of such came or of an attempt or solicitation to commit such crime.
>
> (2) Scope of Conspiratorial Relationship. If a person guilty of conspiracy, as defined by subsection (1) of this section, knows that a person with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring with such other person or persons, whether or not he knows their identity, to commit such crime.
>
> (3) Conspiracy with Multiple Criminal Objectives. If a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship.
>
> (4) Joinder and Venue in Conspiracy Prosecutions.
>
> (a) Subject to the provisions of paragraph (b) of this subsection, two or more persons charged with criminal conspiracy may be prosecuted jointly if:
>
> (i) they are charged with conspiring with another; or
>
> (ii) the conspiracies alleged, whether they have the same or different parties, are so related that they constitute different aspects of a scheme of organised criminal conduct.
>
> (b) In any joint prosecution under paragraph (a) of this subsection:
>
> (i) no defendant shall be charged with a conspiracy in any county [parish or district] other than one in which he entered into such conspiracy or in which an overt act pursuant to such conspiracy was done by him or by a person with whom he conspired; and

(ii) neither the liability of any defendant nor the admissibility against him of evidence or acts or declarations of another shall be enlarged by such joinder; and

(iii) the court shall order a severance or take a special verdict as to any defendant who so requests, if it deems it necessary or appropriate to promote the fair determination of his guilt or innocence, and shall take any other proper measures to protect the fairness of the trial.

(5) Overt Act. No person may be convicted of conspiracy to commit a crime, other than a felony of the first or second degree, unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.

(6) Renunciation of Criminal Purpose. It is an affirmative defense that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

(7) Duration of Conspiracy. For the purposes of section 1.06(4):

(a) conspiracy is a continuing course of conduct that terminates when the crime or crimes that are its object are committed or the agreement that they be committed is abandoned by the defendant and by those with whom he conspired; and

(b) such abandonment is presumed if neither the defendant nor anyone with whom he conspired does any overt act in pursuance of the conspiracy during the applicable period of limitation; and

(c) if an individual abandons the agreement, the conspiracy is terminated as to him only if and when he advises those with whom he conspired of his abandonment or he informs the law enforcement authorities of the existence of the conspiracy and of his participation therein.

[C] Incitement[1209]

Introduction

It is a common law offence, formerly a misdemeanour, to solicit or to incite another to commit a crime.[1210] This may be done by persuasion, as in solicit, or by intimidation. Properly, the offence is called incitement and is to be found in modern statutory form in that way, or more anciently in s 4 of the offences Against the Person Act 1861 whereby it was an offence to conspire to murder or to "solicit, encourage, persuade, or endeavour to persuade, or shall propose to any person to murder any person." These various epithets encompass the entirety of the crime save that it is also incitement to threaten consequences as part of such incitement.[1211] The essence of the crime lies in the mere incitement: it is not necessary that the person approached proceeded to commit the crime: *The People (Attorney General) v Capaldi*.[1212] Thus whether the recipient was influenced by the incitement or persuaded to act upon it is of no relevance. If the person proceeds to commit the offence then the accused will be as guilty as a party to the crime. Depending on the nature and degree of intimidation and the elements and category of offence committed, the accused may be able to plead the defence of duress.

[1209] See generally Law Commission (UK), Codification of the Criminal Law: General Principles Inchoate Offences Conspiracy Attempt and Incitement (Working Paper No 50 – 5 June 1973); Buxton, 'The Working Paper on Inchoate Offences (I) Incitement and Attempt' (1973) Crim LR 656; Dickey, 'Prosecution Under the Race Relations Act, 1965, s 6 (Incitement to Racial Hatred)' (1968) Crim LR 489; Joseph Jaconelli, 'Incitement: A Study in Language Crime' (2018) 12 Crim Law and Philos 245-265; Tom Daly, 'Reform of the Prohibition of Incitement to Hatred Act 1891 Pat 1' (2007) 17(3), ICLJ 16-23, 17(3), Tom Daly, 'Reform of the Prohibition of Incitement to Hatred Act 1891 Pat 2' (2007) ICLJ 16-23 16- 25.

[1210] Archbold, *Archbold's Pleading, evidence & practice in criminal cases* (26th ed, Sweet and Maxwell 1922) 1428.

[1211] ibid 1430.

[1212] (1949) 1 Frewen 95; see Armstrong [2000] Crim LR 379.

The offence requires both communication to another person and an intention that thereby the incited crime may be brought about. Therefore, something must be said or done by the accused. Generally mere passive presence is not enough to amount to incitement. As we shall see in the next chapter this is also true for aiding and abetting a crime. It is beyond doubt that to hold out pornographic images of children for sale over the Internet is incitement, but responding to that is to be doubted as an incitement to supply illegal material since that was the seller's intention all along.[1213] But it has been held in England that such purchases constitute encouragement to maintain the illegal activity.[1214]

The accused must intend to bring about the criminal result in question and he must know the external elements of the crime he or she wishes to bring about which is the object of the incitement: *Whybrow*.[1215] It is not necessary to plan out the facts of the crime in detail, since that might more properly be conspiracy if A and B intend to pursue that plan together. Nor is it required that the inciter know how the crime is to be carried out. It is the offence if the accused tries to put someone in the way of committing a specified crime by threats or persuasion. In addition the accused must believe that the person incited possesses the necessary mental element to commit the crime in question. In other words, the accused must be inciting his agent to commit a crime and not simply to cause the external elements of a crime without its accompanying mental element: *Curr*.[1216] Equally the person incited must be one who is capable of committing the crime and not, for example, in the category of persons which the crime is designed to protect by declaring them to be victims, such as children protected by legislation against sexual exploitation: *Whitehouse*.[1217]

In *Most*[1218] an article published by the accused in German circulated in London exulting in the murder of Tsar Alexander II of Russia and commending this assassination as an example to revolutionaries throughout the world, that tyrants should be eliminated. Upheld on appeal was a direction to the jury that if they found that the accused intended to, and did, encourage or endeavour to persuade any person to murder any other person and that such encouragement or endeavouring to persuade was the natural and reasonable effect of the article, the accused should be found guilty. Hence, encouragement can be indirect or diffuse provided that encouragement amounts to incitement.[1219] In *Abu Hamza*[1220] the accused was a cleric who made inflammatory sermons at a London mosque calling for the death of a range of individuals abroad. His pronouncements were widely circulated through Internet and members of his congregation had modern means of travel at their disposal. The Court of Appeal held that an inchoate offence could be committed in respect of persons or actions abroad provided that the substantive offence would contravene the law if carried out in the jurisdiction of the incitement or conspiracy.

The word "encourages" is sometimes used in the context of incitement. This may mislead.[1221] Encouragement which contains an element of persuasion is certainly enough; but encouraging words of approval where another has decided on a crime, such as: "Oh Goody", hardly amount to incitement. The essence of the offence is that A persuades or intimidates B into committing an offence, whether B subsequently commits the offence or not. Where B comes to A and announces that he proposes to kill C, and A simply says "well, that's what I would do myself", that is not an incitement, but could render A a party to the offence if it is later committed, provided A intended that the offence be committed and offered encouragement for that purpose, thereby facilitating

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1213 *Goldman* [2001] Crim LR 822.
1214 *O'Shea v Coventry Magistrates' Court* Co/6342/2003.
1215 (1951) 35 Cr App R 141.
1216 [1968] 2 QB 944.
1217 (1977) 65 Cr App R 33.
1218 (1881) 7 QBD 244; 14 Cox CC 583; 45 JO 696; 50 LJMC 113.
1219 Andrew Simester, John Spencer, Findlay Stark, GR Sullivan and Graham Virgo, Simester and Sullivan's Criminal Law (7th ed, Hart Publishing 2019) 312.
1220 [2006] EWCA Crim 2918; [2007] 2 WLR 226; [2007] 3 All ER 451; [2007] 1 Cr App R 27; [2007] QB 659.
1221 See *Comment* [1997] Crim LR 897.

the commission of the offence. The law as to incitement is different. The crime stands alone and does not depend on whether a substantive offence was committed or as to who participated in it. There must be more than merely pointing out the pleasures or benefit of a course of action.[1222] Thus in *The People (AG) v England*[1223] it was not an offence to describe what went on by way sexual licence in a premises. In *The People (AG) v Capaldi*[1224] the line between description and encouragement was passed. The accused brought a pregnant girl to a doctor and asked him "to do something for her" and on the medical person replying "do you realize what you are asking me to do, you are asking me to perform an illegal operation", the accused said: "Yes. Would you operate; there is ample money to meet your fees."

As these instances illustrate, there must be some actual communication from the accused to the person sought to act in a criminal manner but, as in the *Capaldi* case, it is unnecessary to show that the person incited was in any way affected by the threats or blandishments; *R v McCarthy*[1225] where the ruling of O'Brien LCJ was: "If you use incitement there must naturally be evidence that the incitement reached the persons alleged to be incited".[1226] It is possible to attempt to incite, however, where such communication as amounts to incitement is sent by the accused to a particular person or persons but does not reach them, as where a letter is intercepted in the post.[1227] What is or is not incitement depends on an analysis of the facts; *The People (DPP) v Gillane*.[1228]

The Scope of the Offence

One of the leading definitions of incitement is to be found in the English case of *Race Relations Board v Applin*.[1229] A married couple were registered with three local authorities as suitable foster parents. About half of the children they had fostered had been of non-pale skin origin. In August 1971 the defendants, who were members of the National Front, brought pressure upon the foster parents, through their neighbours and directly, to take white Caucasian children only. The Race Relations Board issued a complaint against the defendants claiming a declaration that their actions were unlawful by virtue of the Race Relations Act 1968, s 12 of which provided that "Any person who deliberately aids, induces or incites another person to do an act which is unlawful by virtue of any provision of this Part of the Act shall be treated for the purposes of this Act as doing that act." It was held that s 12 of the Act had been breached. Lord Denning MR held that incitement encompasses both persuasive and coercive forms of encouragement:

> If, therefore, Mr Applin and Mr Taylor 'incited' Mr and Mrs Watson to do an unlawful act, ie, to take white children only, they are to be treated as themselves doing that act, even though the incitement did not succeed. Here I may mention a small point. Mr Vinelott suggested that to 'incite' means to urge or spur on by advice, encouragement and persuasion, and not otherwise. I do not think that the word is so limited, at any rate in this context. A person may "incite" another to do an act by threatening or by pressure as well as by persuasion. Mr Applin and Mr Taylor undoubtedly brought pressure to bear on Mr and Mrs Watson to take white children only, and thus 'incited' them to do so.

It is no defence to a charge of incitement to claim that you had the best of intentions in inciting someone else to commit a crime. In *Shaw*[1230] the appellant, S, was charged with incitement to obtain property by deception. The Crown's case was that S dishonestly incited a fellow employee dishonestly to obtain cheques from their employers by falsely accepting bogus invoices, supplied

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[1222] Fox 19 WB 109 (Ir); Ransford 13 Cox 9.
[1223] (1947) 1 Frewen 81.
[1224] (1949) 1 Frewen 95.
[1225] [1903] 2 IR 146.
[1226] ibid 154.
[1227] *Krause* 66 JP 121; Banks 12 Cox 393.
[1228] CCA 14 December 1998.
[1229] [1973] QB 815.
[1230] [1994] Crim LR 365.

by S, as real invoices. When S was arrested, his defence was that he was not aiming to make a profit out of the scheme but was trying to show his employers how easily their security arrangements could be circumvented, and that, although he had not told his fellow employee this, he would have done so eventually. He hoped by perpetrating the scheme to gain esteem and perhaps promotion in the company. At the appellant's trial, the jury indicated by way of a note that some jurors believed it possible that he was indeed trying to demonstrate the lack of security of the company's system. The trial judge repeated his direction on dishonesty, explaining that when the appellant said that he had told his fellow employee about the scheme intending that the latter to take it as a dishonest scheme to obtain dishonest financial benefits, he intended to obtain the benefits by reason of the incited person's dishonesty. The appellant's appeal against conviction was successful on the basis that the judge should have told the jury that, if they thought it possible that the appellant was trying to demonstrate the insecurity of the company's system, they should acquit. In other words, was it an incitement to steal or an incitement to demonstrate sham acts of theft dependent on a later revelation of their occurrence thereby showing poor security![1231] Evidence of incitement may come from under-cover operatives and a legislative scheme to regulate their work, while unnecessary, is desirable.[1232]

Legislation

In the neighbouring kingdom, legislation has, as we have seen, reformed the inchoate offences and has made encouragement and assistance specific criminal offences in substitution for the common law offence of incitement.[1233] This has made analysis of such matters as the nature of attempt and impossibility considerably simpler. In addition, many jurisdictions now have woken up to the effect of crowd psychology and the dangers of spreading hatred as generating terrorism and bigoted violence against vulnerable minorities. Article 40.3.1º of the Constitution "guarantees liberty for the exercise" of the "right of citizens to express freely their convictions and opinions" but this is "subject to public order and morality" and the media, "such as the radio, the press, the cinema" and probably now the Internet are not to "be used to undermine public order or morality or the authority of the State." Specifically, Government policy may be criticised, but this is no warrant for incitement to crime. While it is not a crime to hate someone, and this is a condition which must fleetingly touch most human beings, the dangers generated by causing mass hatred, most especially that arising from believing oneself to be special and others to be inferior and nasty, are obvious from human history.[1234] Hence, it is justifiable to curtail incitement to hatred. Now regarded as incitement to racial hatred, apparently, is scrawling the words "JobPath Macht Frei" on the wall of a social welfare office.[1235] With the rise of political correctness, society tends to self-correct, but these moods may be transitory and thus justify the passing of the Prohibition of Incitement to Hatred Act 1989.[1236] Hatred does not need to be defined but it is prohibited if directed against "a group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation".[1237] Actions likely to stir up hatred are those by way of writing or broadcast or any use of words outside a private residence that are "threatening, abusive or insulting and are intended or, having regard to all the circumstances, are likely to stir up hatred."[1238] If the prosecution do not prove the accused intended to "stir up hatred", then unawareness in relation to the nature of the hateful written material or broadcasts is a defence.[1239] It is an offence to possess or prepare such

[1231] [1994] Crim LR 366. The decision has been criticised by Professor JC Smith in this article.
[1232] *The People (Director of Public Prosecutions) v Mills* [2015] IECA 305.
[1233] David Ormerod and Karl Laird, Smith, Hogan, & Ormerod's Criminal Law (15th ed, OUP 2018) 499; Andrew Simester, John Spencer, Findlay Stark, GR Sullivan and Graham Virgo, Simester and Sullivan's Criminal Law (7th ed, Hart Publishing 2019) 309.
[1234] Peter Charleton, Lies in a Mirror: An Essay on Evil and Deceit (Blackhall publishing 2006).
[1235] Brian Hutton, 'Extremely offensive Nazi sign removed from Cork social welfare office' The Irish Times (17 October 2019).
[1236] See Charleton and Libreri, 'Blasphemy: Religion Challenges Freedom of Speech' [2017] 1 IJSJ.
[1237] Prohibition of Incitement to Hatred Act 1989, s 1.
[1238] ibid s 2.
[1239] ibid s 2(2); Section 3 of the Act contains multiple variants of this defence in relation to broadcasts.

material or broadcast.[1240] The legislation requires that "all the circumstances" be looked at in relation to the material and its effect and its use. But this is nothing new.

It should be noted that in ss 2(2), 3(3) and 4(2) a reversed burden of proof is included in the 1989 Act. The reversed burden of proof does not arise where the prosecution show that the accused intended to stir up hatred. Where, however, there is an issue before the court as to whether the accused person intended to stir up hatred, or as to whether there is a reasonable doubt in that regard, the accused may defend himself by proving that he was not aware of the content of the words, written material, broadcast or book or video, as the case may be, in respect of which the charge arises. The manner of the reversed burden of proof is dealt with in Chapter 1.[1241]

There have been few prosecutions under the legislation. The UN Committee on the Elimination of Racial Discrimination has commented on the lack of review of Act since 1989. Hatred implies the evocation of destructive emotion through irrational appeal to despise, if not to turn on, the supposed repulsive qualities inherent in a group described as inferior or defective or, usually incorrigibly, prone to causing serious trouble. Pointing out home truths, perhaps clumsily, whether correctly or in error, is not necessarily to advocate hatred. An example of a prosecution concerns a Mayo politician, John Flannery who was charged that at a meeting of the Western Health Board he had declared about members of the ethnic group, Irish Traveller Community: "Travellers expect to have everything done for them and do nothing themselves. They are able bodied men who should be made to go out and do FÁS courses like everybody else, but instead are lying out in the sun like pedigree dogs." The prosecution claimed that these words were abusive or insulting or, having regard to all the circumstances, were likely to stir up hatred. The newspaper reports of the meeting were, as might be expected, of variably dismal levels of accuracy. The local press reported the matter, according to the judge, "very fairly and accurately". The national press, however, misreported the words of the accused as being a statement that travellers were pedigree dogs who needed to be tagged so the authorities could keep track of them.[1242] One traveller woman was reported by an official of the Southern Travellers' Justice Group as distraught that she thought that she and her children would now have to have micro-chips implanted in them. The witness claimed that there was an escalation of attacks on travellers and that the words had been repeated in a taunting fashion by members of the settled community. The prosecution accepted that the accused did not intend to stir up hatred, but the case made on the mental element in the definition of the offence was that his choice of words made this result likely. The accused denied referring to traveller men as "dogs". He also claimed that he had not intended to be derogatory against towards travellers who, in the past, he had helped and continued to help as a member of a travellers housing committee. Politicians and health board officials at the meeting gave evidence that they were not incited to hatred by what they described as the "unfortunate" choice of words used by the accused. One TD showed to the court the range of headlines which appeared in the national press in the following days and claimed that the newspaper editors should be before the court instead of the accused. District Judge FitzPatrick acquitted the accused stating that the counsellor had blurted out the words before he knew what he was saying. It was the misdescription and misreporting of the accused's words which had caused the problem, in particular, by referring to "tagging", which words the judge was satisfied the defendant had never used.[1243]

Inciting an Unlawful Assembly

In *Burnard v Police*[1244] the appellant had been arrested and placed in a police van after a hotel fracas which had spilled over into the street. While in the van he made a call lasting 20 to 30 seconds

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[1240] ibid s 4.

[1241] See *The People (DPP) v Byrne; Healy and Kelleher* [1998] 2 IR 417.

[1242] To use the words of Raymond Chandler: "As usual, the newspapers came close. About as close as Mars is to Venus."

[1243] Anon, 'Councillor cleared of inciting hatred towards Travellers' The Irish Times (Dublin, 2 March 1999); See also Alan Erwin, 'Belfast man convicted of incitement to hatred towards Pakistanis' The Irish Times (Ireland, 23 May 2016).

[1244] [1996] 1 NZLR 566.

from his mobile phone. When he was removed from the van four of his friends, who were gang members, arrived. A witness to the fracas urged the police to let the accused go. The accused went back into the van and the friends went back to the hotel to confront the accused's assailant. The accused had earlier told the police that they had better let him go or "his boys" would get them and threatened to firebomb their houses. He was convicted of unlawful assembly and on his appeal, the police advanced the proposition not that the appellant was a member of an unlawful assembly but rather that he had incited or encouraged the actual members, not to assemble but, when assembled, to intimidate the police. Tipping J reasoned as follows:

> In Vujcich and Hall [CA, Wellington, 4 July 1978] at p 5 the Court of Appeal set out a convenient analysis of what the Crown must show to establish a charge of unlawful assembly. It is necessary to adapt the analysis to reflect the secondary party involvement. On that basis it was open on the evidence for the Judge to find:
>
> (i) that Burnard had a shared intent with the others to carry out a common purpose, ie to procure his release; and that he was inciting them, once assembled, to carry out that purpose;
>
> (ii) that the relevant fear existed in persons in the neighbourhood;
>
> (iii) that such fears were caused by the words or actions of the participants in the assembly; and
>
> (iv) that the conduct in question was referable to the shared common purpose as flowing directly or indirectly from it.
>
> For these reasons I consider that the conviction was appropriately entered and the appeal against it is dismissed.

Books

In *Marlow*[1245] the appellant was the author of a book on the cultivation and production of cannabis. Some 500 copies were sold, and several customers followed the methodology advocated in the book. The appellant was convicted of incitement to commit an offence, contrary to s 19 of the Misuse of Drugs Act 1971 (Eng). His conviction was affirmed on appeal. The better approach to encouragement of wrongful or undesirable forms of behaviour would be a general identification of the wrongs to be outlawed in the context of a statutory provision. A model is provided by s 5 of the Misuse of Drugs Act 1977 which provides for the control of drugs, their manufacture, distribution and labelling.

Other examples

There are many statutory forms of incitement. An example is that under the Criminal Law (Sexual Offences) Act 2017 it is an offence, punishable with a maximum of 14 years' imprisonment, if a person, for sexual purposes, invites, induces, counsels or incites a child (a person under 15 years) to touch with a part of the body, or with an object, the body of any person including the person who invites, etc. It is also an offence, punishable with a maximum of 10 years' imprisonment, to invite, induce, counsel or incite a protected person to engage in a sexual act (as defined). Despite the statutory formulation, by using the concept of incitement, the legislature is taken in this legislation and others of similar kind, to adopt the existing law as to its elements.

Products

In *Invicta Plastics Ltd v Clare*[1246] the defendant company manufactured a device called Radatec which gave out a high-pitched whine when near radio transmissions such as those used for police radar traps for speeding motorists. It advertised the device in a motoring magazine. The advertisement

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[1245] [1997] Crim LR 897.
[1246] 120 SJ 62 (1975); [1976] Crim LR 131.

showed a view through a car windscreen of a road and a speed limit sign. The company sent the prosecutor a stockist's name and a leaflet which described the device and included the words: "The majority of [such] transmissions are not intended for public use and therefore their deliberate reception is illegal unless licensed by the Post Office. However no licence is required to receive [other such] transmissions … It is illegal to employ the Radatec specifically for the reception of, for instance, police radar transmissions."

The defendant company was charged in respect of the advertisement with incitement of the readers of the magazine and in respect of the leaflet with incitement of the prosecutor to use unlicensed apparatus for wireless telegraphy in contravention of s 1(1) of the Wireless Telegraphy Act 1949. The defendant was convicted. On appeal Park J noted that judges directing juries on incitement usually used words such as that it involved the suggestion, or proposal, or persuasion, or inducement to commit the offence which the person charged was alleged to have incited. He held that the whole advertisement had to be looked at and the justices were correct to conclude that the defendant company had incited breach of the Act by means of the advertisement. In addition, the plain intention of the whole leaflet was to persuade and incite a reader to use the device, and the justices were right to convict the defendant company on the charge relating to the leaflet.

Mistake of Law

It is no defence to claim that the counsellor does not know that what he is counselling is contrary to law. This is because knowledge that what one is counselling is contrary to law is not part of the requisite mental element for counselling, any more than knowledge that one's act is contrary to law is, generally speaking a defence.[1247] If, however, a person counsels another to commit an act that he thinks is an offence when in fact it is not, he is not counselling an offence.[1248]

Impossibility

Sometimes a person incites another to commit an offence, the commission of which is impossible due to a mistake of fact or law. The common law position is that incitement to commit an offence cannot be committed where it was impossible to commit the offence alleged to have been incited. Thus, it is necessary to analyse the evidence in order to decide the precise offence which the defendant is alleged to have incited and whether it was possible to commit that offence.[1249] However this conclusion may be disputed. A mistake as to the surrounding facts does not mean that the person counselling has not counselled the commission of an offence. He has counselled the doing of an act that the law characterises as a criminal offence. There is nothing inconsistent in saying that he has counselled the commission of an offence even though it is not possible for that offence to be committed.[1250] If the offence does not exist, however, then impossibility is as much a defence as in attempt or conspiracy.

Code Options

Section 5.02 of the Model Penal Code provides:

> (1) Definition of Solicitation. A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime or would establish his complicity in its commission or attempted commission.

1247 Mewett and Manning on Criminal Law **(**3rd ed**,** Butterworths 1994**)** 306.
1248 ibid.
1249 *Fitzmaurice* [1983] QB 1083.
1250 This argument is taken from Mewett and Manning on Criminal Law **(**3rd ed**,** Butterworths 1994**)** 307.

(2) Uncommunicated Solicitation. It is immaterial under subsection (1) of this Section that the actor fails to communicate with the person he solicits to commit a crime if his conduct was designed to effect such communication.

(3) Renunciation of Criminal Purpose. It is an affirmative defense that the actor, after soliciting another person to commit a crime, persuaded him not to do so or otherwise prevented the commission of the crime, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

The Canadian Criminal Code[1251] provides in s 464:

Except where otherwise expressly provided by law, the following provisions apply in respect of persons who counsel other persons to commit offences, namely,

(a) everyone who counsels another person to commit an indictable offence is, if the offence is not committed, guilty of an indictable offence and liable to the same punishment to which a person who attempts to commit that offence is liable; and

(b) everyone who counsels another person to commit an offence punishable on summary conviction is, if the offence is not committed, guilty of an offence punishable on summary conviction.

Section 22(1):

Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.

Section 22(2):

Every one who counsels another party to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.

Combining Inchoate Offences

There seems to be no reason why two or more people should not combine in order to incite a third person to commit an offence. Suppose A and B decide that they wish to have Z murdered and are aware that C has an animus against Z. If A and B agree that they should go to C and provide him with convincing reasons why Z should be murdered, and that together they should supply him with notes as to his habitual movements, they have conspired to incite C to murder Z.[1252] While, at common law, every attempt to commit an offence is in itself an offence, it is submitted that it is impossible to attempt an attempt. It is also stretching credibility to imagine an attempt to conspire. To do so would be to act in a way beyond that contemplated by the proximity rule. It would also be a logical absurdity. Some elements of the proximity theory survivs in each of the inchoate offences and, apart from conspiracy to incitement, limit their scope to what is practical. Stuart comments:

That the general principles of defining each incomplete offence would be applied to situations surely never imagined, suggests that the criminal sanction should not be extended at all to combinations of incomplete offences. The nature of criminal responsibility in respect of offences not yet committed is already wide enough. In practice police and

[1251] See further Don Stuart, Canadian Criminal Law (3rd ed, Carswell, 1995) 649-651.

[1252] In Canada it has been held by the Ontario Court of Appeal that there can be a conspiracy to incite. See Nernich (1915) 24 CCC 256.

> prosecutors rarely resort to such linguistic acrobatics. Academic fantasies should not become part of the criminal law.[1253]

In *Dungey*[1254] the Ontario Court of Appeal refused to recognise an attempt to conspire.

[1253] Don Stuart, Canadian Criminal Law (3rd ed, Carswell, 1995) 651.
[1254] 1979 CanLII 2940 (ON CA).

Chapter 8

Complicity

Introduction[1255]

One can commit an offence by doing it oneself with the mental element that makes the commission of the external element a crime; or by confederating with others in a scheme whereby tasks necessary to commit the crime are shared; or by encouraging or assisting from outside. Only the latter is, strictly speaking, complicity in a crime as opposed to participation. The principles of establishing liability beyond the actual perpetrator of the deed that makes up the crime overlap to the analysis confederates and those who encourage or assist.

The criminal law is primarily designed to define the circumstances which are so socially repugnant as to require the imposition of penal sanction. Apart from instances of the creation by statute or common law of individual offences, the law also expands liability by prohibiting both attempts to commit crime and confederations in pursuit of crime as well as making offenders of those who demand others commit crimes.[1256] If the law only pursued the actual perpetrator of offences, grave social evil would be left unchecked. Increasingly, the surface appearance of the commission of an individual offence may hide a deeper reality. A man goes into a bank and utters a forged cheque. He is, of course, guilty of that offence. It is not uncommon for others to be involved in directing him, supplying him with a stream of stolen cheques and awaiting, on their being rendered into cash, the return of those funds of which the visible perpetrator will receive perhaps a small percentage. Terrorism and drug trafficking are group activities, generally. Despite the involvement of several actors, there is also a deeper reality. Organised crime erects a system where those who plan and direct the operations are far more a menace to society than the person who, as in drug trafficking, while on the street corner, is often himself or herself an addict and hence malleable by pressure. Others are pulling the strings and they keep their distance. In terrorism, people with tendencies to violence and lacking empathy are used by those who plan under the guise of ideology. To ensure there is no evidence against them, their hands do not actually perpetrate the crime and, to ensure that no one will reveal their involvement, ruthless discipline is enforced. Direction of crime is a crime in itself. Hence, modern legislation tends to proscribe the direction and financing of terrorist organisations.[1257] Not organised crime, however, since that is an amorphous concept incapable of definition. An organisational ability coupled with an unscrupulous disregard of the rights of others constitutes the most extreme menace to society through structured and planned crime. This characterises both terrorism and serious organised crime. Carney J has commented:

> Those engaged in such crime require a wall of silence to surround their activities and believe that its maintenance is necessary for their protection. They have at their disposal the resources including money and firearms to maintain this wall of silence and will resort to any necessary means including murder in furtherance of this objective. To deal with crime

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[1255] See generally, Buxton, 'Complicity in the Criminal Code' (1969) 85 LQR 252; Charleton, 'The Scope of the Doctrine of Common Design' (1985) ILT 199; Charleton and Bolger, 'The Competition (Amendment) Act 1996: Extending the Criminal Law' (1998) 3 The Bar Review 214; Finlay, 'Criminal Liability for Complicity in Abortions committed outside Ireland' (1980) XV Ir Jur (ns) 88; Giles, 'Complicity – The Problems of Joint Enterprise' [1990] Crim LR 383; Giles, The Law of Criminal Complicity (1980) LBC Sydney; Giles, Criminal Law, Essays in Honour of JC Smith (1987) Butterworths; Kadish,'Complicity, Cause and Blame: A Study in the Interpretation of Doctrine' (1985) 73 Cal LR 324; Lanham, 'Three Cases of Accessorial Absurdity' (1990) 53 MLR 75; Perkins, 'Parties to Crime' (1941) 89 U Pa L Rev 581; Robinson, 'Imputed Criminal Liability' (1984) 93 TLJ 609; Sayre, 'Criminal Responsibility For Acts of Another' (1930) 43 Harv LR 689; Smith, 'Complicity and Causation' [1986] Crim LR 663; Virgo, 'Clarifying Accessorial Liability' (1998) 57 CLJ 13; Williams, 'Which of You Did It?' (1989) 52 MLR 179; Williams, 'Complicity, Purpose and the Draft Code – 1 and 2' [1990] Crim LR 4 and 98; and The Accused (1988) (motion picture) Paramount.

[1256] Chapter 8.

[1257] Criminal Justice (Terrorist Offences) Act 2005.

> of this nature it is necessary for An Garda Síochána to collect information, to gather intelligence and to take information in confidence from those willing to provide it. Those prepared to furnish confidential information to the police in relation to organised crime know they could face a death sentence if this co-operation became known.[1258]

Policy

In the next chapter we deal with inchoate offences, from the Latin *inchoare* meaning to start at a task. Participatory offences require, unlike inchoate offences, that the crime be actually committed. Those set apart from the primary commission crime are made liable on a secondary basis. Judge-made rules in relation to complicity are designed to deal with those who assist or encourage others to commit crime. This is a recognition that criminal liability extends beyond the party who appears to be the principal perpetrator. The policy of the law requires that those who knowingly assist in the commission of an offence, whether by encouraging others to commit a crime or by physically supplying the means for its commission, will share complicity through their intention that the crime be perpetrated. It is relevant only as to sentence to enquire as to the degree to which an accused furthered the commission of a crime by his or her encouragement, direction or assistance. The law recognises that when a criminal group becomes organised in furtherance of their ends, that the actual perpetrators of the offence may be among the least significant members, acting as they do on the instructions of those that have created the opportunities for crime by planning the commission of offences. As a matter of policy, the least assistance or encouragement offered with the intention of furthering the commission of a criminal offence will constitute complicity.

Terminology

The application of common law terminology to the law of complicity has the potential to result in confusion. The Criminal Law Act 1997 replaced the complex rules as to the category of offender within which a party to an offence falls. Instead, there is a simple taxonomy whereby the nature of the discussion can turn to an analysis as to whether the facts and state of mind of the accused amount to complicity, as opposed to the categorisation of that person's wrong. At common law, the distinction between felonies and misdemeanours led to the creation of particular categories of offender who assisted the commission of a felony. Where the crime was a misdemeanour the accused's liability was described in terms of having counselled, procured, aided or abetted the offence. In the case of felony, a principal in the first degree was the person who committed the crime either with their own hands or through the instrument of an innocent agent.[1259] A person who aided or abetted the commission of a crime by being present at it, thus participating in the commission of a felony, was a principal in the second degree.[1260] "To aid" is to give help, support or assistance in the actual commission of a crime.[1261] "To abet" on the other hand, means to incite, instigate or encourage the commission of a crime.[1262] "To counsel" means to urge the commission of a crime and "to procure", while again overlapping, essentially means the setting up of another to commit a crime.

It remains the law, in respect of all offences, whether felonies or misdemeanours, or now serious offences or arrestable offence and otherwise, or offences committed after the coming into force of the Criminal Law Act 1997, that promotion of a crime through ordering its commission, encouraging it, or assisting in a crime through supplying some physical means of helping in its commission, or whereby it is committed, constitutes the basis of the law of complicity. The reason for the distinction was that, under the former law, accessories were not liable to be brought to trial

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[1258] *DPP v Special Criminal Court* [1999] 1 IR 60, 63.

[1259] See *Russell on Crime* (12th ed 1964) 131; Archbold, *Archbold's Pleading, evidence & practice in criminal cases* (26th ed, Sweet and Maxwell 1922) 1435-1455.

[1260] Russell on Crime, pp 132-133.

[1261] Smith and Hogan, Criminal Law (8th ed 1996) p 129.

[1262] ibid.

until the principal offender had been convicted or outlawed. They escaped liability if the principal offender was unknown, or died, or concealed himself, or was pardoned or acquitted.[1263] To overcome this distinction the common law established a rule that all persons who were present, aiding and abetting the commission of a felony, are themselves principals in the second degree. Where the accused instigated the commission of a felony which was later perpetrated, by asking someone to for instance kill someone, or by encouragement or assistance, but was absent when the felony was committed, he or she was an accessory before the fact.[1264] The purpose of the Accessories and Abettors Act 1861 was to consolidate and amend the over-complex existing statute law relating to accessories and abettors of indictable offences. The enactment was procedural. It did not alter the crimes which accessories commit through complicity but dealt with the procedure on indictment for such crimes; thus removing many of the difficulties which existed under earlier statute and common law.[1265]

The Accessories and Abettors Act 1861 constituted a vast improvement on the existing law but plucked, from the existing case law, the words which still abide in modern discussion of complicity; aid, abet, counsel, procure. Section 22 of the Petty Sessions (Ireland) Act 1851 also provided that anyone who "shall aid, abet, counsel or procure" the commission of a summary offence could be punished as principle. The Criminal Justice Administration Act 1914, s 43(7) provided for the continuation of that legislation and a similar scheme was to be found in s 5 of the Explosive Substances Act 1883 and also in: the Piracy Act 1837; s 2 of the Treason Act 1939; s 56 of the Malicious Damage Act 1861; s 11 of the Forgery Act 1913; s 67 of the Offences Against the Person Act 1861. For an application of these provisions see *Dawson v Glynn*[1266] and *Bradley v McGivern.*[1267]

Arguments have been made for removing the law on complicity to offences. It is suggested that the law should become instead a branch of inchoate liability. The argument is that the rules in relation to complicity should be abolished and replaced instead by legal rules which make it an offence to act with the intention of aiding a crime, or to encourage another party, intent on a crime, to proceed with this criminal purpose. This hardly constitutes a reform of the law. That is the current law.

The Criminal Law Act 1997

It was always a fundamental principle that all parties to a joint enterprise are principal offenders. This is not altered or affected by the Criminal Law Act 1997. The principle of liability as a perpetrator on the basis of joint participation continues. The 1997 Act abolishes any distinction between felonies and misdemeanours, and thus sweeps away the prior law in relation to accessories before the fact, principals in the first and second degree and parties to misdemeanours. Instead simple, though overlapping, concepts apply to complicity in all crimes. Section 7(1) of the 1997 Act is almost identical to s 323 of the Crimes Act 1958 of Victoria which provides that "A person who aids, abets, counsels or procures the commission of an indictable offence may be tried, indicted or presented and punished as a principal offender". Section 267 of the Criminal Law Consolidation Act 1935 of South Australia provides a similar provision. Opinion in Australia is to the effect that s 323 of the Victoria legislation affects terminology only and not substantive law.[1268] The Criminal Law Act 1997 provides at s 7(1): "Any person who aids, abets, counsels or procures the commission of an indictable offence shall be liable to be indicted, tried and punished as a principal offender." In reality, what was always involved and what now remains the scheme under modern legislation on complicity is directing, encouraging or assisting a crime with the intention

[1263] Russell on Crime p 133.
[1264] ibid, 150-155.
[1265] ibid, 157.
[1266] [1945] IR 489.
[1267] [1963] NI 11.
[1268] See Brett, Waller and Williams, Criminal Law (8th edn, Butterworths1997), 464, and Roche, Criminal Law, (Toronto 2018) chapter 4.

that it be perpetrated.[1269] That can also be simplified into assisting or encouraging,[1270] or into the law requiring encouragement or contribution to the perpetration of the offence that has been committed by the principal actor.[1271] Since the common law is repelled by liability on the basis of doing nothing, mere presence at a crime or indifference to the prospect that a crime may be committed is insufficient for liability.[1272] Participation means just that.[1273] Section 7(1A) extends liability extraterritorially to ensure that assistance or encouragement abroad does not escape liability: "Any person who, outside the State, aids, abets, counsels or procures the commission of an indictable offence in the State shall be liable to be indicted, tried and punished as a principal offender" provided "the person does so on board an Irish ship … on an aircraft registered in the State" and "the person is an Irish citizen, or … the person is ordinarily resident in the State."

Essence of complicity

In *Sweeney v Ireland*[1274] a pithy statement of secondary liability was offered:

> Participation in a crime requires that some aid be given in the commission of a crime through supplying some facility for its perpetration, which is the external element, while realising that this is the purpose of giving that aid, which is the mental element. Assistance in the commission of a crime can range from participation as a principal, such as being the person who drives a getaway car from the scene of a robbery committed in concert with others, to supplying that car in the awareness that it is to be used to that end, to disposing of the car afterwards in order to frustrate an investigation, to assisting the perpetrators to escape. … In essence … a participant in a crime, is someone who gives some positive assistance, coupled with the realisation that such assistance will aid in the commission of that crime; see the analysis by Eichelbaum CJ for the New Zealand Court of Appeal in *R v Schreiek* [1997] 2 NZLR 139 at 153 and *People (DPP) v Madden* [1977] IR 336 at 352 per O'Higgins CJ and *The People (DPP) v FitzGerald* [2018] IESC 58 at paragraphs 11-29. [1275]

Derivative Liability

The Criminal Law Act 1997, s 7(1) continues the previous laws as to derivative liability. There must be the "commission of an indictable offence" in order for the accused's liability in the commission of that offence to derive from it. Liability depends upon the state of the evidence, and not of the record, and requires the prosecution to prove that the main offence has been committed; whether the principal offender has been convicted or not. Derivative liability for the commission of a crime always depends upon the proof of the crime from which it is derived and can occur in the following ways.

1. Persuasion

The accused A wishes to have an indictable offence committed. He or she therefore sets about persuading B to commit that offence. At common law, this would be called procuring. If B then commits the offence A has counselled or procured the commission of an indictable offence and is liable under s 7(1) of the Criminal Law Act 1997. If A's attempts to persuade B are unsuccessful, or the State cannot prove the commission of the central crime by B, then A may be liable for

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[1269] Peter Gillies, Criminal Law (3rd ed, Law Book Company 1993) 305.
[1270] *Jogee* [2016] UKSC 8.
[1271] Andrew Simester, John Spencer, Findlay Stark, GR Sullivan and Graham Virgo, Simester and Sullivan's Criminal Law (7th ed, Hart Publishing 2019) 231.
[1272] *The People (DPP) v Boyle* [2010] IECCA 3, *Dunlop* (1979) 47 CCC (2d) 93 at 111.
[1273] Roche, Criminal Law 168-169.
[1274] [2019] IESC 39.
[1275] ibid [18].

incitement; a crime in itself. This inchoate offence does not depend upon the commission of the central offence, but constitutes an offence in itself. An example of persuasion is *The People (DPP) v Nevin*.[1276] The accused and her husband ran a hostelry on the N11 roadway. She decided to have her husband killed and, in that regard, engaged a person unknown to shoot him in the heart while he was counting the takings in his office at the end of the day. Proof of her actions came from three other men whom she had attempted to engage for the murder (but had refused), circumstantial evidence as to the desertion of the premises at her direction when otherwise staff would sleep there and her spontaneous declarations as to her future conduct. This fits within a modern description of procuring an offence:

> To procure means to produce by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening. We think that there are plenty of instances in which a person may be said to procure the commission of a crime by another even though there is no sort of conspiracy between the two, even though there is no attempt at agreement or discussion as to the form which the offence should take. In our judgment the offence described in this reference is such a case.[1277]

2. Encouragement

Encouragement overlaps with persuasion or procuring. At common law this is called abetting an offence. The principal offender is committing, or is planning the commission of, an indictable offence. The accused either beforehand, or at the scene, encourages the principal offender in his criminal purpose. An example would be a bystander at the scene of an assault yelling: "Go ahead – crease him!" or cheering on a gang rape. But, such encouragement must be with intent to further the commission of the crime and hence such ambiguous statements as "Let him have it" need not be necessarily be interpreted as a stimulus to shoot an unarmed policeman who has asked for a gun to be surrendered.[1278] Encouragement could be attending an illegal prize fight where the object of the principle crime, assault causing grievous bodily harm as it would then have been classified, was for people to gather and bray encouragement or to benefit by prize fund by contributions or making the bookmakers role profitable by their presence. Hence, while mere presence at the scene of a crime is not a crime, on the authority of *Coney*.[1279] Depending on the circumstances in which the crime takes place, prior knowledge and presence may be encouragement: "The chief incentive to the wretched combatants to fight on until (as happens too often) dreadful injuries have ben inflicted and life endangered or sacrificed, is the presence of spectators watching with keen interest every incident of the fight."[1280]

3. Assistance

Aiding an offence establishes liability. The accused is aware that the principal offender intends to commit an indictable offence and assists him by lending or giving him some weapon or tool, for example a getaway car or a glass cutter, in furtherance of the principal offender's plan. The example of *The People (DPP) v Murphy*[1281] is not one of complicity. There, on the prosecution case, there was the planning of and direction of a bombing in Omagh, with carnage resulting. The bomb travelled in a convoy of two cars; the car bomb with another car in mobile phone contact in advance as a scout. One of the mobile phones was borrowed. This was not complicity by the lender since in that case the aid to the bombing which the prosecution alleged to have been committed by the accused as principle offender was the innocent loan of a mobile phone. The excuse given was the need to borrow that phone to replace an apparently broken one over a weekend. Assistance, in

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[1276] [2003] 3 IR 321.
[1277] *AG's Reference* (No 1 of 1975) [1975] QB 773, 779.
[1278] *R v Craig and Bentley* (1952) The Times, 10 December. For the overturning of the conviction see [1998] 7 WLUK 610.
[1279] (1882) QBD 534, 544.
[1280] ibid.
[1281] [2005] 2 IR 125.

this regard could also amount to agreeing in anticipation of the crime to assist in a means of escape in the immediate aftermath of the offence, as in the prosecution's case in *The People (DPP) v Ward* mentioned below. The difference, therefore, between this situation and s 7(2) of the Criminal Law Act 1997, which penalises assistance after the crime, is that the accused aids the commission of the offence being aware that it is about to be committed; the accessory after the fact becomes aware of the commission of the offence after it has occurred, but then offers help with a view to impeding the apprehension or prosecution of the principal offender. Sometimes the evidence will only establish the latter.

4. Aid at the scene

Here, the accessory is not part of a plan to commit an indictable offence, but comes upon its commission and there encourages the principal offender in the commission of that offence or spontaneously lends aid to the principal offender, or offenders, in carrying out their criminal purpose. For example, the accused stops the victim who is being assaulted or subjected to sexual violence by thugs from running away from the assailants.[1282]

5. Escape

Where a person has committed an arrestable offence (one carrying five or more years' imprisonment) then any person who although they did not participate in that offence, but who knows or believes the principal offender to have been guilty of the offence, or of some other arrestable offence, helps the principal offender in order to impede his apprehension or prosecution, an offence contrary to s 7(2) of the Criminal Law Act 1997 is committed. This is what used to be called an accessory after the fact and is dealt with under a separate heading below.[1283] This kind of activity to engage the offence of misprision of a felony, provided the principal offence was a felony.

The principal offence

Liability for complicity in an offence depends upon that offence having been perpetrated by some party, whether known or whether charged, or not. It is essential that the crime committed by the principal offender should be proved to the satisfaction of the jury on the trial of the accused.[1284] On a charge of murder, for example, although the accused was being tried as if he or she were the perpetrator, the factual substratum upon which the charge, however described, depends is the commission by the principal offender of the offence of murder. Thus, for example, in *The People (DPP) v Paul Ward*,[1285] the prosecution proceeded to prove the murder of the victim, notwithstanding that the contest at the trial was directed only to the question as to whether the accused was complicit in that offence by, as was alleged, making himself and his property available pursuant to a pre-arranged plan to dispose of the murder weapon and motorcycle used to track the victim along the public highway from Naas to Dublin and carry the actual killer.[1286] If the evidence does not establish to the satisfaction of the jury that the offence in which the accused is alleged to be complicit was in fact perpetrated, the accused is entitled to be acquitted. An example is *See Lun*[1287] where the accused was charged with complicity in the offence of arson. The prosecution was unable to offer evidence as to how the fire started or as to who started it. The accused could not be convicted of arson because no offence of arson had been proven to have been committed by anyone.[1288]

The record

[1282] *Black* [1970] 4 CCC 251; *Stevenson* (1984) 11 CCC (3d) 443.
[1283] *The People (DPP) v FitzGerald* [2018] IESC 58 is an example merely of an allegation of post-crime assistance to escape detection.
[1284] Russell on Crime p 158.
[1285] Special Criminal Court, unreported, 27 November 1998.
[1286] See also *King v The Queen* (1986) 60 ALJR; *Standefer v United States* (1980) 477 US 10.
[1287] (1932) 32 SR.
[1288] This account of the case is taken from Howard, Criminal Law (5th ed, Law Book Company of Australasia 1990) 324.

As is the case with the inchoate offence of conspiracy, a person can be convicted as a party to a crime notwithstanding the fact that the principal offender has been acquitted or has not been tried.[1289]

The trial of an accomplice to an offence may proceed provided his or her conviction is consistent with the state of the evidence; liability does not depend upon the state of the record.[1290] Some argue that the accused, however, cannot be convicted of complicity in a greater offence than the one actually proved to have been committed by the principal offender.[1291] Howard suggests that where the principal offender has available to him a qualified defence of provocation or excessive self-defence, which reduces a greater offence to a lesser one, and where the accused has no such defence, the accused may be convicted of the greater offence. In *Howe*[1292] the House of Lords held that there was no rule of law whereby an accessory could not be convicted of a more serious crime than the principal. Such a conclusion can be justified. Suppose A1, in response to serious provocation, attacks V with intent to kill her. A2, who is unaware of the provocative incident, comes on the scene after the provocation and because of a grudge against V, or because of blood lust, encourages A1 to continue the attack and A1 does so and V is killed. In that situation A2 is guilty of murder, notwithstanding that A1 is liable only for manslaughter by reason of having lost self-control in response to the provocation offered to him by V.[1293] Similarly, there is no reason why an accessory cannot be convicted of a lesser crime than the principal.[1294] Suppose a person kills with the mental element for murder while the accessory intends only to assist or encourage an offence which he thinks is likely to cause hurt and not serious injury. If death ensues in these circumstances, the person who actually kills is guilty of murder, but the aider or abettor, not having the intent to kill or cause serious injury, would be guilty only of manslaughter.[1295]

Using a mad person to commit an offence, by setting that person on the accused, may mean that the principal offender is not guilty by reason of insanity, but primary liability would result in using the perpetrator as an instrument. Similarly, the availability of a defence for the principal offender, which results in acquittal or reduction of liability, does not avail a secondary party to whom such defence is unavailable. In *Richards*[1296] a woman hired thugs to beat up V, her husband, and specified that he should be put in hospital for a month. The assailants inflicted a minor wound. The woman was found guilty of wounding with intent to cause grievous bodily harm but the thugs only convicted of unlawful wounding. The later reversal of this result based on the state of the record was criticised and the appellate reasoning disapproved.[1297] Where offenders A1 and A2 embark on a robbery, liability is for the robbery and for the violence or threat of violence used to effect the theft. But A1 is not liable for murder, but remains guilty of robbery, where A2 unexpectedly draws a weapon not part of the plan and uses it to wound V seriously.[1298] Thus, facts prevail over the record.

Form of charge

If, as is unlikely, the prosecution expressly charged the accused with being an accessory before the fact then if it emerges at the trial that the accused was present and assisting at the commission of the crime, it may be argued that the charge must fail.[1299] In consequence, the prosecution indict for

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[1289] *Zanini* [1966] 2 CCC 185 (Ontario CA); [1967] SCR 715 (Supreme Court of Canada).
[1290] *Breen* (1990) 47 A Crim R 298.
[1291] *Richards* [1974] QB; *Hartley* [1978] 2 NZLR 199.
[1292] [1987] AC 417; see also *Hébert* (1986) 51 CR (3d) 264.
[1293] See Brett, Waller and Williams, Criminal Law (8th edn, Butterworths1997) 467.
[1294] See Mewett and Manning on Criminal Law **(**3rd edn**,** Butterworths 1994**)** 278.
[1295] See the discussion in Andrew Simester, John Spencer, Findlay Stark, GR Sullivan and Graham Virgo, Simester and Sullivan's Criminal Law (7th edn, Hart Publishing 2019) 270-272; and Mewett and Manning on Criminal Law (3rd edn, Butterworths 1994) 278.
[1296] [1974] QB 776.
[1297] *Howe* [1987] 417.
[1298] *Jogee* [2016] UKSC 8.
[1299] *Brown* (1878) 14 Cox 144.

the substantive offence, the role of the accused being described in the book of evidence.[1300] This scheme which existed under the former law of describing and indicting secondary participants as offenders and not distinguishing as to degrees of participation is continued in simplified form by s 7 of the Criminal Law Act 1997.

Direct Participation

Early Irish law recognised that several may commit a crime even though there is one ostensible perpetrator: "The onlooker who incurs full penalties is the man who instigates and accompanies and escorts and exults at his deed in the territory, but his hand does not wound."[1301] A number or parties can be jointly responsible for the commission of a crime. They can be charged or convicted as such without resort to the law on complicity. Where, pursuant to a pre-arranged plan, a number of parties arrange for the commission of a criminal offence and share out tasks between them then, despite the fact that one or more parties may be absent from the scene of the actual commission of the crime, the law sensibly regards the offence as having been perpetrated by them all.

To confederate for the commission of an offence and, thereafter, to work as a team in performing the essential tasks that make up the perpetration of the offence is to become directly complicit in the commission of that offence. Some perpetrators may be remote from the crime, as in loading guns or preparing bullets, some may be closer, as in driving the killer to the scene, and perhaps only one dispatches the victim. All liability is primary because this is a joint criminal enterprise. Similarly, when all of the parties are in the vicinity of, or at, the crime scene, it is unnecessary to establish liability that all engage in the same activity once the proof is that each accused is acting in concert for the furtherance of their purpose. The essence of this is participatory conduct in the crime, albeit that pursuant to the enterprise some or other are at a distance.[1302]

An example is the scenario put forward by the prosecution in *Ward*. That proposition was that in order to murder the victim it was necessary to have a person listening to police communications and potentially warning the driver of the motorcycle and the actual killer as pillion passenger. The prosecution claimed these, as part of the plan, would resort to a place where their vehicle and gun could be destroyed.[1303] A commonplace example is often given to juries to explain joint enterprise Where A and B set out to rob a bank using C's car for that purpose, they all participate in the crime. All the parties would be equally guilty of the crime of robbery, even though A was the only person who entered the bank while B waited outside in the getaway car and C remained at home, knowing his car was to be used and then driven to his lockup garage in the aftermath of the crime so that all could more easily remain undetected. On such a situation, Howard comments: "Each is guilty as a principal offender notwithstanding that his actions alone neither made up the full offence nor assisted the other to commit the full offence. This is an instance of the law's justifiably overlooking a minor logical difficulty to reach a sensible result."[1304] There does not seem to be a logical difficulty, provided each plays some part.[1305] In such a situation there is not one principal offender from whom liability for encouragement or assistance derives onto others as secondary parties. Rather, this is a case of several principal offenders, even though each fulfil differing roles.[1306]

[1300] This is sufficient, but see Andrew Simester, John Spencer, Findlay Stark, GR Sullivan and Graham Virgo, Simester and Sullivan's Criminal Law (7th edn, Hart Publishing 2019) 226.

[1301] An Críth Gablach, quoted in Fergus Kelly, A Guide to Early Irish Law (Dublin Institute for Advanced Studies 1988) 353.

[1302] Peter Gillies, Criminal Law (3rd ed, Law Book Company 1993) 302.

[1303] Later reversed on appeal on different grounds.

[1304] Brent Fisse and Colin Howard, Howard's Criminal Law (5th ed, Law Book 1990) 323 citing Williams, Criminal Law: The General Part (2nd ed, Stevens 1961) 349; Peter Gillies, Criminal Law (3rd ed, Law Book Company 1993) 302.

[1305] *Guango* [2011] UKSC 59, [2012] AC 827 [129].

[1306] Andrew Simester, John Spencer, Findlay Stark, GR Sullivan and Graham Virgo, Simester and Sullivan's Criminal Law (7th ed, Hart Publishing 2019) 227.

Howard rightly confines the foregoing analysis to situations where the accused and his confederates work as a team in the direct perpetration of the crime: as where two people commit a burglary, the one breaking into the home and remaining to keep watch with the other entering; or two people attack the victim with weapons, each intending to inflict a serious injury;[1307] or where two people over a long period starve a child to death.[1308] It therefore follows that there can be more than one actor liable as the person who actually commits the crime.[1309] At common law where two persons forged separate parts of the same instrument they were both considered principals in the first degree.[1310] Similarly, as Bramwell B remarked in *Jackson*,[1311] where two persons both beat, stab or shoot the victim they must be regarded as principals in the first degree. On a conspiracy charge there must clearly be at least two persons involved in the agreement and both by agreeing to commit the crime or unlawful act thereby commit the crime of conspiracy, as well as a substantive offence, if it is later perpetrated.[1312] There is the difference in inchoate liability and secondary liability. Inchoate liability occurs on agreeing to commit the offence or on seeking to persuade another to commit the offence. Secondary liability derives from the commission by what is called the principal offender actually committing the offence. The difference is in the commission of the offence, though conspiracy, or incitement, to commit the offence will often also be present but not charged. In *Kuferburg*,[1313] Lawrence J stated that "a charge of conspiracy is not the same as aiding and abetting". The difference is that an agreement is not necessarily an element in aiding and abetting, though it may also incidentally be present.[1314] In a case of joint participation in a crime where all parties can be regarded as principal offenders, an agreement to formulate a plan and follow it is invariably present. In such an instance it is not necessary to look to the rules of derivative liability, but to regard each as a principal pursuant to their common purpose to commit the crime and the sharing out, to that end, of the necessary roles. Where a number of men go pursuant to a joint enterprise to waylay the victim and beat him or rape her, all will be liable for the attack. Liability for murder must depend, however, on the prosecution proving an understanding on the part of each person charged that the accused would be caused serious injury or death.[1315]

Presence at the scene unnecessary

As in the *Nevin* case, there is no reason of logic or authority for confining an analysis of cases of direct participation to those instances of joint criminal enterprise where each of the parties charged is actually present and actively participating at the scene of the crime. B, waiting in the getaway car is at a physical and temporal remove from the robbery committed in the bank by A. C, lending her car for the express purpose of the commission of the crime and having her lockup garage available in its immediate aftermath to aid escape, is at a further physical and temporal remove. The degree of physical or temporal remove from the crime does not affect liability or change its nature. Where a number of parties confederate and share out the tasks necessary to perpetrate a crime then if the crime is perpetrated pursuant to an enterprise common to them all, then all will be equally guilty of the primary act by virtue of their joint participation. Such constitutes the joint commission of a crime where all parties would be persons on whom primary, and not derivative, liability falls. Where a case can be stated in terms of whether the accused and the principal offender were acting in

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1307 *Mohan v The Queen* [1967] 2 AC 187.
1308 *McDonald* [1904] QSR 151.
1309 See Alan Mewett and Morris Manning, Mewett and Manning on Criminal Law **(**3rd ed**,** Butterworths 1994**)** 269.
1310 *Bingley* (1821) Russ and Ry 446.
1311 (1857) 7 Cox CC 357.
1312 *Kravenia* (1955) SCR 615 cited by Alan Mewett and Morris Manning, Mewett and Manning on Criminal Law **(**3rd ed**,** Butterworths 1994**)** 269.
1313 [1918] 13 Cr App R 166, 168.
1314 Alan Mewett and Morris Manning, Mewett and Manning on Criminal Law **(**3rd ed**,** Butterworths 1994**)** 269.
1315 *People (DPP) v Doohan and Others* [2002] 4 IR 463; *Huynh* [2013] HCA 6 [38].

concert that it is unnecessary to complicate it by bringing in rules as to complicity.[1316] Thus in *The People (DPP) v Doohan & Others*[1317] a grudge arose against the owner of a guesthouse, for the apparent reason of a hedge blocking a view of Lough Gara in Sligo and because of the victim's activism in trying to bring industry to the area. Four people participated in the murder. Four people were involved in planning and sharing tasks and all were found guilty of murder. One of the accused commissioned the others to join in the plan, another spied on the victim's movements, passing on information to the others, another drove a car used in the attack and another introduced a gun into what was initially planned to be a so-called punishment beating.

Principal or participant

In *Thatcher*[1318] the Supreme Court of Canada held that it is sufficient for the prosecution to prove that the accused either acted as a principal offender or, in the alternative, aided and abetted the principal offender. As in this country, the effect of the legislation is to put participants on the same footing as actual perpetrators.[1319] In *The People (DPP) v Ward*[1320] the Special Criminal Court analysed the facts proven against the accused in a way which was open to them to decide the case on the basis of direct participation. An expansion on the facts already given is necessary. In June 1996 a journalist on her way home from Nass to Dublin was murdered by a man riding pillion on a motorcycle. The driver and passenger pulled up alongside her car when it stopped at a red light and the passenger shot her six times, having first broken the window. The motorcycle sped away. Ward was asserted by the prosecution to be complicit as part of a joint criminal enterprise. His task was to await at a location some 5km distant with a scanner listening in to police communications, telephoning the killer and his driver if necessary, open the door of his garage to the motorcycle at a real laneway and thus enable the direct participants to escape detection while later disposing of the Glock handgun used and the murder vehicle. He was convicted on this basis but the Special Criminal Court used a confession by him that had been excluded to convict him and he was acquitted on appeal. The law applied to this joint criminal enterprise by the Special Criminal Court was that stated by O'Higgins CJ for the Court of Appeal in *The People (DPP) v Madden*[1321]

> In the absence of evidence showing that any one of the accused actually took part in the shooting of Laurence White, the case made against each of them is that he aided and abetted in the killing of the deceased. The killing of the deceased is described in the evidence which undoubtedly establishes that it was accomplished in a manner from which the *mens rea* required for the offence of murder may be inferred in relation to the persons by whom the killing was committed. To sustain a conviction of any one of the accused as an accessory before the fact for aiding and abetting in the commission of this crime, the prosecution must prove that the acts of aiding and abetting attributed to the accused were done in the knowledge of the intended commission, and assisted the commission, of the actions carrying the *mens rea* of the offence committed by the principal, that is to say, an unlawful killing such as is described in section 4, sub-section (1) of the Criminal Justice Act 1964. It is not contested that the trial court correctly stated the principles of law in relation to the onus of proof on the part of the prosecution to establish the guilt of a person accused of aiding and abetting the commission of the offence charged. The court had regard to the decision of the Court of Criminal Appeal in England in *R v Bainbridge* [1960] 1 QB 129 in which Lord Parker CJ quotes with approval the charge to a jury given by a trial judge in that case as set out at pp 132 and 133 of the report. The court had regard

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[1316] See *Howard* pp 321-322 and *Lowery* (No 2) (1972) VR 560; *Mohan v The Queen* [1967] 2 AC 187; *DPP v Merriman* [1973] AC 584; *Demirian* (1988) 33 A Crim R 441; *Clarke* (1986) VR 643.
[1317] [2002] 4 IR 463.
[1318] (1987) CCC (3d) 481; see *Pickton* [2010] 2 SCR 198.
[1319] Roche, Criminal Law, 166-168.
[1320] Special Criminal Court, unreported, 27 November 1998.
[1321] [1977] IR 336, 340-341.

> also to the decision of the Queen's Bench Division in England in *National Coal Board v Gamble* [1959] 1 QB 11 and, in particular to the statement of principle extracted from the judgment of Devlin J at pp 20 and 23 of that report. The objection taken on the appeal is not that the trial court mis-stated the principles of law but that, in the application therefore, the court misdirected itself in relation to the evidence before it.
>
> > In relation to a charge of aiding and abetting, it is clear from the cited judgments in *Bainbridge's* case and *Gamble's* case that motives and desires are irrelevant, and that mere evidence of common association is insufficient ... The kernel of the matter is the establishing of an activity on the part of the accused from which his intentions may be inferred and the effect of which is to assist the principal in the commission of the crime proved to have been committed by the principal, or the commission of a crime of a similar nature known to the accused to be the intention of the principal when assisting him.'

The court held that the murder fell "squarely within the definition of murder as stated in s 4 of the Criminal Justice Act 1964" since each participant acted their part with intent that the victim should be killed. By being part of the plan to murder before the killers set out, those assisting in a seamless get-away were part of the enterprise of murder.[1322] On appeal, the Court of Criminal Appeal noted that delivery of the motorbike was proven from an excluded statement, thus undermining the conviction: "The contention that both the bike and the gun were so delivered was not supported by the evidence. This court would not be justified in assuming that the Special Criminal Court was or could have been satisfied that the gun was received by Mr Ward and the bike was not."

Proof

Derivative liability depends upon an analysis of what can be proven against the accused in terms of aiding or encouraging the commission of a crime and upon the degree of awareness as to the intention of the principal offender. A bank robbery will, of necessity, involve actual or threatened violence. A, B and C planning a bank robbery may be inferred to anticipate trouble. Where A punches a bank teller in the face in order to seize the money, both B and C will be guilty of an assault. It is expressly contemplated by the common purpose of the parties. All of the accused are liable for the violence used in the bank provided it is proved that this was contemplated by all of them and therefore had to be within the express terms of the common purpose upon which they embarked.[1323] One slight change in the facts of the example illustrates a legal difficulty which may only be resolved by a reference to fundamental principle. Where A, to the knowledge of B and C, carries a loaded weapon into the bank and encounters an heroic customer or security operative who resists, and is then killed by A, no specialised rules are required to deal with the liability of B and C. What must not be done is to turn a matter that is a question of evidence, of inference from facts, into a matter of liability. Foresight or the accused assuming wilful blindness to the obvious is a matter from which intention may be inferred: but it is not a matter from which intention to use the gun must be inferred. The prosecution must either prove that the death of the customer or security operative was intended by B and C, or that B and C intended that death or serious injury would be caused to the victim if it was necessary, to complete the common purpose of robbery on which all embarked.[1324]

Inference and intention

Derivative liability cannot construct guilt for an offence on a constructive basis. There is no doctrine known to Irish law whereby an intent to commit a robbery becomes an intent to kill or cause serious injury simply by reason of the fact of one of the parties to a criminal enterprise

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1322 *The People (DPP) v Paul Ward*, Court of Criminal Appeal, unreported, 21 March 2002.
1323 *The People (DPP) v Doohan & Others* [2002] 4 IR 463.
1324 *Huynh* [2013] HCA 6 [38]; *Jogee* [2016] UKSC 8. This has always represented the law in Ireland and is as was presented in the first edition of this work.

carrying and using a deadly weapon. From that fact, intention may be inferred but that is not inevitable. Liability in respect of the death of the victim, in this example, depends upon the prosecution identifying A as the assailant. If B and C are to be charged there is no principle of law which can construct liability against them in the absence of an intention by them to cause serious injury or to inflict death on any party who might stand in the way of the completion of their criminal enterprise. It may be that an intention to kill or cause serious injury may be inferred from the knowledge of B and C as to the loaded weapon carried by A, but this inference need not necessarily be made and is not to be constructed save by proof of their subjective liability. If there is proof from which an inference may be made, then that renders liability for the murder possible but not automatic:

> If, at any time prior to the stabbing, the appellant whose case was under consideration was found to have come to an understanding or arrangement with others, including the principal offender, that a knife or similar bladed weapon would be used to kill or to inflict really serious bodily harm on a person or persons at the … premises, his presence as one of the hostile group amounted to participation in furtherance of the agreement [1325]

Aid to what offence

Historically, reconciling the approaches from Ireland, Northern Ireland and England is difficult. *Hyde*[1326] proceeds upon a basis of stating subjective liability, but then requiring its inference, as a matter of law, in every set of circumstances which fits within the statement of legal parameters. In *McClafferty*[1327] an intention to kill an officer of the law by reason of sectarian bitterness is translated into a sufficient intention also to kill his wife. Yet, in the series of cases from Ireland where gardaí have been murdered, referred to in this text,[1328] a subjective liability has been found on the basis of necessary inference from the facts as proven. The exception to this appears to be *The People (DPP) v Egan*[1329] where the Court of Criminal Appeal was faced with a set of facts which made it impossible for the prosecution to prove anything other than the fact that the accused lent his aid to "a small stroke". By a process of reasoning devolving from an analysis of the Larceny Act 1916 as a sentencing statute and the admitted intention of the accused to take part in some form of that crime, he was found guilty of an extremely serious armed robbery. A correct statement of the rule would be that derivative liability may properly be found where the accused aids an enterprise of the kind understood by him or her. Hence, agreeing to assist the importation of drugs illegally is still complicity in importation whether the drugs are cocaine or heroin. Complete knowledge of all of the facts is not necessary.

The essential rule is that before "a person can be convicted of aiding and abetting the commission of an offence he must at least know the essential matters which constitute the offence."[1330] Normally, this is analysed as part of the mental element of the offence, that of intention to aid or encourage the commission of the offence, and is considered below.

Liability is subjective

There is no rule of law which allows a departure from subjective liability for complicity. Shortly stated, secondary participation must be tested on a subjective basis. In our bank robbery example, A and C would normally contemplate that B, the getaway driver, may have to drive in a criminally negligent fashion in order to escape arrest. If, during the course of such driving, another road user is killed, then all participants will be guilty of dangerous driving causing death, or perhaps guilty of manslaughter under the special rules of criminal negligence. But for B and C to be guilty of the

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[1325] *Huynh* [2013] HCA 6 [38].
[1326] [1990] 3 All ER 892; 1993 WLR 1115; (1991) 92 Cr App R 131.
[1327] [1981] NI 1.
[1328] See paras [3.60]–[3.62].
[1329] [1989] IR 681.
[1330] *Johnson v Youden* [1950] 1 QB 11, 20.

murder of the heroically interfering customer or the garda, however, they must participate in the crime with the knowledge that A is carrying a deadly weapon and accept that, if it is necessary to effect the purpose of robbing the bank, A may have to kill or cause serious injury to anyone who gets in his way. A confession after the completion of a criminal enterprise in the commission of the offence, is only admissible against the party who makes it.[1331] If there was no common intention, and the accused were acting independently of each other, then the acts and words of one were not spoken in pursuance of a conspiracy and are admissible as evidence only against that person.[1332] Liability is thus derivative from the offence committed by the principal offender or is direct by reason of a shared purpose between the parties to commit the crime actually perpetrated:

> The liability which attaches to the traditional classifications of accessory before the fact and principal in the second degree may be enough to establish the guilt of a secondary party: in the case of an accessory before the fact when that party counsels or procures the commission of the crime and in the case of a principal in the second degree where that party, being present at the scene, aids or abets its commission. But the complicity of a secondary party may also be established by reason of a common purpose shared with the principal offender or with that offender and others. Such a common purpose arises where a person reaches an understanding or arrangement amounting to a crime between that person and another or others that they will commit a crime.[1333]

Thus, the issue is what does the evidence establish as to the understanding of the accused.

Communication and Participation

There is no requirement in law that the accused should make a causative contribution to the commission of the offence. The rule is not: but for the procuring of the offence by the accused, or encouragement, or lending of a weapon, the offence would not have happened. The law does not assume the burden of proving that the accused made a decisive or any substantial difference to the commission of the crime. The point is that he or she was involved. Howard explains: "How D makes his contribution is of no consequence. He may be the major influence in the enterprise or he may be no more than a junior assistant. He may render active help or he may do no more than encourage and advise, in both cases either at the time of the offence or earlier and either at the scene of the crime or elsewhere."[1334]

Liability in respect of complicity arises by virtue of offering aid or assent to the commission of a crime. If the principal offender knows of the assent of the accused that he or she commit the crime, some degree of encouragement from that knowledge may be inferred.[1335] If the principal offender is not aware of the accused's assent he cannot thereby be encouraged to commit the offence. It may be inferred that assent or encouragement has an affect on the mind of the accused. Advice or encouragement which has no effect on the mind of the accused does not amount to counselling him to commit the offence.[1336] Smith and Hogan suggest: "This is not to say that the counselling must be a cause of the commission of the offence. So to require would be to insist that, but for the counselling, the offence would not have been committed. This would confine counselling (and abetting) much too narrowly."[1337] But there must be communication for there to be encouragement just as there must be a weapon or tool provided to amount to assistance. In

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[1331] See generally Phipson, Law of Evidence (14th ed, 1990) chapter 23.

[1332] *The People (DPP) v Madden* [1977] IR 336, 341; See also *Sayker and Simon* (1962) 133 CCC 98 (BCCA); *Kufis* [1941] SCR 481; *Cloutier* [1940] SCR 131.

[1333] *McAuliffe* (1995) 69 ALJR 621.

[1334] Brent Fisse and Colin Howard, Howard's Criminal Law (5th ed, Law Book 1990) 384-417; and Don Stuart, Canadian Criminal Law (3rd ed, Carswell 1995) 326.

[1335] ibid 328.

[1336] *Clarkson* [1971] 3 All ER 344; [1971] 1 WLR 1402.

[1337] David Ormerod and Karl Laird, Smith, Hogan, & Ormerod's Criminal Law (15th ed, OUP 2018) 131.

Clarkson[1338] soldiers came into a barracks where a girl was being raped. They did not intervene but watched, offering neither encouragement nor any step at intervening. This was not participation in rape, though watching without intervening may be encouraging to the principal offenders while in this instance the reversal of the conviction was based on the complete absence of communication. Were the watching soldiers to have a superior rank, liability based on omission may arise, which is discussed below.[1339]

The accused must manifest his or her assent in external action in a manner which, it may be inferred, promotes the performance of that offence. It is not required that the accused actually cause the crime.[1340] It is only necessary to prove that he or she intentionally joined in it. The prosecution does not have to prove that but for the fact that the accused lent the principal offender a glass cutter that person would not have broken into the jewellers. The burglar could have obtained a glass cutter in a hardware shop. The point is that by lending the glass cutter the accused intended to join in the criminal enterprise of the principal offender by that assistance.

Participation: the test

It must be proved that the accused participated in the offence committed, mere knowledge that such a crime was about to be committed is insufficient.[1341] Section 19 of the Misuse of Drugs Act 1977 is there because establishing liability on the basis only of knowledge does not suffice. Thus in *Rochon*[1342] it was an insufficient basis for complicity that a mother knew her son was growing cannabis on her land. This branch of the law focuses upon participation. One can participate in a crime without necessarily causing it. If A and B come on the scene of a gang rape and do nothing except watch, they are behaving reprehensibly but they are not participating in the crime. If they yell and shout encouragement at the perpetrators, they become part of the crime being inflicted on the victim. In an earlier work on Irish criminal law[1343] it was suggested that it is not a necessary element of participation that the actual perpetrators hear the participators and are encouraged by them; it is essential only that the participators intend to participate in the crime and do so by actually communicating their encouragement. Thus, on an objective view, they participate by some overt act.

The New Zealand Court of Appeal considered this problem in *Schriek*.[1344] The victim had been subjected to a sustained beating during which it appeared that the appellants were present and took some part, although the precise roles were not clear. The appellants appealed their convictions for murder, arguing that the trial judge had been wrong to tell the jury that provided any encouragement offered was communicated it did not have to be established that it in fact encouraged the principal offender. Their convictions were upheld by the Court of Criminal Appeal where Eichelbaum CJ made the following comments about the minimum conduct necessary for participation in a crime:

> By way of one boundary it can be stated with confidence that the prosecution need not prove a causal connection between the act of encouragement and the commission of the offence. At the other limit, with equal confidence it can be said that *some* connection between the abettor and the principal offender is required. To illustrate, persons who while monitoring a closed-circuit television system happen to witness an assault, which they approve by sounds and gestures of encouragement, cannot thereby be said to "abet any

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1338 [1971] 1 WLR 1402.

1339 This might amount to acquiescence in circumstances where someone had authority; *DuCros v Lambourne* [1907] 1 KB 40.

1340 *Stringer* [2011] ESCA Crim 1396.

1341 In *The People v Madden* [1977] IR 336 (CA), a case involving a charge of murder, O'Higgins CJ at 352 held that "Proof of knowledge that such a crime was about to be committed, even if it had been well established against him, would not support the appellant's conviction for murder in the absence of proof of some active participation."

1342 [2012] 2 SCR 673.

1343 Charleton, Criminal Law: Cases and Materials (Butterworths 1992).

1344 [1997] 2 NZLR 139.

> person *in the commission of the offence*." Likewise, had the soldiers in *Clarkson* ([1971] 3 All ER 344) been behind a soundproof one-way glass, the principal offenders being unaware of their presence, their guilt could not have been argued.
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> In terms of attempting a definition of the remaining middle ground we consider the Judge's expression, that the encouragement must be communicated to the principal offender, put the position adequately, for purposes of the case before him. It is not necessarily an all-embracing or exhaustive definition to suit all circumstances, nor will we attempt to construct one. In the prizefight or duel situation, or the more commonly found equivalent today where violence is inflicted or sexual offending perpetrated in the presence of others, it would be a manifest nonsense to require proof that the principal offenders were aware of the encouragement provided by each individual. If 'by his countenance and conduct' the secondary party intentionally is giving encouragement of which the principal offender could be aware, even if only by virtue of being conscious of the presence of a group of people behaving in a similar fashion, in the generality of cases there will be sufficient evidence of abetting.

Mere intention is insufficient; the law does not punish a person because of what they think.[1345] If a causative factor were required, and it is not, it would be easy for a jury to find that a crowd of encouragers at a gang rape, by their activity, firmed the purpose of the perpetrator and discouraged the victim from resisting or made her feel that protest was hopeless. This is plain sense. A person cannot be liable for causing a criminal offence by reason only of proceeding with their lawful business. Thus proceeding with a meeting or demonstration knowing that it will result in a counter demonstration is not the "procuring" of a criminal offence within the meaning of s 7(1) of the Criminal Law Act 1997.[1346] The accused must set about producing the commission of a criminal offence through his endeavours.[1347] It can be enough to influence the physical condition of the principal offender as opposed to encouraging or aiding his purpose, as where the accused spikes the drink of a person who later commits a road traffic offence.[1348]

Cases where the accomplice supplies the weapon used in the crime, acts as a lookout during the crime, or drives the getaway car, provide least difficulty in terms of finding liability as an aider or abettor. Alternatively, this is a joint enterprise, but assistance may arise in a less structured way. The aider or abettor does not have to be physically present at the scene of the crime. A classic example of aiding and abetting from a distance is provided by *The People (DPP) v O'Reilly*.[1349] The accused was a milkman who one morning was approached by a man who told him that he was "going to do a stroke" and wanted to be picked up afterwards. The milkman drove to the assigned spot where three men wearing balaclavas jumped into his milk float and he drove them around until they asked to be dropped off. The defendant was subsequently charged with the aggravated burglary of a post office. The District Judge dismissed the case as the prosecution had failed to prove that the accused had been physically on or about the premises where the offence had been committed. On a case stated to the High Court, Egan J held that the District Judge had erred in law in holding that it was an essential ingredient that there should be proof that the accused was physically present at the scene. The real question was whether the accused had knowingly and wilfully aided and abetted the commission of the offence set out on the charge sheet. In England it has been held that an accused would: "present and aiding and abetting if with the intention of giving assistance, he is near enough to afford it, should occasion arise. The commonplace example given was that "if he be outside the house, watching to prevent surprise, whilst his companions

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[1345] *Allan* [1965] 1 QB 130; [1963] 2 All ER 867.
[1346] *Beatty v Gillbanks* (1882) 9 QBD 308; David Ormerod and Karl Laird, Smith, Hogan, & Ormerod's Criminal Law (15th ed, OUP 2018) 133.
[1347] *Attorney General's Reference* (No 1 of 1975) [1975] 2 All ER 648.
[1348] David Ormerod and Karl Laird, Smith, Hogan, & Ormerod's Criminal Law (15th ed, OUP 2018) 131-132.
[1349] [1991] 1 IR 77 (HC).

are in the house committing a felony, such constructive presence is sufficient to make him a principal in the second degree."[1350]

Mere presence and jury charge

Where a person is actually present when the crime is committed by the actor, whether his mere presence will amount to aiding or abetting depends upon the circumstances but, as a general proposition some act of aiding or abetting must occur over mere presence.[1351] In *Coney*[1352] the accused were present at an illegal prize fight and were charged with aiding and abetting a battery. The court held that mere presence is not in itself conclusive proof of the intent to encourage the fight, but where the accused bet on the fight or shout encouragement to the fighters, then that would amount to aiding and abetting. Mere presence at the scene of a crime, as where people are taking drugs,[1353] or at a breach of the peace,[1354] or in an uninsured car,[1355] or watch a rape from a distance offering no encouragement,[1356] is not complicity. The prosecution must prove that the accused was present to further the crime, as where drugs are part of a common pool from which the accused will draw or that the accused offers encouragement to the principal offender in its commission. In *Dunlop and Sylvester*[1357] the two accused were charged with raping a girl. She testified that they physically had intercourse with her against her will. However, the trial judge also left the case to the jury on the basis that, supposing the prosecution had failed in proving that they had intercourse with her, they stood by and watched a rape. They might also be complicit by aiding its commission or continuation. The jury asked the trial judge this question: "If the accused were aware of a rape taking place in their presence and did nothing to prevent or persuade the continuance of the act, are they considered an accomplice to the act under law?" The Supreme Court of Canada, through Dickson J, indicated that the answer to that question should be negative:

> In the case at bar I have great difficulty in finding any evidence of anything more than mere presence and passive acquiescence. Presence at the commission of an offence can be evidence of aiding and abetting if accompanied by other factors, such as prior knowledge of the principal offender's intention to commit the offence or attendance for the purpose of encouragement. There was no evidence that while the crime was being committed either of the accused rendered aid, assistance or encouragement to the rape of Brenda Ross. There was no evidence of any positive act or omission to facilitate the unlawful purpose. One can infer that the two accused knew that a party was to be held, and that their presence at the dump was not accidental or in the nature of casual passers-by, but that is not sufficient. A person cannot properly be convicted of aiding or abetting in the commission of acts which he does not know may be or are intended: *per* Viscount Dilhorne in *Director of Public Prosecutions for Northern Ireland v Maxwell* [1978] 3 All ER 1140 at p 1144 (HL). One must be able to infer that the accused had prior knowledge that an offence of the type committed was planned, *ie,* that their presence was with knowledge of the intended rape. On this issue, the Crown elicited no evidence ...
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> A person is not guilty merely because he is present at the scene of a crime and does nothing to prevent it: Smith & Hogan, *Criminal Law* 4th ed (1978), p 117. If there is no evidence of encouragement by him, a man's presence at the scene of the crime will not suffice to render him liable as aider and abettor. A person who, aware of a rape taking place in his presence,

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[1350] *Betts v Ridley* (1930) 22 Cr App R 148 (CCA); see also *Turanga* [1993] 1 NZLR 685 (HC).
[1351] *R v Black* [1970] 4 CCC 251
[1352] (1882) 8 QBD 534.
[1353] *Saerle* [1971] Crim LR 592; *Bland* [1988] Crim LR 41.
[1354] *Atkinson* (1869) 11 Cox CC 330.
[1355] *Smith v Baker* [1971] RTR 350.
[1356] *R v Salajko*, [1970] 1 CCC 352; [1970] 1 OR 824; 9 CRNS 145
[1357] (1979) 99 DLR (3d) 301; Further cases include Dick (1947) 87 CCC 101, [1947] DLR 213; *Hoggan* [1966] 3 CCC 1, 47 CR 256.

> looks on and does nothing is not, as a matter of law, an accomplice. The classic cases is the hardened urbanite who stands around in a subway station when an individual is murdered.

In *The People (AG) v Ryan*[1358] a party leaving a dance was approached by a group of young men carrying heavy tools. There had been some skirmishes between the two groups earlier in the evening. Coffey, one of the attacking group, struck and killed a member of the dance party with his weapon. Coffey was convicted of murder. Another member of the attacking group, Ryan, was convicted of manslaughter. He claimed that the trial judge had mistakenly given the jury the impression that mere "standing around" in Coffey's company made him liable for the death. On appeal it was held that the trial judge had made it quite clear that something more than mere standing around was required. The essential question was whether Ryan by his presence had lent Coffey aid and encouragement. The Court of Criminal Appeal held that: "If Coffey was enabled to accost these people by reason of the presence of a superior number in his gang, of whom the applicant was one, then mere presence, if it was knowingly to lend him support in his enterprise, could implicate the applicant and the others in the crime."[1359] In *The People (DPP) v Boyle*[1360] the accused was convicted of possession and dealing in cocaine. Gardaí raided a shed in which they found three men, the accused and two others. Those others were wearing rubber gloves. There was some cocaine in the shed and more in a nearby shipping container. The accused maintained that he was only there to "tidy up" but had also opened a gate to let the other men drive in and use the shed. The trial judge charged the jury on participation:

> Now there is no requirement that an aider or abettor should make substantial contribution to the commission of an offence. Opening and closing a gate might be enough. The liability arises by virtue of offering the aid in the commission of the crime. It is only necessary to prove that he intentionally joined in the commission. If that is absent, the intention to join in the commission is absent, there is no crime. Mere presence is not sufficient. There must be some act of aiding or abetting over and above mere presence. The prosecution must prove that the accused was present in order to further the crime. One can actually be present, but if one doesn't do anything in the furtherance of the crime one will not be liable. So one could conceivably open and close a gate, but if one does not know that those for whom you do that act are engaged in a criminal activity, you will not be guilty of aiding and abetting. …I am just saying if, that he did open the gate and closed the gate, he would not aid or abet in the commission of the crime if he did not know that the persons on whose behalf he opened and closed the gates were engaged on criminal activity. But if he opens the gate and closes the gate innocently for somebody and then thereafter discovers that they were involved in criminal activity, the opening and the closing of the gate does not involve him as an aider or abettor. He must know at the time he does the act. It cannot be retrospective.

In the Court of Criminal Appeal, the conviction was upheld. This was more than the use of a shared space where a person might just step back and do nothing. This was assistance in a crime. Denham J characterised the activity thus:

> In the instant case there was no evidence directly connecting the appellant with actual possession or control of the items on the bench in the shed or in the filing cabinet. However, there was evidence that the appellant was a lawful and also a de facto occupier of this shed. There was evidence that he was there every day. From this it was open to a jury properly to conclude that the drugs and drug handling equipment, not least the adapted compressor, could not have come and remained there without his knowledge and at least tacit, in the sense of passive, consent. This was not a shared space, as in the Bland case, over which the appellant had no control and to which others were free to come and go and do as they pleased. While

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[1358] (1966) 1 Frewen 304 (CCA).
[1359] ibid, 309.
[1360] [2010] IECCA 3

> this might not be sufficient to establish actual physical possession or control over these items it was evidence sufficient to go to a jury of offering assistance and encouragement to the two other men in using the shed for the unlawful purpose.[1361]

Participation thus can be a matter of fine degree, as to whether a person is present merely or is present as encouragement. In *Re ACS*,[1362] a group of university students were present during the occupation of a university computer centre and on that basis were charged with mischief in obstructing lawful use of the centre. Although they did not actually take part in erecting the barricades, they were convicted of aiding and abetting. The Supreme Court of Quebec held that while mere presence does not make an accused a party, "nevertheless if the circumstances are such as to show that by that person's presence the party who actually committed the offence was aided and abetted by that person's presence then ... that person is a party to the offence." Since the accused gave the occupation the strength of numbers that it required to succeed, such presence in those circumstances amounted to aiding and abetting. However, it is clear that the accused must have the intent to aid. If the effect is that the perpetrator is aided without the accused having the intent to aid, then the crime is incomplete as regards the accused.[1363]

Trivial participation

The act of the accessory may be an apparently trivial one. As was stated in *Boyle*, there is no requirement of substantial contribution.[1364] In one Australian case it was simply a cough,[1365] but that cough was a signal which was intended to tell, and did tell, the killer that the victim was leaving his room. It was intended to assist and in fact assisted in the commission of the murder. When the killing occurred, the cougher became a party to that murder. In one English case,[1366] where the defendant was charged with the murder of his wife the judge, answering a question by the jury as to what was sufficient to make a man liable as an accessory, told them that if someone had come to the accused and said "I am going to kill your wife" and the husband had responded by patting him on the back, nodding, saying, "O goodie" that would be enough. Upholding the husband's conviction, the Court of Appeal agreed that "any involvement from mere encouragement upwards would suffice". The defence response in the context of such evidence of apparent complicity may be to deny the occurrence: that the external element of the offence did not happen. Alternatively, the argument may be that the evidence is remote from the commission of the later offence and should not be admitted. This argument was rejected by the Court of Criminal Appeal in *Attorney General v Joyce*.[1367] Finally, it might be argued that an attempt to have someone murdered was a joke or that in handing over a weapon, the accused meant it to be used to kill crows and not to kill people.

Participation by a passenger in a car

Participation in manslaughter has been found in respect of a passenger in a car, where the car was stolen, and driven with criminal negligence by the driver. This rarely arises. The usual charge is under s 112 of the Road Traffic Act 1961,[1368] which makes it an offence for a person "who knows of the" unlawful taking of a motor vehicle to be a passenger. In *Baldessare*,[1369] however the question was whether any party other than the driver could be convicted of the criminally negligent driving of the car. The issue then becomes whether there is any evidence from which the jury can infer an

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[1361] ibid, [4]-[5]; *Bland* [1987] 151 JP 857.
[1362] (1969) 7 CRNS 42 (Que Sup Ct); discussed by Alan Mewett and Morris Manning, Mewett and Manning on Criminal Law (3rd ed, Butterworths 1994) 274.
[1363] Alan Mewett and Morris Manning, Mewett and Manning on Criminal Law (3rd ed, Butterworths 1994) 274.
[1364] [2010] IECCA 3, 4.
[1365] Brown [1968] SASR 467; discussed by JC Smith in 'Criminal Liability of Accessories: Law and Law Reform' (1997) 113 LQR 453,454.
[1366] *Giannetto* [1996] Crim LR 722.
[1367] [1929] IR 529.
[1368] As amended by the Road Traffic Act 1968.
[1369] 29 Cox CC 193; 22 Cr App R 70.

encouragement or aiding by the passenger of the dangerous driving of the principal offender. Where the evidence does not establish an encouragement by the other, as in *Guthridge*, only the driver may be liable. Where the evidence establishes encouragement by each, then complicity may be alternatively principal or derivative. If the jury are sure it is one or other they may convict.[1370] If there is no evidence of mutual assistance or encouragement and the driver cannot be identified among the people in the car, absent s 112, all must be acquitted.[1371] Hewert LCJ in *Baldessare* discussed the circumstances under which encouragement might be inferred:

> The only question for this Court is whether there was any evidence on which the jury could properly find that conformity of purpose and action. The matter was very carefully argued before us, and we have very carefully considered it, and our conclusion is that we are not prepared to say that there was not evidence on which the jury were entitled to arrive at their verdict. Here was a clandestine ride commonly called a "joy-ride" on a dark night in February, without proper lights, and the two men had taken the car for a purpose, which the jury have found was not felonious, but which had as its object a "joy-ride" without the knowledge and assent of the owner. Looking at these facts, and at the actual speed of the car and its movements before and after the collision, we think that the jury were entitled to find that both the appellant and Chapman were responsible for the way in which the car was being driven at the moment of collision.

In *Halmo*[1372] the owner of a motor vehicle allowed his chauffeur to drive while he reclined in the rear. The chauffeur was extremely drunk and caused a fatal accident which claimed four lives. The owner was convicted of aiding and abetting the offence of reckless and dangerous driving since the chauffeur drove the car with the consent and in the presence of the owner while in a condition which was obviously not compatible with an ability to drive. The court reasoned that if the accused intended to rely on a defence that he himself was so intoxicated that he was unable to appreciate the condition of his chauffeur, or of preventing him driving while intoxicated, it was incumbent upon him to demonstrate that his condition was such as to go beyond mere drunkenness and amounted in fact to an actual incapacity. The court thus seemed to infer that drunkenness, if established to the point of incapacity, would be a defence to a charge based on aiding or abetting. If the accused was very drunk he may have lacked any awareness of anything and so might lack a mental element.[1373] In *Kulbacki*[1374] the Manitoba Court of Appeal held that "Every passenger in an unlawfully driven motor vehicle is not necessarily subject to conviction as an aider or abettor, as it is conceivable that a passenger might not have any authority over the car or any right to control the driver ...". The test to determine who is an aider or abettor in driving cases would therefore seem to be an ability to control followed by a failure to exercise that control. The failure to act is encouragement to the other party and amounts to abetting the offence in question.

Participation may be by mutual encouragement. In *Guthridge*[1375] whether by accident or plan, two men encountered each other on a public road and then engaged in a dangerous race through the highway, weaving and dodging in and out of traffic, one of them eventually colliding with another car and killing the occupant. This was a joint encouragement to dangerous driving of which liability for death ensued.

[1370] *Du Cros v Lambourne* [1907] 1 KB 40.

[1371] *Abbot* [1955] QB 497.

[1372] [1941] OR 99 (CA). The description of the case comes from Alan Mewett and Morris Manning, Mewett and Manning on Criminal Law **(**3rd ed**,** Butterworths 1994**)** 275.

[1373] As to the application of the rules in relation to drunkenness as a defence see Chapter 17.

[1374] [1966] 1 CCC 167.

[1375] [2010] VSCA 132

Joint Attack

The inference of an intention to kill or cause serious injury may be made if the facts as proved by the prosecution are sufficient to support that inference beyond reasonable doubt. The facts of a joint attack may be infinitely variable. In consequence, each case must be judged on its individual circumstances. In *The People (DPP) v O'Toole & Hickey*[1376] the defendants followed their victim along the road in order to rob him. Hickey said that he was not carrying any weapon and that his intention in relation to the victim was to "just jump on him and empty his pockets". During the course of the robbery there was a struggle and the victim was fatally stabbed. Hickey's conviction for murder was upheld by the Court of Criminal Appeal, which approved of the trial judge's direction to the jury in respect of the requisite mental element: "If you take the view that there was a common design and that the common design included the use of a knife and clearly the use of a knife to overcome any resistance then you have to consider whether it is implicit that serious injury would have been caused and if so there is sufficient mental element against both of them."

On a joint trial each of the accused is entitled to a separate consideration of their case. Therefore, the jury should be instructed as to the factual case made against each accused and as to the inferences which the prosecution ask them to make in respect of those facts. Where two or more men attack the victim, all the attackers are guilty of manslaughter by reason of their participation in the assault. In *Calderwood and Moore*[1377] the victim's body showed signs of having been struck by bullets from two different revolvers, one carried by each accused. The argument was made, however, that the victim was already dead when the bullet from Calderwood's revolver hit its target. Hutton J, nonetheless stated that complicity was established on the basis of the joint actions of both men:

> On the evidence the front seat passenger fired at least two shots before Calderwood fired, and I think it is reasonably possible on the evidence that Mr Blake was killed almost instantaneously by one of the shots fired by the front seat passenger so that he was already dead when Calderwood's shot struck his body. But even if this were the factual position, in my judgment Calderwood was still a principal in the first degree to the murder. I consider that where two or more men attack another and death results, the attackers are all guilty of the homicide as principals in the first degree, even although it is not possible to say which of the accused inflicted the actual wound or blow which caused the death or even although only one fatal wound or blow was inflicted.

In *The People (DPP) v Roche*[1378] the accused and others brought a young man in a car into the countryside to rob him and to beat him up. All were charged on the basis of a common design to cause serious injury. The victim died, hence the charge became murder. The Court of Criminal Appeal approved this direction to the jury which predicate liability only on the basis of each intending serious injury to the victim: "if a person is involved in a joint enterprise, that anything that is done in furtherance of that and if that is contemplated at the time of that, embarking on that enterprise, both are equally guilty." The example to illustrate this was not on the basis of unexpected events establishing liability, but of guilt only on the basis of intentional aid to a scheme involving death or serious injury if necessary. Thus, the driver of a car: "He doesn't do anything like that but he is as guilty of murder as the person, who pulls the trigger if he knew about the gun sand if he knew that they intended, if necessary, to shoot to kill, even though he never had his hand on the gun, because it's a joint enterprise, it is a common enterprise, the killing is done in furtherance of it." On this case, the trial judge referred to the prosecution allegation that "the accused man and Mr Sage went out on this expedition to beat up, to inflict serious injury on Mr

[1376] [1990] 7 JIC 2001.
[1377] [1983] NI 361; 92 Cr App R 131.
[1378] [2004] IECCA 24

Carroll or otherwise to kill him." For liability: "It must be part of a common design and it must be contemplated that serious injury will take place."

Duty to intervene

Mere presence without interference may be sufficient for complicity if the accused is under a duty to act. That may arise by marriage or other close family relationship or otherwise from the nature of the responsibility assumed or given to the accused. Brehon law acknowledged that a person witnessing an offence without attempting to prevent it might be guilty of "a crime of the eye",[1379] on the basis that those looking on at an offence consents to the offence. This was at time when a fit man bearing arms was, according to the *Cáin Adonháin* written by Saint Colmcille, obliged to attempt with all his might to save a cleric or child, otherwise full liability would devolve onto him. This is not the common law approach, however, and a duty to intervene is only to be found where the inert bystander is much more than an observer; for instance someone organising a fight between dogs.[1380] In *Sweeney v Ireland*[1381] Charleton J commented:

> To be a witness is not an offence; whether a person is in a position to later give evidence about witnessing the crime actually being carried out or merely to helpfully testify as to some aspect of fact that is part of the jigsaw that links in a perpetrator to the commission of a crime. Those who may have "information which he or she knows or believes might be of material assistance in … securing the apprehension, prosecution or conviction of any other person for a serious offence" would include those who saw the Ford Focus car at the scene of the murder, or who may have seen the plaintiff Michael Sweeney exiting it when it crashed, or the police investigators, or others who happen on facts that may build a case. The leading case of *R v Coney* (1882) 8 QBD 534 is authority for the proposition that merely being at the scene where others are committing an offence does not constitute an offence. As Hawkins J stated in that case at page 557-8: "It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder." This statement was recently endorsed in this jurisdiction by the Court of Appeal in *DPP v Collopy* [2016] IECA 149.[1382]

In *Russell*[1383] the issue was whether a husband who stood by and watched his wife drown both herself and her two infant children could be guilty of murder. Cussen A-CJ, speaking for the majority, held that in some circumstances inaction can amount to acquiescence and thus establish liability on the basis of encouragement:

> Now in the circumstances of this case I think that an absence of dissent or of real dissent by the accused might well 'show assent' to the wife's action in drowning herself and their children. The jury may well have considered the woman was desperate or distracted or angry and thought that there was no way but this to end her troubles. One of the influences which would lead her to this would be the fact that her husband did not care what became of her and the children, and this was shown by his non-interference. In such a case a husband and father doing nothing, or nothing effective to prevent a tragedy may well be taken as showing his assent to what he contemplated as likely to happen.

It has been suggested that the majority were influenced by a strong suspicion that the accused in fact deliberately murdered all three.[1384] Essentially the case was about how standing by inactive when someone murders a person's children constituted the communication of encouragement. Probably that is not all. The principle enunciated is nevertheless consistent with the traditional common law analysis which imposes a duty to act where ties of marriage, blood, contractual

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[1379] Fergus Kelly, A Guide to Early Irish Law (Dublin Institute for Advanced Studies 1988) 154-155.
[1380] *Coney* (1882) 8 QBD 534; Clarkson [1971] 1 WLR 1402.
[1381] [2019] IESC 39.
[1382] ibid [17].
[1383] *The People (DPP) v Jordan* [2006] 3 IR 425; *Russell* [1933] VLR 59, [1933] ALR 76.
[1384] See Brett, Waller and Williams, Criminal Law (8th edn, Butterworths 1997) 472.

responsibility or other special factors disentitle a person from adopting with impunity the role of an apparent spectator.[1385] The principle has been applied in subsequent cases.[1386] Where the accused has an express role pursuant to contract or position in society to prevent the occurrence of the crime by the principal offender, mere inaction on his part can amount to assent. This can be so in the case of a factory foreman who allows a theft to occur under his nose.[1387] Another instance is where a person has authority over a situation but allows a crime to occur when intervention would have prevented it. Here, the authorities are not necessarily consistent. In *Du Cros v Lambourne*[1388] liability was imposed on the owner of a car who sat as a passenger while the driver drove dangerously. This was analysed on the basis of assent in particular circumstances of authority being the same as encouragement, as would have been the case had an officer walked in on the rape taking place in the barracks in *Clarkson* and not intervened. That was the reasoning in *Cassady v Reg Morris Transport Ltd*[1389] to the effect that non-intervention was capable of raising an inference of encouragement. In other instances, the law is best served by a statutory formula.

The first question is therefore is there a duty on the accused? In the Canadian case of *Nixon*[1390] the accused was a police officer in charge of a jail. The victim was a prisoner who was beaten by several officers. While the accused was at the scene and knew what was happening, there was insufficient proof that he had personally administered any blows. The officer had a statutory duty to protect persons under his care and, in addition, a common law duty to safeguard prisoners. The British Columbia Court of Appeal held that a failure to act in accordance with a duty to protect may amount to an omission to do something resulting in liability for complicity. The failure to act in this case also allowed the court to infer that the purpose and effect of the failure to act was to aid and abet the offence. Legg JA said:

> An accused who is present at the scene of an offence and who carries out no overt acts to aid or encourage the commission of the offence may nonetheless be convicted as a party if his purpose in failing to act was to aid in the commission of the offence. Section 21(1)(b) extends by its very terms to such an omission in that it makes a person a party to an offence who 'omits to do anything for the purpose of aiding [in the commission of the offence]'. A failure to act in accordance with a duty to act may be an omission to do something for the purpose of aiding or abetting.
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> In some circumstances the presence of an accused will, in itself, be held to have encouraged the commission of the offence. In this situation there will be more than 'mere presence' on the part of the accused and the accused will be liable as a party. ... In the case at bar I consider that the trial judge was entitled to draw the inference that here there was passive assistance in the sense of presence with no steps being taken by the appellant to protect Jacobsen from assault.
>
> The appellant was convicted of aiding and abetting an assault on the grounds that he failed to act to prevent the assault from occurring when he had a duty to do so. In my opinion, the learned trial judge did not err in reaching that conclusion. The authorities to which I have referred support the conclusion that where the accused had a duty to prevent the commission of an offence, or where he was in a position to have control over the acts of the offender and failed to prevent the commission of the offence, he will be guilty as an aider and abettor ... Where there is duty to act, and the accused does not act, it is open to

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1385 Charleton, Offences Against the Person (1992) at 95-102.

1386 See eg Clarke and Wilton [1959] VR 645 (failure by spouse in his or her parental duty to protect the child from harm inflicted unlawfully by the other spouse sufficient to ground a conviction for manslaughter). See also *Witika* [1993] 2 NZLR 424 (CA) where convictions for ill-treating a child were upheld even though the prosecution was unable to prove whether the mother or her partner did the acts alleged.

1387 *Ex p Parker* [1957] SR 326.

1388 [1907] 1 KB 40.

1389 [1975] RTR 470 and see *Tansley v Painter* [1969] Crim LR 139.

1390 (1990) 57 CCC (3d) 97.

> the court to infer that the purpose of the failure to act was to aid in the commission of the offence … Although the trial judge made no express finding that the failure of the appellant to protect Jacobsen encouraged the commission of the assault, I think it is clear from her judgment that she inferred that the appellant had encouraged the commission of the offence by finding that the appellant was at the scene when the vicious act occurred and failed to perform his duty as a police officer to protect Jacobsen.

For a discussion of the criminal liability of a soldier who fails to intervene when other soldiers are torturing a captured civilian see the Canadian case of *Brocklebank*,[1391] the facts of which arose out of an UN peacekeeping mission to Somalia. A distinction can be drawn between a duty to act and a power to intervene. That distinction, however, may be more apparent than real. Liability can only be imposed if there is a duty to protect, a family member or prisoner, or to ensure that a task, such as locking up a warehouse after hours, is carried out. Imposing a general duty to intervene may be regarded as a diminution of liberty,[1392] and circumstances where duties devolve onto those carrying out particular functions either are now or can be defined by legislation. As was stated in *Sweeney*:

> It is also rare for the common law to require those who witness the commission of an offence to intervene. Absent statutory intervention, no one is ordinarily obliged to take on the role of Good Samaritan. A close connection to others can mean that an obligation of intervention, or of care, can arise. This extends to a situation where a man hires a prostitute for a party, and subsequently fails to come to her aid when she falls ill. In such a case, he may be guilty of manslaughter. On this point see *R v Russell* [1933] VLR 59, *Ex P Parker* [1957] SR 326, *R v Clarke and Wilton* [1959] VR 645 and *R v Nixon* (1990) 57 CCC (3d) 97. [1393]

Standard for accessories before the fact

In *Johns*[1394] an attempt to argue that an accessory before the fact should be judged by a lesser standard than an accessory at the fact was rejected by the High Court of Australia. The court was unimpressed by the suggestion that accessories before the fact are generally less blameworthy than those at the fact and trenchantly commented that "Lady Macbeth was surely more blameworthy than was her husband." Was she? It concluded that the issue of blameworthiness in such cases should be left to the sentencing stage and should not go to liability.

A good description of the type of conduct that may attract liability as an accessory before the fact is provided by the following words of Lord Pearce: "One man may abet another by helping to set the stage even before the victim has been found. If a man helps another in preparation for crimes of a certain nature with the intention that the other shall commit crimes of that nature he may abet those crimes when they come to be committed".[1395] In one New Zealand case a pharmacist who sold Panadeine tablets, knowing that they would be used for the production of heroin, was convicted as a party to the subsequent manufacture.[1396]

Victims[1397]

Where the law is designed to protect a particular class of persons, for example, girls who are under the age of consent for sexual intercourse, the law will penalise the principal offender, but the victim cannot participate in a crime despite the fact of consent. In *Tyrell*[1398] a girl between the ages of 13

[1391] (1996) 106 CCC (3d) 234.
[1392] Andrew Simester, John Spencer, Findlay Stark, GR Sullivan and Graham Virgo, Simester and Sullivan's Criminal Law (7th ed, Hart Publishing 2019) PAGE REF TO BE INSERTED
[1393] [2019] IESC 39, [18].
[1394] (1980) 28 ALR 155 (HC).
[1395] *Thambiah* [1966] AC 37 at 46 (PC).
[1396] *Wentworth* [1993] 2 NZLR 450 (HC).
[1397] See generally Hogan, 'Victims as Parties to a Crime' [1962] Crim LR 683 and Williams, 'Victims as Parties to Crime: A Further Comment' [1964] Crim LR 686.
[1398] [1894] 1 QB 710.

and 16, abetted the principal offender to have sexual intercourse with her contrary to s 5 of the Criminal Law Amendment Act 1885 in England. It was held that the accused could not be guilty as a principal in the second degree to the offence committed by her sexual partner. Lord Coleridge CJ stated that "it is impossible to say that the Act, which is absolutely silent about aiding or abetting, can have intended that the girls for whose protection it was passed should be punishable under it for the offences committed upon themselves." See also *Whitehouse*[1399] and *Halligan.*[1400]

Certain well-defined exceptions to the general principle of victim immunity from participation have been made by statute; see for example s 2 of the Punishment of Incest Act 1908. This makes it an offence for a woman to allow her son, brother or other close relation, have intercourse with her. It is submitted that where a person is by law declared to be the victim of conduct perpetrated on them, that the correct approach to interpretation is that they cannot participate in the offence and that consent or encouragement go only to sentence. The legislature may, if this course seems socially desirable, make complicity by that victim-category an offence. Thus a girl is not an accomplice to incest upon herself by her father.[1401] Howard disagrees with this approach: "It is submitted that liability for complicity should not be excluded. If given conduct is thought to be injurious enough for the consent of V to be no defence, as is usually the case with this class of offences, no sufficient reason suggests itself why V should not be equally guilty with D if he or she has encouraged or assisted in the performance of the conduct." [1402]

In the Australian case of *Keane*[1403] the appellant was convicted of complicity in an offence of breaking a domestic violence order. The appellant was the person in whose favour the order was made. The Supreme Court of South Australia held that there was no reason in policy why the offences in the Act should not attract accessorial liability in such circumstances and every reason of justice and convenience why they should. It is hardly likely to be followed in this jurisdiction where protection by legislative intervention is intended to benefit and not to harm a class of persons.

Strict Liability

Where the principal offender is committing an offence of strict liability the other party, to participate in the crime, must have a knowledge of the facts which constitute the crime, but not necessarily knowledge that the facts amount to a crime.[1404] In *Giorgianni*[1405] the High Court of Australia stated the rule in the following terms:

> Although a person cannot aid, abet, counsel or procure the commission of an offence, even a statutory offence involving strict liability, without intent based upon knowledge of the essential facts which constitute the offence, the requisite intent and knowledge do not, in the case of culpable driving, extend to the occurrence of the death or grievous bodily harm which 'ensues upon' the unlawful act the commission of which was aided, abetted, counselled or procured.

Exclusion of Participation by a Statutory Scheme

It may be that, as in the case of statutes designed to protect particular classes of victims, offences created by statute may impliedly make the application of the ordinary rules as to participation inconsistent with a statutory scheme.[1406] Usually the statutory rules will, in that context, clearly

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[1399] [1977] 2 WLR 925.
[1400] [1973] 2 NZLR 158.
[1401] *Stan* [1969] QWN 23.
[1402] Brent Fisse and Colin Howard, Howard's Criminal Law (5th ed, Law Book 1990) 352-3.
[1403] (1997) 95 A Crim R 593.
[1404] *Woolworth & Co* (1974) 46 DLR (3d) 354 and *Leeu You-Kwong* [1985] LRC (Crim) 604.
[1405] (1985) 59 ALJR 461.
[1406] See Andrew Simester, John Spencer, Findlay Stark, GR Sullivan and Graham Virgo, Simester and Sullivan's Criminal Law (7th ed, Hart Publishing 2019) 227-229.

indicate who is to be liable for a range of offences and in what circumstances. This difficulty has been discussed in the case of persons who purchase drugs from a seller. If the legislature makes it an offence to sell a particular drug, is the buyer liable as principal in the second degree, or should the maxim *expressio unius est exclusio alterius* be applied, so as to exclude liability on his part under the general rule? This is a matter of statutory construction as to whether only the principal can commit the offence.[1407] Canadian cases have held that in such cases the purchaser is not guilty of aiding and abetting the seller in trafficking.[1408] But there seems no good reason why this should be an absolute rule. Where a seller approaches a prospective purchaser and persuades him to buy, it seems clear that the only purpose the buyer has is buying the drug. This has the incidental consequence of assisting the seller in trafficking but it is not the purpose of the buyer. Where, however, a person approaches another and persuades the latter to sell him a drug it is difficult to see why the purpose of the purchaser is not to assist the other person in making a sale that otherwise would not have been made without his assistance.[1409]

Innocent Agency

The accused cannot be convicted of being a party to an offence which has not taken place. It would seem possible to argue that where the principal offender has a defence to a crime then those who assist him or her should also be acquitted. However, a person could also use a six-year old child,[1410] or incite a madman into a state of rage in order to shoot the victim.[1411] Why should this be different to putting a sedative into a drink, served innocently by someone else, in order to overpower or rape a woman? To meet this situation the law has evolved the doctrine of innocent agency.[1412] This treats the legally innocent perpetrators of a crime in the same way as if they were merely instruments of the accused.[1413] Thus one may be guilty of murder if one has entered into a common design with a madman to kill another, provided, on the facts, the madman has sufficient sense to be capable of completing the arrangement, or where one unleashes the madman on the victim knowing that death or serious injury will be the result of that action.[1414]

In *Berryman*,[1415] the accused was charged with two counts of forging a passport and making a written statement on a passport application that the applicant had submitted a birth certificate and social insurance number as identification. The accused was employed in a passport office as a passport application examiner and on two occasions she accepted applications for passports knowing that the person from whom they were received was not the applicant. The accused falsely stated in writing on the face of each application that the applicant had produced proof of citizenship and identification. She also marked the applications with a notation which ensured that no check would be made on the guarantors of identity. The evidence, however, did not establish that the accused actually put together the false passports. Rather, it appeared that the forgeries were unwittingly produced by another employee of the same office who had no knowledge that the information contained in the applications on which they were based was false. The trial judge convicted the accused on the charge of making false statements on the passport application but acquitted her on the charges of forging the passports since she did not actually make the passport and was not a

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[1407] Such decisions as *Woby v B & O* [1986] Crim LR 183 that teenagers sending an adult in to buy drink in an off-licence are not buying liquor, are not convincing.

[1408] See *Madigan* [1970] 1 OR 80 (Ont CA); Dyer (1971) 5 CCC (2d) 376 (BCCA); Perry (1974) 18 CCC (2d) 366 (PEI, CA); Meston (1975) 28 CCC (2d) 497 (Ont CA), all cited by Alan Mewett and Morris Manning, Mewett and Manning on Criminal Law (3rd ed, Butterworths 1994) 277.

[1409] See Alan Mewett and Morris Manning, Mewett and Manning on Criminal Law **(**3rd ed**,** Butterworths 1994**)** 277.

[1410] *Manley* (1844) 1 Cox CC 104.

[1411] *Tyler* (1838) 8 C&P 616.

[1412] See further Andrew Simester, John Spencer, Findlay Stark, GR Sullivan and Graham Virgo, Simester and Sullivan's Criminal Law (7th ed, Hart Publishing 2019) 227-228.

[1413] Cogan & Leek [1976] QB 217; see also on this topic, Tyler (1838) 8 Cr & P 616 (insane person); Manley (1844) 1 Cox CC (small child).

[1414] *Matusevich* (1977) 15 ALR 117.

[1415] (1990) 57 CCC (3d) 375.

party to an offence committed by someone else since the employee in the office was an innocent agent. On appeal by the prosecution, the trial judge was overruled, a conviction being instead entered in respect of both counts. Wood JA reasoned that using an innocent agency was not complicity but the manipulation of circumstances to effect a crime made the perpetrator the principal:

> In English common law, the person who caused a felony to be committed, by means of the act of an innocent agent, was considered to be a principal in the first degree. The most common examples of such cases were in connection with the crimes of forgery and false pretences ... It is my view ... that a person who commits an offence by means of an instrument "whose movements are regulated" by him, actually commits the offence himself. Thus there is no variance between the doctrine of innocent agency and the plain meaning that would seem to attach to s 61(a) of the Criminal Code 1982. While there have been substantial changes to that section over the years, none has affected the language used which is relevant to this issue, and I therefore conclude that what is today s 21(1)(a) of the Criminal Code can and should be construed so as to give effect to the doctrine of innocent agency.
>
> It follows that while the learned trial judge was right in his conclusion that the respondent could not be convicted as an aider or an abettor, because Miss Venturin committed no forgery, it was none the less open to him to convict the respondent as a principal in the first degree, under s 21(1)(a) of the Code. Thus, in concluding that the respondent could not be convicted of forging the passports, because those passports were made by an innocent agent, the learned trial judge was in error.

Accomplices and Insanity

The question of liability can be complicated where a sane person, D1, acts with an insane person, D2, in the commission of a crime. Suppose a prisoner is beaten to death in his cell. Also present in the cell are D1 (sane), D2 (insane) and an axe dripping with blood. During the trial the question arises as to whether D1 and D2 acted in concert in killing the victim. The legal position would appear to be as follows. If the insanity of D2 is such that he was incapable of reaching any agreement, arrangement or understanding with D1, it does not follow that D1 must be acquitted if the death of the victim is caused by the acts of D2. If D1 incited D2 to kill the victim, D1 would be guilty of murder, since D2, if insane, would then be treated as D1's innocent agent.[1416] If there was no pre-concert between the two accused; and D1 did not influence D2 to act as he did, D1 may nevertheless be convicted if he was present and assisted D2 when D2 struck the fatal blows.[1417] This is because it would be an affront to justice and common sense that D1's insanity should exculpate D2 in such circumstances. In the circumstances, the insane person is a weapon and the user of that agency is a principal offender.

Mental Element[1418]

The prosecution must prove that the accused, in encouraging or lending aid to the proposed crime, intended thereby to assist the commission of the crime. It is irrelevant whether this caused the crime to be committed. For derivative liability, however, the crime must be committed. Reading the cases which follow one might be tempted to abandon a formulation which requires the accused to intend to aid or encourage crimes which have the mental element of intent, or to be reckless in relation to whether his aid or encouragement furthers the commission of crimes with a mental element of recklessness. The potential legal analysis which might reconcile the various threads of authority into one coherent statement would be apply the distinction between crimes of specific

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[1416] *Matusevich* (1977) 15 ALR 117 (HC, Aust).

[1417] ibid.

[1418] See generally Sullivan, 'Intent, Purpose and Complicity' [1988] Crim LR 641; Ní Raifeartaigh, 'The Mental Element of Accessories to Murder' (1994) 4 ICLJ 31; and Dennis, 'Intention and Complicity: A Reply' [1988] Crim LR 649.

intent and crimes of intent.[1419] For those crimes which require a specific intent, murder being the most obvious example, the participant by assistance or encouragement must be specifically proven to have the subjective intent to kill or cause serious injury, either as the object of the criminal enterprise or as an intention arising from a tacit permission to proceed with deadly force should the necessity arise. For other crimes, classified as not being crimes of specific intent, the absence of intent would be irrelevant and replaced by a species of fault in failing to enquire further. The fault lines in such an approach are already apparent from the discussion in this work of the defence of intoxication. Such an analysis is not to be recommended. An underlying feeling, as opposed to an explicit reasoning, based upon some similar or underlying process of reasoning is to be found, however, in the reasoning drawn from the disparate authorities which follow. As Irish law is based upon an advertent disregard in recklessness and a purposeful occasioning of events in intent any such reasoning would be a departure from fundamental principles. Intention to encourage or assist the crime, or a crime like it, not recklessness, is what is required for the mental element of derivative liability. As the Canadian Supreme Court explained: "a person becomes a party to an offence when that person – armed with *knowledge* of the principal's intention to commit the crime and with the intention of assisting the principal in its commission – does (or in some circumstances, omits to do) something that assists or encourages the principal in the commission of the offence."[1420] This does not mean that the secondary party intends that the principal perpetrator commit the crime. In most cases that is so. What it does mean is that the person assisting or encouraging intends their aid or encouragement furthers a criminal enterprise of which they know. It can be that the person assisting or encouraging intends that the crime be committed and it can also be that in making the contribution they know of such essential matters that make, or will make, the action of the principal perpetrator an offence.[1421]

Not all crimes require the intentional perpetration of the external element. Intent or recklessness, or knowledge or recklessness is now a hallowed statutory formula. It is insufficient, however, for derivative liability for those who assist merely to have an inkling or suspicion that by lending a car, a mobile phone, a premises in which to park a motorcycle, or whatever the aid is, that the article or facility might be used for a crime.[1422] Ultimately, however, the proof of all criminal liability is from primary fact and inference from such facts, rather than theory. Hence, lending a knife or a gun, leaving open a garage down a laneway at a particular time, the context of borrowing a mobile phone over a weekend, will generate avenues of thought in the minds of ordinary people which lending a dress, a car for good reason, or a phone charger will not. What was the purpose of the person accused of assistance in doing that deed: was it in pursuit of normal social interaction and assistance or was it to aid a proposed crime? Where the mind of the accused shuts off what is inescapable, that does not reduce intention to aid to recklessness as to whether an act or omission might assist a crime as wilful blindness is a state equivalent to intention.[1423] Such issues are logically incompatible with participation through encouragement. To urge on the principal offender is to act with intention.

Hence, an accused must intend to offer encouragement or assistance to the principal offender in the commission of an indictable offence. To innocently lend a sporting weapon to the principal offender, without being aware that he intends to shoot the victim with it, undoubtedly assists him in the commission of the crime; but the mental element to offer encouragement or assistance is missing. Similarly, to encourage the principal offender to go to Donegal only constitutes complicity in the context of the accused being aware that the principal offender there intends to rob a branch of Ulster Bank.

[1419] *Majewski* [1977] AC 443; Apparently following *Beard* [1920] AC 479.
[1420] *Vu* [2012] 2 SCR 411 [58].
[1421] Andrew Simester, John Spencer, Findlay Stark, GR Sullivan and Graham Virgo, Simester and Sullivan's Criminal Law (7th ed, Hart Publishing 2019) 241-242.
[1422] *DPP for Northern Ireland v Maxwell* [1978] 3 All ER 1140; Scott (1978) 68 Cr App R 164; Roche (2004) 192 CCC (3d) 557, [36].
[1423] *Antonelli* (1905) 70 JP 4; *Briscoe* [2010] 1 ACR 411, [22]-[25].

Crimes and categories of crimes

No difficulty is encountered where the accused aids or encourages the commission of the offence which the principal offender later commits, it being the actual offence in the contemplation of both of them. By reason of a lack of proof that the accused was aware of the crime actually committed subsequent to the aid or encouragement by the actual perpetrator, difficulties arise. Often, the prosecution may be able to prove that the accused intended to aid or encourage a particular crime. If, in the course of it, a graver crime is committed the liability of the accused may, but not must, be inferred from circumstances which point to his complicity in that graver crime. This is not constructive liability.

An example is *The People (DPP) v Eccles.*[1424] A garda was murdered during the course of an armed robbery of a post office van. According to the prosecution, the robbery was carried out with "military precision". Prior to the raid all three defendants were present at two meetings planning the commission of the offence. To ensure the success of the raid, the perpetrators had stolen cars, all were armed, and each was given a particular role in the execution of the crime. They were all convicted of capital murder. On appeal argued that there was no evidence that they knew the victim was a garda and that the court erred in law in holding that the mental element of capital murder is constituted by adherence to a common design which includes even a risk of causing death or serious injury to the police, as opposed to a civilian intervenor or security guard. The Court of Criminal Appeal held that in order to convict the accused of capital murder the trial court would have to be satisfied beyond all reasonable doubt that the alleged participants in the common design:

1. Had prior knowledge that the post office van would be escorted by members of the Garda Síochána,
2. Knew of the arrangements made and outlined at the meeting of the raiders,
3. Were aware that certain members of the raiders were allocated to render ineffective the members of the Garda Síochána, necessarily involving the use of firearms if the need arose.

Hederman J concluded that the trial court "was entitled to convict both applicants of capital murder and that in reaching their decision they applied the correct principles of law." His analysis was entirely fact based and was to the effect that:

> Both applicants voluntarily participated in an expedition to carry out the armed robbery. They had prior knowledge that the Post Office van, the subject of the robbery, would be escorted by guards. They were also informed that "there might be resistance from the guards" and that "the guards would be taken care of", that is to say, overcome with the use of firearms by the raiders. As this was a robbery planned on a Post Office van, of monies the property of the State, the only reasonable inference is that the "guards" that were anticipated would be members of the Garda Síochána (or as popularly referred to, "the guards"). There was no evidence to suggest that this was not the correct inference to draw from all the circumstances of the case. Once the applicants were aware that any prospective resistance by the Gardaí would be overcome by the use of firearms they are guilty of whatever offence arises from the actual use of firearms by those with whom they were acting in concert.

A similar case, where the penalty was again the special one applying to the murder of gardaí and prison officers in the course of their duty was *The People (DPP) v Pringle*[1425] which was another robbery with a brave officer intervening and losing his life. The Court of Criminal Appeal held that the evidence in the case, admitted "of no other inference except that of the existence on the

[1424] (1986) 3 Frewen 36.
[1425] (1981) 2 Frewen 57.

part of all those involved in the bank raid of a common intent to kill or seriously injure anyone who stood in their way, and that this applied to and included members of the garda"'.[1426]

Inference of intent to assist

The cases of *The People (DPP) v Eccles*,[1427] *The People (DPP) v Pringle*[1428] and *The People (DPP) v Noel and Marie Murray*[1429] indicate that pursuing a violent enterprise, such as a robbery, through confederates who are, to the knowledge of the accused in issue, armed with lethal weapons where the common purpose of the confederates contemplated the use of those weapons should there be opposition, may give rise to an inference that such an accused intended to kill or cause serious injury if the need arose in the perpetration of the planned crime. That inference, however, is not inescapable but merely possible. It should only be made if the circumstances are such that the inference of intent to kill has been proved by the prosecution beyond all reasonable doubt. In the *Murray* case the intention to kill or cause serious injury was inferred against both accused. The reckless state of mind in question was as to whether their pursuer, in civilian clothes and who had run after them from an unmarked car, was a member of An Garda Síochána. The pursuer, Garda Reynolds, had tackled Noel Murray after a chase through a park and Marie Murray, who had also participated in the robbery and escaped in the same car, approached the officer and shot him at close range in the head. On the issue as to whether there was sufficient evidence to prove intent at against Noel Murray, Henchy J commented:

> As to the appellant Noel Murray, if the recklessness required for the capital murder charged is held to have been proved in the case of Marie Murray, that recklessness should not be imputed to Noel Murray. In the absence of evidence that a decision to shoot a would-be captor even if there was a risk that he was a Garda, was an express or an implied part of the common design, recklessness in this respect on the part of Marie Murray must be deemed to be personal to her and outside the scope of the common design. The activities of the parties to the bank robbery, particularly the carrying and use of loaded guns, amply support the inference that there was a common agreement to shoot, to kill or to cause serious injury if necessary. It may, however, have been the case that it was part of the pre-arrangement that a shot should not be discharged at a Garda. At all events, it cannot be fairly inferred from the evidence that the discharge of a shot at a Garda was part of the pre-arranged scheme of things, and more particularly the discharge of a shot at a Garda in the circumstances in which Marie Murray shot Garda Reynolds.[1430]

An inference that the accused intended through assistance or encouragement the result actually achieved by the pursuit of the planned crime depends upon the state of the evidence. The evidence may be such that it is possible to infer that the accused, in helping the enterprise, intended one of a range of possible crimes which he or she was aware their confederates might carry out; *DPP for Northern Ireland v Maxwell*.[1431] There, the essential question was whether an accused lending assistance can be convicted of the offence in question, when that offence was one of a number of offences which he knew the principal offender might commit. Was such a state of mind a sufficient intention? Maxwell was convicted of unlawfully and maliciously doing an act with intent to cause an explosion likely to endanger life, contrary to s 3(a) of the Explosive Substances Act 1883 and possession of a bomb with intent, contrary to s 3(b) of that Act. The facts against him emerged from his own confession. When he was interviewed by police officers on 21 January 1976, he admitted that he had used his own car to guide another car, which contained four men, to a bar

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[1426] ibid, 71.
[1427] (1986) 3 Frewen 36.
[1428] (1981) 2 Frewen 57.
[1429] [1977] IR 360; see also *Adams* [1932] VLR 222; *Murray* [1924] VLR 343; and *Vandine* [1971] NSWLR 252.
[1430] [1977] IR 360, 405.
[1431] [1978] NI 321; [1978] 3 All ER 1140; [1978] 1 WLR 1350.

owned by a potential target of the mindset of the "Ulster Volunteer Force" of which he was a member. He claimed that after the death of his father he had been told by his "commanding officer" that he would not be used for further military actions but would be doing welfare work, such as collecting money for loyalist prisoners. When Maxwell had led the other car to the bar, one of the men in the following car jumped out and pushed a "pipe bomb" into the hallway. Despite the fact that the bar was packed, no one was injured because the owner's son courageously defused it. Maxwell described this action as "a job". This was explained to be a commonly used euphemism for paramilitary terrorist activity. It was argued on appeal that as he did not know the precise nature of "the job", he could not be an accessory before the fact to the commission of the offences charged, or an abettor by reason of the aid which he had lent to the enterprise. This argument was rejected in the Northern Ireland Court of Appeal and that judgment was upheld by the House of Lords. Lowry LCJ rejected the idea that an accused must have knowledge of a particular crime.[1432] At issue was what understanding the person aiding the principal in the commission of the offence had:

> The principle with which we are dealing does not seem to us to provide a warrant, on the basis of combating lawlessness generally, for convicting an alleged accomplice of any offence which, helped by his preliminary acts, a principal may commit. The relevant crime must be within the contemplation of the accomplice and only exceptionally would evidence be found to support the allegation that the accomplice had given the principal a completely blank cheque.

A finding of liability was made on the basis of an analysis of the facts and not in taking the problem as an abstract issue:

> The facts found here show that the appellant, as a member of an organisation which habitually perpetrates sectarian acts of violence with firearms and explosives, must, as soon as he was briefed for his role, have contemplated the bombing of the Crosskey's Inn as not the only possibility but one of the most obvious possibilities among the jobs which the principals were likely to be undertaking and in the commission of which he was intentionally assisting. He was therefore in just the same situation, so far as guilty knowledge is concerned, as a man who had been given a list of jobs and told that one of them would be carried out.

In the House of Lords this reasoning was upheld. Lord Scarman considered that the correct principle was that there was participation if the accused contemplated the commission of one or more crimes and there was the lending of intentional assistance to that category of crime:

> The principle thus formulated has great merit. It directs attention to the state of mind of the accused – not what he ought to have in contemplation, but what he did have: it avoids definition and classification, while ensuring that a man will not be convicted of aiding and abetting any offence his principal may commit, but only one which is within his contemplation. He may have in contemplation only one offence, or several: and the several which he contemplates he may see as alternatives. An accessory who leaves it to his principal to choose is liable, provided always the choice is made from the range of offences from which the accessory contemplates the choice will be made. Although the court's formulation of the principle goes further than the earlier cases, it is a sound development of the law and in no way inconsistent with them. I accept it as good judge-made law in a field where there is no statute to offer guidance.

Foresight as founding intent by inference

Foresight can be a basis whereby an intent to assist in a crime may be inferred. Hence, it is a neutral fact that a gun safe was left unlocked. The owner may have forgotten to lock it or may have

[1432] See *Bainbridge* [1960] 1 QB 129.

intended to leave it open for guests to shoot fowl. The omission to lock the safe becomes capable of raising an inference of intent where the accused knew that a person with a murderous grudge intended to take a gun for the purpose of homicide. In *Johns*[1433] it was claimed that an accessory before the fact is only liable for the crimes of a principal offender if they were within his contemplation as a probable, as opposed to a possible, consequence of the common purpose of the parties. The High Court of Australia decisively rejected this contention stating that in such cases:

> it is understandable that criminal liability should be made to depend upon the jury's assessment of whether or not the accessory before the fact must have been aware of the *possibility* that responses by the victim or by third parties would produce the reaction by the principal offender which led to the other crime. In such a speculative area, it would be remarkable were the accessory's liability for the other crime to depend upon the jury assessing, in terms of 'more probable than not' the degree of probability or improbability which the accessory attached to the happening of the particular reaction by the principal offender which in fact occurred, itself dependent upon the intervening uncertain responses of victim or third parties.

This rejection of the probability standard can be supported. Otherwise an accessory before the fact to, say, an armed robbery, who well knows that the robber is armed with a deadly weapon that they supplied and is ready to use it on his victim if the need arises, will bear no responsibility for the killing which in fact ensues so long as their state of mind was that, on balance, he or she thought it rather less likely that not that the occasion for killing would arise. Yet his complicity seems clear enough; the killing was within the contemplation of the parties. In Canada the test is framed in terms of a probable consequence.[1434] What aid did the accused proffer to the common purpose? What did he or she foresee in so aiding the criminals? Foresight is to be judged from inferences arising on the evidence, the acts in furtherance of the crime and, if there is that evidence, the declarations as to what was to be done to commit the crime. The more strongly it emerges that, for example, in a bank robbery force might be necessary and the more strongly it emerges that the force was potentially lethal to anyone resisting, the stronger becomes the evidence that the accused in aiding the common design by supplying a weapon intended that force, or lethal force, should be used if that allowed the completion of the planned crime.

Right of refusal

Intention to aid a crime might not arise where the principal perpetrator has the entitlement in law to an article later used as an instrument to commit the offence. The gun used to murder the victim might be the principal perpetrator's own property which was simply lent to the accused. A shopkeeper, on the other hand, selling a knife knowing that the accused will use it in an attack has every right to refuse aid. That attack might not be desired, only the profit is wanted. But the mental element of secondary liability "is a matter of intent only and does not depend on desire or motive."[1435] Entitlement by the principal offender to an article later used in a crime which the accused has handed over because of legal compulsion rather than from free choice has generated contradictory decisions.[1436]

Possibility as intention

A party to a common who closes his mind down to the obvious prospect of what aid to a criminal design means is wilfully blind. That is an equivalent state to knowledge and to help such a purpose

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[1433] (1980) 28 ALR 155 (HC, Aust); see also *Varley* (1976) 12 ALR 347 (HC, Aust); other cases on the topic of common design include Stewart and Schofield [1995] 3 All ER 159, and R (1995) 63 SASR 417.

[1434] *Logan* (1990) 58 CCC (3d) 391.

[1435] *National Coal Board v Gamble* [1959] 1 QB 11, 23.

[1436] Discussed in Andrew Simester, John Spencer, Findlay Stark, GR Sullivan and Graham Virgo, Simester and Sullivan's Criminal Law (7th ed, Hart Publishing 2019) 247-248.

can found an inference that the accused intended to aid the perpetrator in a criminal enterprise. In *Millar*[1437] the accused was a close friend of one Worrell. On several occasions he drove Worrell around looking for girls whom Worrell could pick up. Once this had been achieved he would drive Worrell and the girl to a deserted place and then leave the car whilst Worrell had sexual intercourse with the girl. On one occasion whilst the accused was thus away from the car, Worrell murdered the girl with him. During the following six months the accused Millar continued to drive Worrell about for the purpose of picking up girls. On six further occasions Worrell murdered the girls in question. On most occasions however, no harm came to the girl with him. The accused Millar was charged with seven counts of murder on the basis of the assistance he gave to Worrell. The accused claimed that the only common design in existence had been to pick up girls, which was not in itself unlawful. The High Court of Australia held that it was open to the jury to conclude that after the first murder the scope of the common purpose had altered. By reason of the knowledge of one another's state of mind a new factor would be present in the recurring common purpose of the pair, namely that if the mood took him Worrell might, in the accused's absence, murder his victim.

The circumstances made it possible to infer that Millar lent his aid to the enterprise intending that if Worrell wished, he might murder a girl. Liability for murder was thus not imposed on the basis that something was possible or on any false foundation of a reckless state of mind, but, on a contingent basis whereby the accused was lending his aid to the enterprise intending that Worrell would murder a girl, if he so wished. There can be circumstances, therefore, when the possibility of an occurrence, and especially a recurrence of violence, gives rise to the inference that the accused intended that occurrence by aiding the perpetrator:

> The scope of the common purpose of the applicant and Worrell, as it applied to each occasion upon which Worrell murdered a girl would, on any view, have included the following: the applicant driving the car throughout the enterprise; Worrell finding a suitable girl and inducing her to get into the car; the applicant driving it to a secluded site and then leaving Worrell and the girl together so they might have sexual intercourse. It was open to the jury to conclude that after the first murder had occurred the scope of the common purpose had altered. Millar now knew that Worrell not only intended sexual intercourse with the girls, but might also murder them, while Worrell knew that when Millar participated in further expeditions he was fully aware of the fatal outcome of the earlier expeditions. Because of their knowledge of one another's state of mind a new factor would be present in the recurring common purpose of the pair: when Millar would leave Worrell and a girl together, he would no longer be leaving them merely so that they might have sexual intercourse, but also so that, if the mood took him, Worrell might, in Millar's absence, murder the girl. The intended role of the girl was no longer merely that of Worrell's partner in the intercourse, she had become also a possible murder victim. It is significant that Millar's evidence was that he found Worrell's murderous moods to be wholly unpredictable, sudden in their on-set and due to no apparent cause, thus to his knowledge putting each girl at risk of death.

The New Zealand Court of Appeal considered the issue of knowledge as a basis of inferring intention to aid a crime in *Te Moni*.[1438] A bank teller had been fatally shot at close range by one Mantenga during the course of an armed raid. At their trial, it was alleged that the appellants had formed a common intention with Mantenga to rob the bank and to this end had provided him with a loaded firearm. From the facts of the case, it appeared that Mantenga had shown very little interest in taking any money when he entered the bank. He had brought with him three notes in the nature of suicide messages to his mother, his family and his former girlfriend. A fourth note demanded that his girlfriend be brought to the bank, "or people will start dying". When

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[1437] (1980) 32 ALR 321 (HC, Aust), the description of the facts is taken from Brett, Waller and Williams, Criminal Law (8th edn, Butterworths 1997), 488.

[1438] [1998] 1 NZLR 641.

interviewed after the robbery, Mantenga claimed that he really wanted to take his own life and did not actually want to proceed with the robbery. The bank teller had been shot after making a dive at Mantenga who had then surrendered to the police. The appellants appealed against their conviction for murder on the ground that the trial judge had failed to adequately instruct the jury as to one possible defence applicable to them, namely that at the stage when Mantenga fired the fatal shot, the common purpose had ended. They argued that even if Mantenga had the intent to commit a robbery when he entered the bank, he abandoned it soon afterwards and that hence the common purpose came to an end. They pointed particularly to the suicide notes, the rejection of the opportunity to take money from the tills, and the attempts to have his former girlfriend brought to him. The judgment imposes liability for murder on the basis that the accused is guilty if he foresees there is a real and substantial risk that murder will be committed by another participant. It is submitted that nothing short of intention to kill or cause serious injury suffices in this jurisdiction. The intent is still a valid intent if it is conditional that the weapon will only be used if the necessity for its use arises.

Constructive Liability

The basic rule whereby liability for a further crime was constructed on the basis that the accused was an accomplice to a criminal enterprise was set out by Parker CJ in *Anderson v Morris*:[1439] It was approved by the Court of Criminal Appeal in *The People (DPP) v Doohan & Others*[1440] but was not the basis of liability on the facts of that case since each perpetrator had joined in and mutually aided a common design. The notion of constructive liability has never been applied in Ireland and has since been abandoned in England.[1441] As formulated and as much applied in that jurisdiction, the rule was:

> Where two persons embark on a joint enterprise each is liable for the acts done in pursuance of that joint enterprise and that includes liability for unusual consequences if they arise from the execution of the joint enterprise but (and this is the crux of the matter) that, if one of the adventurers goes beyond what has been tacitly agreed as part of the common enterprise his co-adventurer is not liable for the consequences of that unauthorised act.

The House of Lords reviewed the doctrine of common design in *Powell*[1442] and concluded that while: "Intellectually, there are problems with the concept of a joint venture, but they do not detract from its general practical worth, which has proved itself over many years". Embarkation with loaded weapons on a criminal enterprise may allow a jury to infer foresight that an accomplice will use them to lethal or near lethal effect. The stronger the evidence of such foresight is, in all the circumstances of the case, the more readily such intention could be inferred. In order to make out a case against an accused that he acted as part of a common design with others, the prosecution does not have to prove an express agreement. The existence of a common purpose to commit the crime charged may be inferred from the evidence.[1443] In relation to an occurrence for which the accused claims not to be criminally responsible, the foresight or contemplation test is a subjective one; it is what the participant foresaw not what that person should have foreseen:

> Initially the test of what fell within the scope of the common purpose was determined objectively so that liability was imposed for other crimes committed as a consequence of the crime which was the primary object of the criminal venture, whether or not those other crimes were contemplated by the parties to that venture. However, in accordance with the emphasis which the law now places upon the actual state of mind of an accused person, the

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[1439] [1966] 2 QB 110.
[1440] [2002] 4 IR 463, 477.
[1441] *Jogee* [2017] AC 387.
[1442] [1997] 4 All ER 545, 548.
[1443] *The People (DPP) v Pringle McCann & O'Shea* (1981) 2 Frewen 57.

> test has become a subjective one and the scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose. [1444]

In *Logan*[1445] the Supreme Court of Canada indicated that the constitutional principle of fundamental justice required that an accused charged with murder could only be convicted upon proof of his own wrongdoing which, in this context, was analysed by reference to what he foresaw, and so subjectively what intent, if any, might thereby be inferred, and not what he ought to have foreseen. It follows that for an accused to be found guilty of complicity in a crime of intent he must embark on the main crime, aware that the further crime may be committed, and it must be the point of his purpose that such further crime should be committed if it is necessary to the overall criminal purpose. This may readily be inferred if loaded firearms were used to carry out a robbery or, as in *McClafferty*,[1446] where a group of criminals set out to murder a victim in the bosom of his family.

In this jurisdiction one must intend to kill or cause serious injury to be guilty of murder: s 4 of the Criminal Justice Act 1964. In *People (DPP) v Pringle*[1447] the Court of Criminal Appeal held that s 4 of the 1964 Act did not abolish the doctrine of common design. If the accused embarks on a criminal enterprise knowing that it may be necessary to cause serious injury to a person, that is evidence that, if necessary, he intended such injury to be inflicted, and if death results, that intention will render him guilty of murder.[1448] That analysis, however, is not the doctrine of common design, which imposed liability constructively on the basis of law from circumstances. That analysis is merely the application of inference, which the jury is free to make or to reject if the facts proved to not support that step.

Constructive liability untenable

It is no longer possible to impose liability on an accomplice by a form of constructive reasoning, as was sometimes argued to be the former law, an example being *McClafferty*.[1449] In *Jogee*[1450] the former reasoning was rejected by the United Kingdom Supreme Court in favour of a independent analysis of what each accused intended as opposed to any rule of law whereby their intention in being part of an enterprise or of lending aid to it was constructed on the basis of their being liable for all unexpected consequences or whereby a group of criminals was to be automatically liable for any one of their number going beyond the express or tacit limits of what they intended.

Complicity is subjective

Whereas individual sets of facts and circumstances may, on previous case law, indicate that an inference of an intent to kill or cause serious injury in pursuit of a criminal enterprise may be made against an accused, should the necessity to use such force arise, the issue of intent must be considered on an individual subjective basis as regards the involvement of each accused. An inference of intent to kill or cause serious injury is ultimately for the tribunal of fact to be judged on a subjective basis.

Instructing the Jury

Complicity may raise the necessity for a careful direction by the trial judge to the jury. It will be apparent from the book of evidence, and from the prosecution outline of the case, what category the accused is alleged to be in; whether principal offender through a common enterprise, principal offender in consequence of having committed the crime, or participant through intentionally

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[1444] *McAuliffe* (1995) 69 ALJR 621 (HC).
[1445] (1990) 58 CC (3d) 391.
[1446] [1981] NI 1.
[1447] (1981) 2 Frewen 57.
[1448] *The People (Attorney General) v Ryan* (1966) 1 Frewen 304 (CCA).
[1449] [1981] NI 1.
[1450] [2017] AC 387.

assisting or encouraging the commission of a crime of which the accused had broad knowledge. If it is common enterprise, the usual and sufficient example given is of those planning and engaging in a bank robbery though having different tasks. If the accused is claimed to have intentionally aided the commission of a crime of which he or she had broad knowledge, that should be made clear as the alleged basis of liability so that the jury can decide if: aid was given by the accused; intending to assist in the commission of a crime; and with broad knowledge of that offence as intended by another. In *The People (DPP) v Cumberton*[1451] the accused, at the request of one Reilly, arranged for the victim to be at a certain place at a certain time so that Reilly could physically assault him. The accused did as he was requested and when the victim was brought to the arranged place he was shot with a sawn-off shotgun and severely wounded. The accused said that he thought the victim was going to "get a hiding", not that he was going to be shot, and challenged his conviction for wounding and assault occasioning actual bodily harm. The Court of Criminal Appeal held that whether the shooting was within the scope of the common design or not was a question of fact for the jury and that there had been ample evidence on which they could come to this conclusion. However the Court, through Blayney J, also held that the trial judge had erred in his direction to the jury that "If two or more people make an agreed plan to carry out some unlawful act, each of those persons is as liable as the other is for what eventually takes place that is within the reasonable contemplation of that plan." Blaney J affirmed the subjective nature of liability:

> This direction was correct as far as it went but the learned trial judge ought in addition to have told the jury that if one of the persons goes beyond what is contemplated, the other is not liable for the consequences of the unauthorised act. However, what was contemplated by one person but not communicated to the other party is not relevant. The test is what was tacitly agreed *between* the parties and whether what happened was within the common design. In addition the learned trial judge ought to have directed the attention of the jury to the question of whether the use of a double barrel shotgun to shoot Young went beyond what was contemplated and told them that, if it did, they should acquit the applicant.[1452]

Generalised Participation

Where an accused is shown to be an accomplice to a criminal enterprise, if his or her state of mind is proved to be such that he was prepared to lend his aid to any criminal enterprise within a potential category of crimes that the principals might decide upon, then that accused is complicit in whatever crime is ultimately committed. Such appears to be the reasoning of *The People (DPP) v Michael Egan*.[1453] Whereas it might be readily inferred, in circumstances such as those set out in *Maxwell*,[1454] that the accused by joining in and participating in a terrorist organisation is lending his aid to the acts of that organisation, that inference becomes more difficult where the accused participates on the basis of an understanding with criminal confederates that contemplates only the commission of a lesser offence than that charged. The reasoning in this case is difficult to reconcile with subjective criminal liability. It is submitted that it may be applied in circumstances where the offence charged is capable of commission by either intent or recklessness. Where, as in the case of murder and, it is submitted robbery, the accused is required not simply to have culpable foresight of the occurrence of the external elements of the crime, but an intention to bring same about, such reasoning is inconsistent with the mental element. Costello J relied on *The People (DPP) v Madden*[1455] to formulate a principle similar to that enunciated in *Maxwell*.[1456] This should not be taken beyond its true boundaries. Liability can be imposed on a secondary basis where the accused

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[1451] [1994] 12 JIC 0501.
[1452] ibid [14].
[1453] [1989] IR 681.
[1454] ibid.
[1455] [1977] IR 336.
[1456] ibid.

knows the general kind of crime, as opposed to the specific facts or the particular victim, to which that accused intends to assist. Thus the formulation by Costello J remains correct and within the bounds of liability on the basis of the accused's frame of mind:

> Applying the principles established both in *Madden's* case and *Maxwell's* case the Court has reached the following conclusions:
>
> (a) the prosecution was able to establish in this case that the applicant knew
>
> (i) that a crime was to be committed,
>
> (ii) that the crime involved the theft of goods,
>
> (iii) that with this knowledge he assisted the commission of the crime which was actually perpetrated by the principal offender when he agreed to make his workshop available so that the goods to be stolen could safely be hidden after the theft.
>
> (b) The law of theft in this country creates a number of different offences, depending on the circumstances in which goods are stolen. If a principal offender steals goods from another person he is guilty of a felony punishable with a maximum sentence of 14 years (Section 14 of the Larceny Act 1916); if he steals them and uses force whilst doing so he is guilty of the felony of robbery which is punishable with a maximum sentence of life imprisonment (Section 23 of the 1916 Act); if he steals goods having entered a building as a trespasser he is guilty of the felony of burglary which is punishable with a sentence of imprisonment for a maximum period of 14 years (Section 23(a) of the 1916 Act). When goods are stolen it is not, in the opinion of this Court, necessary for the prosecution to establish that a person who has aided the principal offender before the crime was committed knew either the means which were to be employed by the principal offender, or the place from which the goods were to be stolen or the time at which the theft was to take place or the nature of the goods to be stolen. It will suffice if the prosecution is able to show that the accused who gave assistance to a principal offender before the crime was committed knew the nature of the crime intended, namely the theft of goods.
>
> It follows, therefore, that it was open to the jury to conclude that the applicant was an accessory before the fact of the crime committed by the principal offender and that the conviction of the applicant cannot be set aside.

Under the formulation of the rule in *Bainbridge*[1457] the law was stated not to draw fine distinctions between the crime which an accused contemplated participating in or lending aid to and that which was actually committed by the principal offender. Under this ruling what is required is knowledge that a crime of the type committed was planned together with some act of assisting or encouraging it. It has been said of *Bainbridge* that "[e]ver since that decision in 1959 academic lawyers and students have been having sleepless nights worrying about the seller of a rather durable jemmy being convicted of endless burglaries of which he knew nothing, years after the sale". The problem of multiple convictions of this type does not appear to have arisen so far.[1458] A person who is in the business of supplying tools to legitimate persons and enterprises will only become liable for complicity in a crime of recklessness where he averts to the possibility that his supplies may be used in a criminal enterprise. Howard comments:

> If the concept of recklessness is thought to allow too wide a liability, apt to catch traders who cannot fairly be asked to police their customers, one answer appears to be that only those who ignore a very good reason for suspecting that they are dealing with criminals would be affected in practice. Allowance has to be made for the obligations of the supplier.

[1457] [1959] 3 WLR 656.

[1458] JC Smith, 'Criminal Liability of Accessories: Law and Law Reform' (1997) 113 LQR 453, 465.

> For example, a taxi cab driver, rarely has much time to decide on the character of his customers and is usually bound to accept them in the absence of good reason to the contrary. An assistant at a sales counter is equally unlikely to have much room for choice. The person likely to be caught by this part of the law is the recurrent supplier under suspicious circumstances, and there is no reason why he should not be.[1459]

Abandonment[1460]

No more than a crime can be nullified by a perpetrator through thinking the better of it after its commission, it is impossible to withdraw from complicity after the principal has committed the external act which defines the crime.[1461] But withdrawal should be possible for a secondary party prior to the commission of the crime he or she has aided, commanded, or encouraged.

Two conflicting approaches are possible on whether a person who is already complicit in the commission of an intended offence may successfully withdraw before it occurs. The first is that it is socially desirable to encourage those who have supported the commission of a future offence to abandon it, provided in doing so they take sufficient steps to reverse their complicity. This, in turn, would depend on how far preparations had gone and upon the extent of their involvement.[1462] The second view is that complicity involves participating in an offence by encouraging it or helping in its intended occurrence and that no subsequent change of mind, before the commission of the offence, can alter a legal liability that has already been incurred. By agreeing with another to commit a crime, a criminal conspiracy has already become punishable and by encouraging a crime, a secondary offender may be liable in any event for incitement.[1463] But, leaving that aside, supposing inchoate offences are not charged, it is arguable that the criminal law need not be logical if it achieves its policy of social order, as defined in the Preamble to the Constitution, by discouraging offenders. However, it is also apparent that the objective of social order is not furthered by any silent withdrawal. Apart from that, since complicity depends on overt actions, withdrawal must also assume a concrete form. The circumstances for effective withdrawal thus differ.[1464]

Effective withdrawal

Thus, an accused may withdraw from complicity in the commission of a crime. To be legally effective, that withdrawal must be: (1) clear and unequivocal,[1465] (2) timely,[1466] and (3) communicated either to the other parties or to the police.[1467] This may be translated into a requirement to clearly disavow the proposed wrong and to take reasonable steps to reverse the criminal enterprise embarked upon.[1468] Thus, it is required that the accused "took, in a manner proportional to his or her participation in the commission of the planned offence, reasonable steps in the circumstances either to neutralise or otherwise cancel out the effects of his or her participation or to prevent the commission of the offence."[1469] The federal code of the Australia proposes that a person "cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence" if "before the offence has been committed", that person "terminated his or her involvement" and "took all reasonable steps to prevent the commission of the

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[1459] Brent Fisse and Colin Howard, Howard's Criminal Law (5th ed, Law Book 1990), 330.

[1460] See Lanham, 'Accomplices and Withdrawal' (1981) 97 LQR 575 and Smith, 'Withdrawal from Complicity and Inchoate Offences' (1983) 12 Anglo Amer L Rev 200, KJM Smith, 'Withdrawal in Complicity: a Restatement of Principles' (2001) CLR 769-785.

[1461] *André* [2009] EWCA Crim 50.

[1462] *Gauthier* [2013] 2 SCR 403, [40].

[1463] Chapter 8.

[1464] *Mitchell* [1999] Crim L Rev 496, 497.

[1465] *Rook* [1993] WLR 1005, 1012.

[1466] Definitely before any external element of the offence is perpetrated but this may be part of a general requirement for the accused to do what is reasonable; Peter Gillies, Criminal Law (3rd ed, Law Book Company 1993) 319.

[1467] Cases on abandonment include: *Henderson* [1948] SCR 226; *Walker* [1964] 2 CCC 217; *Miller and Cockerrill* [1976] 2 SCR 680; *De Tonnancourt, Paquin and Ferragne* (1956) 115 CCC 154.

[1468] *Guthridge* [2010] VSCA 132, [90].

[1469] *Gauthier* [2013] 2 SCR 403, [50].

offence."[1470] Where a crime is in preparation, an accused seeking to escape liability assumes a duty to reverse that wrong and this requires active steps to undo what has already occurred. There is a requirement for a proportionate and positive step contrary to the wrong already done, as explained by the Supreme Court of Victoria in *Jensen and Ward*:

> Although the understanding or arrangement must not have been called off before the commission of the crime, the mere fact that one or more parties to it feel qualms or wish that they had not got themselves involved or wish that it were possible to stop the criminal act or acts agreed upon, will not amount to a calling off of the understanding or arrangement once it has been made. In order to call it off so far as concerns himself, a party must communicate his withdrawal to the other parties, or at all events take some other positive step, such as informing the police. (We may here refer to *R v Lowery and King (No 2)* [1972] VR 560; *R v Ryan and Walker* [1966] VR 553, at pp 567-7; *R v Adams* [1932] VR 222; *R v Murray* [1924] VLR 374; *R v Dunn, supra: R v Kalinowski* (1930), 31 SR (NSW) 377; *R v Surridge* (1942), 42 SR (NSW) 278; *R v McDonald* (1963), 80 WN (NSW) 1716; *Davies v DPP* [1954] AC 378, esp at p 401; [1954] 1 All ER 507; *R v Anderson and Morris* [1966] 2 QB 110; [1966] 2 All ER 644; *R v Lovesey; R v Peterson* [1970] 1 QB 352; [1969] 2 All ER 1077; *R v Richards* [1974] QB 776; [1974] 3 All ER 696; *Archbold* 36th ed, paras 4124-4126; Smith and Hogan, *Criminal Law,* 1st ed, pp 68-72, 75-78, and 82-83; Howard, *Australian Criminal Law,* 1st ed, pp 221-31; and s 323 of the *Crimes Act* 1958.)[1471]

A defence of abandonment will not succeed unless the withdrawal becomes manifest in the external behaviour of the accused. In *Whitehouse*[1472] three people were at the scene of a murder. The accused struck the fatal blows and was aided by two other youths. These performed the tasks assigned to them but immediately before the attack on the victim they left the scene of the intended crime. Sloan JA described the requirement of an external manifestation of withdrawal as follows:

> I would not attempt to define too closely what must be done in criminal matters involving participation in a common unlawful purpose to break the chain of causation and responsibility. That must depend upon the circumstances of each case but it seems to me that one essential element ought to be established in a case of this kind: where practicable and reasonable there must be timely communication of the intention to abandon the common purpose from those who wish to dissociate themselves from the contemplated crime to those who desire to continue in it. What is "timely communication" must be determined by the facts of each case but where practicable and reasonable it ought to be such communication, verbal or otherwise, that will serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw.[1473]

It will be a question of fact both as to whether the accused was complicit and as to whether the steps taken in withdrawal were sufficient in countermanding involvement. In *The People (Attorney General) v Ryan*,[1474] the applicant had been part of a gang who attacked a group leaving a dance. There had been some skirmishes between the two groups earlier in the evening. Coffey fatally wounded one of the group and Ryan, who had stood by and watched, was convicted of manslaughter. On appeal Ryan claimed that he had assured two girls in the group leaving the dance that there would be no fighting and that this should have been taken as evidence of his disassociation from the enterprise. The Court of Criminal Appeal rejected this contention, holding that:

[1470] See Gans, *Modern Criminal Law of Australia* (2nd edn, Cambridge University Press 2017) 318.
[1471] [1980] VR 194.
[1472] (1940) 55 BCR 420.
[1473] This statement was adopted by the English Court of Appeal in *Becerra and Cooper* (1975) 62 Cr App R 212; see *Wheatfield* [1984] Crim LR 97; *O'Flaherty* [2002] 2 Cr App R 20, [58].
[1474] (1966) 1 Frewen 304 (CCA).

> It is difficult to envisage the fact of Ryan telling the girls that there would be no fighting being accepted as evidence of disassociation while Ryan continued by his presence in support of Coffey. Nothing short of a withdrawal of support would suffice. If Ryan had addressed himself to Coffey rather than to the girls and had evinced some effort, if only by speech, to forestall violence or disengage himself, something could be said for the case made. He endeavoured to calm one of the victims rather than the principal aggressor. He did not disarm until after the fatal blow had been struck. He remained close to Coffey throughout and he fled and was arrested in his company.[1475]

Running away from the scene before anything happens may not be enough,[1476] and nor may simply not turning up. In *Rook*,[1477] three men, including the accused, were offered £20,000 by MA if they would kill his wife. The three men met with MA the evening before the killing and agreed that the next day MA would pick up the three men and drive them to a lake to which he would later bring his wife. The accused failed to turn up the next day as arranged and the killing was carried out by the other two men. When all four men were subsequently jointly charged with the murder, the accused claimed that he had never intended the woman to be killed. His plan had been to get some money "up front" for the killing and then disappear; a scam in other words. He claimed that he had never intended to go through with the killing himself and had deliberately absented himself on the day of the killing because he had thought that if he were not there the other two would not go ahead with the crime. In directing the jury the trial judge stated that more than mere inactivity was required to sustain a defence of abandonment. The accused was convicted and unsuccessfully appealed to the Court of Appeal, which held that:

> In the present case the appellant never told the others that he was not going ahead with the crime. His absence on the day could not possibly amount to 'unequivocal communication' of his withdrawal. In his evidence-in-chief … he said that he made it quite clear to *himself* that he did not want to be there on the day. But he did not make it clear to the others. So the minimum necessary for withdrawal from the crime was not established on the facts. In these circumstances … it is unnecessary for us to consider whether communication of his withdrawal would have been enough, or whether he would have had to take steps to 'neutralise' the assistance he had already given.[1478]

What level of countermanding?

It can sometimes be difficult to decide what level of countermanding is necessary to successfully establish a defence of abandonment. In general, the more immersive the involvement, the greater must be the steps taken for the defence of abandonment to succeed. Suppose a drugs courier, who is part of a joint enterprise, air-freights a quantity of drugs on a flight from Amsterdam to Dublin. He catches an earlier flight and arrives in Dublin airport in advance of his consignment. After being stopped and questioned by customs officials he becomes apprehensive and sends a telex marked "urgent" to the airline company in Amsterdam to stop the consignment. The message arrives too late for action by the airline company and the consignment is transported to Dublin. The accused is charged with importing drugs and pleads abandonment. Will he be successful? Facts similar to these arose in *White v Ridley*.[1479] Although the case involved a defendant operating on his own, the Supreme Court of Victoria held that the accused's position was analogous to that of an accomplice who wished to abandon a criminal enterprise. Gibbs LJ stated:

> Where the accused has requested a person who is of sound and mature mind to do an act which the accused knows, but the agent does not know, is illegal, the accused will not be

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[1475] ibid, 312-13.
[1476] *Becerra and Cooper* (1976) 62 Cr App R 212.
[1477] [1993] 2 All ER 955 (CA).
[1478] ibid; *Goodspeed* (1911) 6 Cr App R 133; *Rook* [1993] 2 All ER 955.
[1479] (1978) 21 ALR 661 (SC, Vict) discussed in Brett, Waller and Williams, Criminal Law (8th edn, Butterworths1997), 495.

> liable if he has given timely countermand of his request. The countermand must have been manifested by words or conduct sufficiently clear to bring it home to the mind of the agent that the accused no longer desires the agent to do what he was previously asked to do; a vague, ambiguous or perfunctory countermand would not be enough. And the accused must have done or said whatever was reasonably possible to counteract the effect of his earlier request. The countermand will not have been timely if it was too late to stop the train of events which was started by his request.

On the facts of the case it was not clear that the countermanding of the request to air-freight the box was not timely. Stephen and Aickin JJ took the view that there is no withdrawal until the offender nullifies the effect of his prior assistance or encouragement. Murphy J analysed the case on whether the accused had done what he reasonably could have to prevent the commission of the offence that he had planned. Even on the last analysis, it was clear that the accused had not done all that he reasonably could to attempt to stop the airline from transporting the box. In particular, if he had informed the airline that the box contained drugs it would have become aware of the importance of stopping the carriage of the box. Perhaps this case is explicable on the basis that it is inherent in the defence of abandonment that same occurs by reason of an intention to withdraw from the commission of a crime, to stop it occurring, and that actions to stop the accused being caught do not fall within the test. Similarly, in *Gauthier*[1480] the accused supplied drugs to her husband with the purpose of murdering their children and each other by murder-suicide did not negative liability merely by stating to him that the plan should not proceed.

Change of mind alone insufficient

The cases establish that a mere change of intention together with quitting the scene is not enough, there must be evidence of timely communication of one's intention to abandon the common purpose amounting, where practicable, to unequivocal notice.[1481] It may be questioned whether this test puts the matter too high, at least where we are concerned with a common purpose. In particular, if a jury is instructed on the basis of this test, it could result in an accused being convicted where the jury is not satisfied beyond all reasonable doubt that the purpose was still common, the burden of proof of which must always remain on the prosecution.[1482] It would therefore seem preferable to instruct the jury as to the legal requirements of the common purpose and then leave the jury to decide whether, on the totality of the evidence, it is satisfied that the purpose was still common at the time of the offence or whether the accused had clearly resiled from any agreement or arrangement and was not a party and had done enough to undo or countermand the plan. Thus the first question is whether the accused was part of a common purpose to commit the offence in issue. If that person was, but withdraws, the second question arises as to whether the accused in fact withdrew from it and as to whether as a matter of law the steps taken, if accepted by the jury, are sufficient in law to amount to a negation of the offence in which he or she was originally complicit.

An issue of fact

The defence of withdrawal is dependent on the facts of each case: what was done, was it timely, was it at least potentially undermining of the scheme?[1483] That, in turn, hinges on how far things have gone and what the accused needs to undo:

> What will suffice in terms of withdrawal from a joint enterprise or from a situation which a defendant has counselled and procured or aided and abetted a crime will vary markedly from case to case. It will involve an assessment of what was reasonable and practical in the circumstances. The more the defendant has done by way of planning or providing information

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[1480] [2013] 2 SCR 403.
[1481] See *Whitehouse* (1940) 55 BCR 420 (BC, CA).
[1482] This idea was put forward by Mewett and Manning on Criminal Law **(**3rd edn**,** Butterworths 1994**),** 292.
[1483] *Miller v Miller* [2011] HCA 9, [104].

> or items to enable completion of the crime, the more is likely to be required of him by way of withdrawal or countermand, if he is to avoid criminal responsibility. In some cases, particularly where the participation or aiding and abetting is spontaneous, withdrawal by leaving the scene, especially when coupled with advice or other indication to those who remain of the abandonment, or with the effluxion of time, might be sufficient.[1484]

Withdrawal may be verbal in the early stages of a criminal enterprise; it may involve countermanding permission to use a vehicle or withdrawing from confederacy in a plan to commit a crime. Where more advance steps have been taken, such as supplying the poison in *Gauthier*, withdrawal may only be valid where it counteracts the help given. This could be fulfilled by reporting the proposed crime to the authorities. At the more extreme stages of a criminal enterprise a withdrawal may only be effective where the accused takes positive action to thwart the plan by, for example, attempting to protect a potential victim from a murderous attack. If the accused is to withdraw, his or her duty is to reverse whatever has been the encouragement or assistance. This, in turn, depends on the degree of assistance or encouragement so far offered. In *Eldredge v United States,*[1485] the court pithily stated that a declared intention to withdraw from a conspiracy to dynamite a building is not enough if the fuse has been set: the person wishing to withdraw must step on the fuse.

Motive

Motive is not part of criminal liability, though it is evidence as to involvement in an offence. Hence, it is irrelevant if the accused gets a seizure of conscience or merely fears getting caught.. A different view appears to have been taken in *Malcolm*.[1486] The principal and the accomplice planned to rob the victim. When the victim approached, the principal asked the accomplice to pass him an axe. The accomplice's reply was: "You get the bloody thing; I'm going; I'm going like hell." The New Zealand Court of Appeal held that the defence of withdrawal was not available because the retreat might have been due not to disapproval but to timidity or squeamishness. It may be that this is an example of the crime being so far advanced that mere withdrawal was insufficient. To escape liability at the point of imminent completion the accused would have had to yell out a warning to the victim or physically discourage his former comrade in crime. If there is a plan to rob using lethal weapons and during the course of the robbery a victim is killed, one accomplice cannot rely on the fact that he was arrested just before the actual killing as constituting a withdrawal from the plan.[1487] Even by withdrawing according to those rules, the accused may be guilty of conspiracy. If preparations have advanced to the point of being proximate to the crime, then the accused may have committed an attempt.[1488]

Exclusion

The drafting of an offence in legislation may exclude secondary participation. That is a matter of construction of the relevant legislation since common law offences admit of complicity by all who offer conscious aid to the commission of a crime or otherwise command or encourage its commission. Hence, there are examples whereby the sale of drugs is to be criminalised but not the purchase.[1489] Where legislation is passed to protect children from exploitation by pornography or to stop those under age from being induced into sexual conduct, the policy behind such legislation may compel an interpretation that even willing assistance, should that possibly arise, cannot give rise to secondary liability to that of the perpetrator.

[1484] *Sully* [2019] SASCFC 9, [75].
[1485] (1932) 62 F 2d 449.
[1486] [1951] NZLR 470 (CA).
[1487] *Commonwealth v Doris* (1926) 135 A 313.
[1488] Page [1933] VLR 351.
[1489]For an example see Peter Gillies, Criminal Law (3rd ed, Law Book Company 1993) 321.

Accessories after the Fact[1490]

In early Irish law, it was a crime to exult in the commission of an offence after the event. Probably more than being happy would have been required.[1491] In current Irish law, not just happiness but action is necessary. Section 7(2) of the Criminal Justice Act 1997 provides that where "a person has committed an arrestable offence, any other person who, knowing or believing him or her to be guilty of the offence or of some other arrestable offence, does without reasonable excuse any act with intent to impede his or her apprehension or prosecution shall be guilty of an offence." This is a lesser included offence, pursuant to s 7(3) which the accused may be found guilty of if charged with the substantive offence. The penalty under s 7(4) is up to ten years where the principal offender can get life imprisonment, up to seven years where the principal offender can get fourteen years, similarly five years where the principal can get ten and in all other cases three years.

One does not ratify an offence, and so become liable for its commission, by knowing that it happened.[1492] Participation occurs by knowing about the commission of an offence beforehand and aiding its commission by assistance or encouraging the perpetrators. A joint criminal enterprise occurs, as explained above, where A, B, C and D plan a crime, and each are assigned roles to ensure that it may take place and the perpetrator be given a chance of non-detection. Assisting a person after the commission of an offence is not sufficient. An element of hindering the course of justice is required. If an offence is a continuing offence, as is rape but not as in a single event like theft, then coming upon it and lending aid to its commission will render the accused liable on the ordinary rules of complicity. An example is *Mayberry*[1493] where complicity was found by the accused encouraging the principal offender to continue to have sexual intercourse without the victim's consent after he had penetrated her. Robbery is another example as it may take time for the victim to respond to threats and if the secondary party happens upon it and encourages the offender to continue in putting the victim in fear, liability can be established.

Section 7(2) mirrors the prior law as to accessory after the fact to felony. An accessory after the fact is one who, knowing a crime has been committed by another, receives, comforts or assists the perpetrator in order to hinder his apprehension, trial or punishment.[1494] In *Jones*[1495] the accused was convicted of being an accessory after the fact to the offence of receiving stolen goods committed by his wife. The only evidence against him was the fact that when police officers visited his house and found stolen articles there, he had made false and evasive statements to them. His conviction was successfully appealed on the basis that the trial judge had failed to make clear to the jury the nature of the active steps which must be proved to have been taken by the accused to assist the crime and in particular had failed to make it clear that there could be no conviction if the jury thought that that the accused's motive in making the statements was to avoid the possibility of himself being arrested.

Examples

Examples of successful prosecutions for post-crime participation with a view to impede the apprehension or prosecution of the principal offender include:

(i) repainting a stolen car and altering its engine number;[1496]

(ii) travelling 250 miles to warn murder suspects that they were sought by the police and offering to hide them;[1497]

[1490] See Howard, 'Misprisons, Compoundings and Compromises' [1959] Crim LR 750 and 822.
[1491] Kelly, Early Irish Law 353.
[1492] *Larkins v Police* [1987] 2 NZLR 282.
[1493] [1973] Qd R 211.
[1494] See, *The State v Nama* 1987 LRC (Crim) 328; Lamp [1968] Crim LR 33.
[1495] [1949] 1 KB 194; see also *Andrews* [1962] 3 All ER 961.
[1496] *Tevendale* [1955] VLR 95.
[1497] *Young* (1950) 98 CCC 195; *Vinette* (1974) 19 CCC (2d) 1.

(iii) buying a car to help the principal offender escape;[1498]

(iv) taking stolen articles to a fence to whom the accused introduced the principal offender;[1499]

(v) the failure by a police officer to report a crime.[1500]

Knowledge and action

Some positive action is required. A mere omission to report knowledge of the commission of a crime was never sufficient. Two possible answers are open as to what degree of knowledge is sufficient to fix the accused with liability. The first, which is consistent with the analysis of the common law by Court of Criminal Appeal as to complicity in *The People (DPP) v Egan*,[1501] is that the accused need merely know of the general category of offence perpetrated. If the accused thinks the principal offender committed theft he is not an accomplice after the fact to murder. The second theory is less attractive and is incompatible with s 7(2). It is that the prosecution must prove an accurate knowledge of the precise offence.[1502] As is the case with conspiracy, the conviction of the accused does not depend on the conviction of the principal offender but on the evidence available against the party accused.[1503] The former law is replaced by the statutory formulation.

The mental element required of the offender is that of "knowing or believing [the principal offender] to be guilty of the offence or some other arrestable offence". This imports a new element into liability since a person to whom it occurs that the fugitive has committed an offence becomes liable on assisting that person to escape being caught believing they have committed an offence. It can be any arrestable offence. So if the principal offender has murdered his wife, but seeks help from his mistress in escaping, telling her he has defrauded the Revenue Commissioners and is fleeing from them, she will on believing his story be liable under the section. The penalty depends on the gravity of the principal offender's crime and obviously as well on the degree of culpability of each participant. If the principal's crime carries life then ten years; if fourteen years then seven; if ten years then five; in any other case three years' imprisonment. In justice, it is suggested the penalty should in practice follow the facts as the prosecution proves the accused to have believed them to have been. There is a defence requiring that the accused acted "without reasonable excuse". This is left at large. It could mean some circumstance of pressure not amounting to duress. In Canada, s 23(1) of the Criminal Code defines an accessory after the fact as: "one who, knowing that a person has been a party to the offence, receives, comforts or assists that person for the purpose of enabling that person to escape".[1504] The Code provides at s 23(2) that a spouse cannot be liable as an accessory after the fact.

The development of receiving stolen goods as an independent crime betokens the general fate of liability for being an accessory after the fact. Harbouring a criminal and facilitating escape are independent wrongs, injuring the social interest in law enforcement rather than compounding the wrongs represented by the antecedent felony. As perjury is a crime independent of the crime whose prosecution might be defeated by perjurious testimony, this may also be prosecuted, though it rarely is. Covering up a crime is an independent assault on the administration of justice.

The category of "accessories after the fact" is being rapidly replaced in the United States, as well as in other jurisdictions, by specially legislated offences of obstructing justice.

Misprision of a Felony

[1498] *Hurley* [1967] VR 526.
[1499] *Dawson* [1961] VR 773.
[1500] *S v Williams* 1998 (2) SASV 191(Supreme Court of Appeal, South Africa).
[1501] [1989] IR 681.
[1502] *Tevendale* [1955] VLR 95, *Stone* [1981] VR 737.
[1503] A specific section of the Canadian Criminal Code, s 592, so provides. See *Campoui* (1993) 22 CR (4th) 348.
[1504] For a full discussion of the scope of this section see *Doung* (1998) 124 CCC (3d) 393.

The offence of misprision of a felony consisted in concealing or procuring the concealment of a felony known to have been committed. It is the duty of all citizens to disclose to the proper authorities all material facts as regards the commission of a felony of which the citizen has definite knowledge. Failure to perform this duty on reasonable opportunity is an offence.[1505] A person may take active steps to conceal a felony and this too amounts to misprision.[1506] A privilege against disclosure or self-incrimination will excuse the reporting of a felony.[1507] This offence is abolished by the Criminal Law Act 1997. However, anyone who perpetrated the offence up to the commencement date of the 1997 Act is prosecutable in perpetuity[1508] (subject to any claim of unconstitutional delay).[1509] Thus, the offence is potentially viable especially when related to old rape or buggery offences. Those interested can consult the first edition of this work. Further explanation of the offence is provided by the Supreme Court in *Sweeney v Ireland*.[1510]

Benefiting and concealing

As a result of the abolition of felonies, the common law offence of misprision of a felony has disappeared. Section 8 of the Criminal Law Act 1997 creates a new offence of concealing an arrestable offence:

> (1) Where a person has committed an arrestable offence, any other person who, knowing or believing that the offence or some other arrestable offence has been committed and that he or she has information which might be of material assistance in securing the prosecution or conviction of an offender for it, accepts or agrees to accept for not disclosing that information any consideration other than the making good of loss or injury caused by the offence, or the making of reasonable compensation for that loss or injury, shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for a term not exceeding three years.
>
> (2) No proceedings shall be instituted for an offence under this section except by or with the consent of the Director of Public Prosecutions.
>
> (3) The compounding of an offence shall not be an offence otherwise than under this section.

Elements

The elements of this offence are quite different from misprision of a felony. The accused does not need to know that an offence has been committed: a mere belief is sufficient. Secondly, one must believe that whatever one knows may assist in securing a prosecution or conviction. Thirdly, in return for not disclosing that information one must obtain a material benefit. That material benefit must be more than making good loss or injury; it requires a gain to oneself. An arrestable offence is one which carries more than five years' imprisonment.

An example of the offence under s 8 would be where a man robs a bank and returns with his accomplices and with the guns and balaclavas and a bag of money to the house of his girlfriend B. She knows or believes that A committed an offence, which she also later hears about on social media, but because of a promise from A of "a quarter of heroin" does not phone the gardaí. If, knowing of the proposed robbery beforehand, she had lent A her car to get to the scene, her liability would be derivative once the offence was committed. If, ignorant up to the time A came home, B lent the gang her car or a "clean vehicle" in which to make their escape, she would be an accessory after the fact contrary to s 7(2) of the Criminal Law Act 1997. If she bought heroin, she as well would be guilty as benefiting from an offence contrary to s 8 of that Act.

[1505] *Sykes* [1962] AC 528; [1961] 3 All ER 33.
[1506] *King* [1965] 1 All ER 1053.
[1507] *Sykes* [1962] AC 528; [1961] 3 All ER 33.
[1508] See *Quinlivan v The Governor of Portlaoise Prison* [1998] 1 IR 456.
[1509] See *The People (DPP) v CC* [2020] IESC 94.
[1510] [2019] IESC 39.

This offence is closely mirrored by Section 9 of the Offences Against the State (Amendment) Act 1998 which provides that "a person shall be guilty of an offence if he or she has information which he or she knows or believes might be of material assistance in" either "(a) preventing the commission by any other person of a serious offence, or (b) securing the apprehension, prosecution or conviction of any other person for a serious offence" and that person "fails without reasonable excuse to disclose that information as soon as it is practicable to a member of the Garda Síochána." A serious offence is the same as an arrestable offence, one carrying five years or more imprisonment.

In *Sweeney v Ireland*, the Supreme Court was faced with a High Court declaration that s 9 of the 1998 Act was unconstitutional. The court took the trouble to clearly enunciate the elements of the offence, the analysis of which is also relevant to s 8 of the 1997 Act:

> In terms of the construction of the offence on the second limb, sub-subsection (b), "securing the apprehension, prosecution or conviction of any other person for a serious offence", the prosecution must prove precise and clearly defined elements. These are: firstly, that a serious offence was committed, secondly that it was committed by a person or persons other than the accused, thirdly that the accused had information which was of material assistance to apprehending or proceeding against that person or persons, fourthly that the accused was aware that he or she had such information in the sense that they both had the information and knew or believed that it might be of assistance to the authorities, fifthly that the accused made no disclosure of that information to the authorities, and sixthly that the accused had no reasonable excuse for not so disclosing. The mental element in this offence is subjective. It is not what a reasonable person would know or believe, it is not reasonably believing that information may assist, but instead depends on the perception of the accused. Thus, a person who does not reason out that the information they have might be of material assistance is not guilty where a person who came to that realisation would infringe the section by not coming forward.[1511]

In the Dáil debates, the wording of s 8 of the 1997 Act was heavily criticised. In particular the abolition of the offence of misprision of a felony, as the legal obligation to report a crime, was questioned.[1512] Henceforth, regardless of the extent of somebody's knowledge of a crime, even if they are an eyewitness they will no longer have an obligation to report that crime under pain of prosecution. In addition, the reasonable compensation provision might be said to give a positive incentive to a victim not to report a crime in return for a pay off. Section 8 of the Act provides that the receipt of reasonable compensation from the alleged perpetrator of a crime will be a defence to the offence of concealing an offence. On the one hand, the offence of not reporting a crime is abolished, while on the other an incentive is built into the legislation to encourage victims not to report crime in return for what is termed reasonable compensation. In response to this criticism, the Minister stated that specific areas of law would be examined to see if there was a need for reporting requirements in particular cases.[1513] For example s 57 of the Criminal Justice Act 1994 obliges designated bodies, such as financial institutions, to report suspicions of money laundering to the gardaí.

Both offences under the 1997 and 1998 Acts carry the defence of reasonable excuse. The burden of proving the absence of a reasonable excuse is on the prosecution once there is evidence adduced that such an excuse might exist.[1514] This defence occurs in multiple pieces of primary and secondary

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[1511] ibid [18].
[1512] Dáil Debates, col 1233, 6 June 1996.
[1513] ibid.
[1514] [2019] IESC 39.

legislation. The analysis of the Supreme Court in *Sweeney* drew on the judgment of Hutton J in construing cognate Northern Ireland provisions in *Donnelly*.[1515] What a reasonable excuse was in these circumstances encompassed being complicit in the offence or, if the revelation of what the accused knew about the offence would expose him or her to more than more than embarrassment but to an actual prosecution, because knowledge had come in consequence of participation in a different offence:

> A person is not obliged to come forward and to state that he or she was involved in a shooting in which a suspected drug dealer was killed. To construct such a compulsion would infringe the entitlement to silence as a shield against self-incrimination. Nor is a person required to disclose that he or she supplied the gun used in the offence. In ordinary litigation of a civil or a criminal kind, in this jurisdiction judges are astute to warn witnesses who are asked a question the result of an answer to which may involve an admission that they had committed a crime that they are not obliged to answer any question which may incriminate them. A witness has a reasonable excuse in this context not only by being involved in the murder or in the supply of the gun for the murder, hence as a participant, but would also not be obliged to answer a question which would reveal that they were a drug dealer. To elucidate: they are not obliged to come forward, and would have a "reasonable excuse" if the information they supply reveals them as engaging in another crime by reason of which they were witness to the murder in issue. A telling illustration is the film Absolute Power (Eastwood, 1967) where a concealed burglar unexpectedly witnesses a murder. But, the excuse must be reasonable; it cannot as Hutton J implies, be falsely invoked. The circumstances in which a witness is entitled to refuse to answer a question on grounds that he or she fears the answer may incriminate him or her are well established. Any such circumstances would, following the approach of Hutton J, be a reasonable excuse, which, moreover, the prosecution would have to exclude beyond reasonable doubt. Section 11(1) of the Prevention of Terrorism (Temporary Provisions) Act 1976 made it an offence in Great Britain to fail without reasonable excuse to disclose information which a person knows or believes might be of material assistance in securing the apprehension, prosecution or conviction of any person for an offence involving the commission, preparation or instigation of an act of terrorism. What constituted terrorism received a statutory definition. This provision, in contrast to that under consideration on this appeal, enabled a prosecution even though the accused had gained information in consequence of being a participant in the crime; see Smith and Hogan - Criminal Law (5th edition, London, 1984) at page 799. A further contrast with the legislation at issue on this appeal particularly arises as regards the burden cast on the prosecution of proving the absence of a reasonable excuse. This provision under the 1976 Act was revived through the insertion of section 38B into the Terrorism Act 2000 by section 117 of the Anti-Terrorism Crime and Security Act 2001, and remains in force. Section 38B criminalises a failure to disclose information that would be of material assistance in the prevention of an act of terrorism, or in securing the apprehension of a perpetrator involved in the "commission, preparation or instigation of an act of terrorism."[1516]

The difficulty with misprision of a felony was that it became over complex and subject to so many judge-made exceptions that it became a dead letter. Certainly, while the legislation on obligations to report serious offences has been construed for the benefit of courts by the Supreme Court and has been saved from a declaration of unconstitutionality, while it may be a useful option to point out its provisions to potential witnesses, prosecution will be a complex undertaking.

Money Laundering

One form of participation in crime that has come to the forefront of public concern is that of aiding a criminal to conceal the proceeds of his criminal activity. Most European countries have

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[1515] [1986] NI 84.

[1516] [2019] IESC 39, [53]; further for an analysis of reasonable excuse see chapter 1.

had long-standing offences of laundering money generated by crime.[1517] This can be drug trafficking, but it applies to all criminal activity. Since, for instance, almost all breaches of the Taxes Consolidation Act 1997 are criminal offences, the scope not only embraces drug dealers and those who export or launder their money, but anyone knowing or believing that a transaction is taking place with criminal funds and chartered accountants dealing with such funds. Ireland introduced such a measure only in 1994 through s 31 of the Criminal Justice Act 1994. Elaborate precautions are required under s 32 to prevent money laundering, including checks by financial institutions. The central focus is the criminalisation of activities around handling the proceeds of crime. This applies, in the words of s 31(11) "whether the drug trafficking or other criminal activity took place in the State or elsewhere" only provided that "where the trafficking or other activity occurred outside the State it corresponded to an offence under the law of the State and amounted to an offence under the law or territory of the country or territory in which it occurred." Confiscation orders are made under s 4 of the Act.

Section 31(1) provides that a person who "for the purpose of avoiding prosecution for an offence or the making or enforcement in his case of a confiscation order" commits an offence if he or she "conceals or disguises any property which is, or in whole or in part directly or indirectly represents, his proceeds of drug trafficking or other criminal activity" or "converts or transfers that property or removes it from the State, for the purpose of avoiding prosecution for an offence or the making or enforcement in his case of a confiscation order." Under s 31(2) a person who "for the purpose of avoiding prosecution for an offence or the making or enforcement in his case of a confiscation order" is "guilty of an offence if, knowing or believing that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of drug trafficking or other criminal activity", that person "conceals or disguises that property" or "converts or transfers that property or removes it from the State, for the purpose of assisting any person to avoid prosecution for an offence or the making or enforcement of a confiscation order." Section 31(3) creates an offence akin to handling stolen property by providing that anyone is guilt of an offence who "handles any property knowing or believing that such property is, or in whole or in part directly or indirectly represents, another person's proceeds of drug trafficking or other criminal activity." Under section 31(6) that includes any person who "receives it" or "undertakes or assists in its retention, removal, disposal or realisation by or for the benefit of another person" or "arranges to do any" of those things. The mental element is set out in s 31(8) and encompasses "believing property to be, or in whole or in part directly or indirectly to represent, another person's proceeds of drug trafficking or other criminal activity includes thinking that the property was probably, or probably represented, such proceeds."

There are multiple ways of concealing or disguising property and clarity is given by section 31(4) in providing that "references to concealing or disguising any property include references to concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it."

The mental element for concealing or for handling the proceeds of crime, subsections (2) and (3), is very wide and includes activities in circumstances where it is reasonable to conclude that he or she knew or believed that nature about funds or goods or other property. This applies only to the property of others and not primary criminals under subsection (1). Hence s 31(7) provides:

> Where a person does, in relation to any property which is, or in whole or in part directly or indirectly represents, another person's proceeds of drug trafficking or any other criminal activity, any of the acts specified in subsection (2) or (3) of this section in such circumstances that it is reasonable to conclude that he knew or believed the property was,

[1517] Law Reform Commission, Report on the Confiscation of the Proceeds of Crime (R 35-1990).

> or in whole or in part directly or indirectly represented, another person's proceeds of drug trafficking or any other criminal activity, he shall be taken to have so known or believed unless the court or jury, as the case may be, is satisfied having regard to all the evidence that there is a reasonable doubt as to whether he knew or so believed.

In terms of participation, s 31(5) widens the scope of "converting, transferring or removing property" to "the provision of any advice or assistance in relation to converting, transferring or removing such property."

This legislation makes it an offence for a person who is engaged in drug trafficking or other criminal activity to conceal, disguise, convert or transfer any property which in whole or in part directly or indirectly represents his proceeds from crime. The mental element involves a purpose of avoiding prosecution or a confiscation order. Thus, every person who commits a crime from which they benefit will be inclined to commit two crimes. The accused earns £1,000 from selling heroin or as his share of a bank robbery. He knows that the Criminal Assets Bureau under the Proceeds of Crime Act 1996 and the DPP under s 4 of the Criminal Justice Act 1994 regularly follow up and seek freezing orders and forfeiture orders under the 1997 Act and confiscation orders following a conviction under the 1994 Act. Instead of putting the money in a bank account in his or her own name, he or she assumes a false identity or puts the money out of apparent reach in an account in Belfast or Vienna. Another example would be stealing bullion and melting it down with a few coins so as to disguise its chemical composition and so its traceable origin, as in the Brink's Mat case in England. Those actions make a prosecution more difficult. It is also an offence to assist such a person by concealment or disguise of the property or by transferring it outside the State if the secondary party knows or believes the property represents in whole or in part directly or indirectly, the other person's proceeds of crime. Again, this must be done in order to hinder a prosecution or to hinder the making or enforcement of a confiscation order.

Finally, it is an offence for a person who knows or believes that property is, in whole or in part directly or indirectly the proceeds of another person's crime, to handle that property. This does not require to be done "for the purpose of avoiding prosecution for an offence or the making or enforcement in his case of a confiscation order." Only primary criminals under s 31(1) and those assisting the disposal of funds or goods under s 31(2) are penalised for acting with that purpose. Handlers are liable on knowledge or belief as to the origin of goods or funds. Designated financial bodies were, for the first time, made subject to stringent requirements designed to eliminate the possibility of a blind eye being turned in certain circumstances. The reverse is the case. An open eye must be turned to banking transactions with a view to uncovering any covert criminal purpose.

Code Options

The Model Penal Code provides:

> **242**.3 A person commits an offence if, with purpose to hinder the apprehension, prosecution, conviction or punishment of another for crime, he:
>
> (1) harbours or conceals the other; or
>
> (2) provides or aids in providing a weapon, transportation, disguise or other means or avoiding apprehension or effecting escape; or
>
> (3) conceals or destroys evidence of the crime, or tampers with a witness, informant, document or other source of information, regardless of its admissibility in evidence; or
>
> (4) warns the other of impending discovery or apprehension, except that this paragraph does not apply to a warning given in connection with an effort to bring another into compliance with law, or
>
> (5) volunteers false information to a law enforcement officer.

The offence is a felony of the third degree if the conduct which the actor knows has been charged or is liable to be charged against the person aided would constitute a felony of the first or second degree. Otherwise it is a misdemeanour.

242.4 A person commits an offence if he purposely aids another to accomplish an unlawful object of a crime, as by safeguarding the proceeds thereof or converting the proceeds into negotiable funds. The offence is a felony of the third degree if the principal offence was a felony of the first or second degree. Otherwise it is a misdemeanour.

Section 206(6) of the Model Penal Code provides:

(6) Unless otherwise provided by this Code or by the law of defining the offence, a person is not an accomplice in an offence committed by another person if …

(c) he terminates his complicity prior to the commission of the offence and

(i) wholly deprives it of effectiveness in the commission of the offence, or

(ii) gives timely warning to the law enforcement authorities or otherwise makes proper efforts to prevent the commission of the offence.

The Canadian Criminal Code provides:

21(1) Everyone is a party to an offence who:

(a) actually commits it,

(b) does or omits to do anything for the purpose of aiding any person to commit it, or

(c) abets any person in committing it.

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other and any one of them, in carrying out the common purpose, commits an offence, each of them, who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

22(1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.

(2) Everyone who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.

(3) For the purpose of this Act, "counsel" includes procure, solicit or incite.

23(1) An accessory after the fact to an offence is one who, knowing that a person has been a party to the offence. receives comforts or assists that person for the purpose of enabling that person to escape.

(2) No married person whose spouse has been a party to an offence is an accessory after the fact to that offence by receiving, comforting or assisting the spouse for the purpose of enabling the spouse to escape.

23.1 For greater certainty, sections 21 to 23 apply in respect of an accused notwithstanding the fact that the person whom the accused aids or abets, counsels or procures or receives, comforts or assists cannot be convicted of the offence.

The United Kingdom Draft Criminal Code states:

29 Parties to Offences:

A person may be guilty of an offence as a principal or as an accessory.

30 Principals:

(1) A person is guilty of an offence as a principal if, with the fault required for the offence, he: (a) does the act or acts specified for the offence; or (b) does at least one such act, any other such acts being done by another.

(2) For the purposes of subsection (1), a person does an act not only when he does it himself but also when: (a) an act of another is attributed to him under section 33 [vicarious liability], (b) he does an act by an innocent agent, that is, by one whom he procures, assists or encourages to do it and who is not guilty of the offence because: (i) he is under 10 years of age; or (ii) he is suffering from mental disorder; or (iii) he does the act without the fault required for the offence; or (iv) he has a defence.

(3) A person is not guilty of an offence as a principal by reason of an act that he does by an innocent agent if: (a) the offence can be committed only by a person complying with a particular description which does not apply to him; or (b) the offence is defined in terms implying that this act must be done by the offender personally; and a person who is not guilty of an offence as a principal by virtue only of this subsection is guilty of that offence as an accessory.

31 Accessories:

(1) A person is guilty of an offence as an accessory – (a) where the offence is committed by a principal, if he procures, assists or encourages the commission of the offence and does so with the fault specified in subsection (4); or (b) if section 30(3) or section 35(1) [liability of officer of corporation] applies.

(2) In determining whether a person is guilty of an offence as an accessory it is immaterial that the principal is unaware of that person's act of procurement or assistance.

(3) For the purposes of this section, encouragement includes encouragement arising from a failure by a person to take reasonable steps to exercise any authority he has to control the relevant acts of the principal in order to prevent the commission of the offence.

(4) A person has the fault referred to in subsection (1)(a) if he – (a) intends that what he does shall, or is aware that it will or may, cause, assist or encourage the principal to do an act of the kind he does and in the circumstances specified for the offence; and (b) where a result is an element of the offence in respect of that element, at fault in the way required for liability as a principal.

(5) For the purposes of subsection (4), and subject to subsection (6), it is immaterial that the accessory does not know the particulars of the offence committed by the principal.

(6) Notwithstanding section 28(1) [transferred fault], a person who assists or encourages a principal in pursuance of an agreement between them that an offence shall be committed in relation to a particular person or thing is not guilty as an accessory to an offence intentionally committed by the principal in relation to some other person or thing.

(7) A person is not guilty of an offence as an accessory by reason of anything he does – (a) with the purpose of preventing the commission of the offence or of nullifying its effects; or (b) only because he believes that he is under a legal obligation to do it.

(8) Where the purpose of an enactment creating an offence is the protection of a class of persons no member of that class who is a victim of such an offence can be guilty of that offence as an accessory.

(9) A person who has procured, assisted or encouraged the commission of an offence is not guilty as an accessory if after his act and before the commission of the offence he took all reasonable steps to prevent it.

The Australian Criminal Code Act 1995 provides as follows:

11 (2)

(1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.

(2) For the person to be guilty:

(a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and

(b) the offence must have been committed by the other person.

(3) For the person to be guilty, the person must have intended that:

(a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or

(b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.

(4) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed the person:

(a) terminated his involvement; and

(b) took all reasonable steps to prevent the commission of the offence.

(5) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the principal offender has not been prosecuted or has not been found guilty.

Cuban Missiles: A warning on the uncertainty of war

Peter Charleton[1518]

Reflection

With the arrival of Spring in 2022, war in Europe has again broken out, millions have been displaced, thousands have been killed and the President of the United States is worried that with a false move, the use of nuclear weapons may be engaged and World War III may break out; fears that tortured President Kennedy in the Fall of 1962. Some say that history does not illuminate or, at best, the light cast is like that reflected by the ocean from the stern of a moving ship. But, if we are to know the dangers of where we are at, can we not learn from dangers past and how the horrors then in prospect passed? With war, as with crime, the stage is set for serial violation of human rights, but with war it is an industry and even at common law to kill in the heat of battle is lawful. And the war continues with no seeming end; thus pregnant with dangers.

Hence, this essay concentrates on the objective truth that can be gleaned from situations of conflict after the passage of decades; on how close the world then came to catastrophe; and takes as its theme the terrible duality in human nature whereby without sense unravelling the senseless and prevailing over deceitful and egotistical urges, the hands that write these words and the eyes that read them might not exist. Historical essays fit within a law journal because law is there to protect against crisis; but in matters of geo-political advancement it may quickly be side-lined as may the institutions of the United Nations and World Court. Besides, law is a study of human behaviour and its amelioration: hence, this discussion involves its subjects as much as the judgment of any court.

An ongoing threat

Since the invention and first use of nuclear weapons in 1945, humanity has lived under swords of Damocles suspended over the continuation of civilization by, first of all, one, then two and now multiple powers disposing of this apocalyptic threat.[1519] Any of them may seek, according to the principle enunciated by von Clausewitz, to pursue politics through war. Hence, in Ukraine in Spring 2022 political demands are now being furthered through horrendous destruction. Violently opposite views of the right and wrong of how two nations should conduct themselves are to be settled through the menace of humanity's destructive instinct. Having started down that path, they might heed the German philosopher's warning as to the incalculable influences of emotion, chance and disappointed pride which quickly make the calculation of outcome obsolete.[1520] Hence, where the current European conflict will go has morphed from what was once a matter of strategy by the initiators into speculation as to the outcome. Once started, the course of war becomes uncertain where conventional weapons are used,[1521] but where nuclear weapons are brought into play, the effect of outcomes will destroy not only the combatants and their innocent populations but potentially the entire world. Even for a small neutral country like Ireland, no declaration of non-combatant status can insulate against the generational catastrophe that a clash of nuclear arms will entail. It is the purpose of this article to consider in the light of the principle of the uncertainty of war how events of sixty years ago in Cuba could have proven in the most devastating way how the varying factors of personality, morality, prestige and conflict of ideology could then have

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1519 Guardian newspaper, 'Putin signals escalation as he puts Russia's nuclear force on high alert', 28 February 2022.

1520 Carl von Clausewitz, Vom Kreige (1832), On War (2008, translation by Beatrice Heuser) passim.

1521 Tolstoy's example was of Prince Andrei seizing the standard at the battle of Austerlitz and charging forward; War and Peace, Part III xvi.

destroyed much of the world and, it follows, given the wrong conditions, how that threat arising from the human personality continues.

More obviously than in the 21st century, once Soviet Russia and the United States of America had espoused and pursued the evangelisation of opposing ideologies, the world lived in fear. That threat of nuclear war loomed so large in 1962 that Ireland began to make preparations for potential fallout, taking what limited steps were available to the State to minimise panic among the population.[1522] Every house was issued with a booklet telling the population what to do in the event of war, including pre-storing water by filling up the bathtub, stockpiling canned foods and taking the hinges off doors to use as makeshift shelters.[1523] Of course, these measures were largely symbolic, though a token of the level of fear. With Soviet missiles being put in place in Cuba,[1524] that fear had crystallised into a real danger. Those were a mere 90 kilometres from the US border,[1525] with major cities well within reach of the USSR's medium-range ballistic missiles.[1526] This was not mere emotion as the United States had approximately 75 nuclear-capable B-52s in the air during the brief period during which a DefCon 2 security stance was established by Kennedy.[1527] The world did, in fact, come close to nuclear warfare, and there were multiple instances that, given other circumstances, or other leaders, or other perhaps chance factors, could have been escalated to all-out war between the Soviet Union and the United States. These small factors – a decision to postpone responding with military retribution to a downed US pilot, the coincidental knowledge of Cyrillic Morse code by a US naval officer, fighter jets running out of fuel – all led to the eventual de-escalation of the conflict, but starkly demonstrate the precarious nature of even threatened war where parties are separated by an iron curtain, or today, by the conflict of world-views which that barrier symbolises.

Our world mid-20th century

The world was then split in two and both sides were armed with nuclear weapons. They faced up to each other, afraid to fight save in proxy wars, but determined to spread their ideologies. In the Soviet Union, Nikita Sergeyevich Khrushchev had succeeded Stalin, the man who had occupied central Europe, supposedly to protect Russia from another surprise German or French attack. But Khrushchev did not have the almost absolute executive power of the President of the United States; he was merely the presiding member of the Soviet Presidium, with one vote. In Korea, Laos, Vietnam, Angola, and South America revolutionary movements were aided by both sides of the Cold War conflict, proffering advice and often weapons and 'advisory' military personnel.[1528] Civil wars, or the severing of nations, North and South Korea, North and South Vietnam, East and West Germany, were the result of these proxy confrontations.

But the superpowers never directly clashed. Explicitly, the terms of NATO membership for West Germany decreed that an attack on Berlin, deep in the heart of East Germany, was an attack on the

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[1522] Public fear of nuclear weapons and nuclear technology has always been extremely high, particularly in relation to fear of fallout; Toni Perrine 'The Godzilla Factor: Nuclear Testing and Fear of Fallout' (1997) 16(1) Grand Valley Review 19.

[1523] The Civil Defence Services first issued a booklet to its own members in March 1962, entitled Methods of Protection, and then a shortened version of it was sent to every household in Ireland the next year after the crisis of October 1962.

[1524] There were 158 Soviet nuclear warheads in place in Cuba by the time the United States imposed the military blockade on 24 October 1962, see Robert Norris and Hans Kristensen, 'The Cuban Missile Crisis: a Nuclear Order of Battle, October and November 1962' (2012) 68(6) Bulletin of the Atomic Scientists 85.

[1525] Thomas C Reeves, *A Question of Character* (London, 1991) 253.

[1526] Soviet MRBMs transported to Cuba were primarily R-14s and R-12s, the latter of which had an operational range of 2,080 kilometres, with the former capable of striking targets up to 3,700 kilometres away, see Serhii Plohky, *Nuclear Folly* (London, 2021) 75.

[1527] Stephanie Ritter, 'SAC During the 13 Days of the Cuban Missile Crisis' (2012) Air Force Global Strike Command AFSTRAT-AIR.

[1528] This was primarily based on the movements' ideological siding with either capitalism or communism; see Richard Saull, 'Locating the Global South in the Theorisation of the Cold War: Capitalist Development, Social Revolution and Geopolitical Conflict' (2005) 26(2) Third World Quarterly 257.

USA and all NATO members.[1529] While European countries lived under the threat of a potential invasion from Soviet forces, the distances between the Americas and the Soviet Union felt too distant for a genuine threat of war to arise. As President of the United States, John Kennedy was determined to keep it that way.[1530] While he had ultimate authority, unlike Khrushchev, he was also a prisoner of history; inheriting the Monroe doctrine,[1531] that, like the Soviets in central Europe, the US would have the entire of the American continent, north and south, within its sphere of influence. Many of the countries of central and south America had corrupt capitalist governments; pro-US investment[1532] but with no interest in developing their economies for their people for fear of undermining their rotten house. Fulgencio Batista's Cuba was an exemplar of these regimes.[1533]

A provocative miscalculation

US hegemony in the western hemisphere was not threatened until 1959, when Fidel and Raul Castro led a non-aligned revolutionary movement that ousted the Batista regime. The government of Fidel Castro was welcomed at first by the Americans, but this waned as the regime moved leftwards into the arms of the Soviets, to "widespread surprise".[1534] It is unclear whether the United States actively lost influence over the new government, or if Castro instead elected for his own path, tying his fate to that of the Soviets.[1535] Regardless, it was clear that Kennedy, spurred on by his personal widely-known dislike of communism,[1536] was growing concerned with the rising influence of the Soviet Union over Cuba. One of the CIA plans to oust the Castro regime centred on Cuban exiles in the United States invading the island and leading a subsequent revolution. This, of course, never materialised, and different measures were undertaken to secure the Soviet stronghold closest to the United States mainland.

In April 1961, Kennedy allowed the Bay of Pigs operation to go ahead, with troops invading from Guatemala and Nicaragua. The initial invasion was a total failure, with Castro's forces "killing or capturing almost the entire brigade".[1537] When given the opportunity to launch an attack by the Air Force to support the ground troops, thereby escalating the conflict, he refused to do so. Instead, air support was limited to six unmarked planes with orders to not fire on Cuban defensive forces.[1538] The attempted invasion was a total failure, supporting Khrushchev's belief that Kennedy was a much less formidable leader than supposed,[1539] and causing the United States significant embarrassment on the world stage. Perhaps even more significantly, however, the Cuban administration became deeply concerned with domestic security,[1540] and saw in the Soviet army a protection against the encroachment of the United States.

1529 Article 5, The North Atlantic Treaty (1949).
1530 Even as close to the crisis as 29 August 1962, Kennedy told the press that he was against invading Cuba due to the "serious consequences" such a step would have for many people; Thomas C Reeves, *A Question of Character* (London, 1991) 366.
1531 See Mark T Gilderhus, 'The Monroe Doctrine: Meanings and Implications' (2006) 36(1) Presidential Studies Quarterly 5.
1532 Anne-Marie Angelo and Tom Adam Davies, 'American business can assist [African] Hands:" the Kennedy administration, US Corporations, and the cold war struggle for Africa' (2015) The Sixties: A Journal of History, Politics and Culture 1.
1533 Mafia leaders were in fact recruited by the United States to assassinate Castro in 1961, in part for the promise of "restoring the extremely lucrative gambling, drug, and prostitution operations they had enjoyed under Batista"; Thomas C Reeves, *A Question of Character* (London, 1991) 257.
1534 V A Borodaev, 'Position of Cuban Leadership During the Cuban Crisis' (2013) International Affairs and World Politics 14.
1535 For an insider's viewpoint see Arthur Schlesinger, *A Thousand Days: John F Kennedy in the White House* (London, 1963) 198-204.
1536 Thomas C Reeves, *A Question of Character* (London, 1991) 253.
1537 Lucien S Vandenbroucke, 'The 'Confessions' of Allen Dulles: New Evidence on the Bays of Pigs" (1984) 8(4) Diplomatic History 365.
1538 Timothy Fursenko and Alexsandr Naftali*, One Hell of a Gamble: Khrushchev, Castro and the Cuban Missiles Crisis 1958-1964* (London, 1997) 96.
1539 The KGB was so convinced that Kennedy's opponent in the 1960 election, Richard Nixon, would be a more effective adversary that KGB aides actively met with the Kennedy team in an attempt to held their campaign; Serhii Plokhy, *Nuclear Folly* (London, 2021) 20.
1540 Fear of a US invasion was the primary reason that Cuba was receptive to the presence of nuclear missiles on its territory; Jim Rasenberger *The Brilliant Disaster: JFK, Castro and America's Doomed Invasion of Cuba's Bay of Pigs* (New York, 2012) 364.

Consequently, Khrushchev began to fixate on the Cuban issue, seeing it as a necessary stronghold in the western hemisphere and going so far as to "identify his leadership of the communist world and the prestige of the Soviet Union with the health of Cuba and Castro."[1541] On an official visit to Bulgaria, the Soviet leader recalled that "one thought kept hammering away at my brain: 'what if we lose Cuba?'"[1542] Nuclear weapons were undoubtedly the ultimate, if not fatal, safeguard against another US plan, and the establishment of the Soviet army in Cuba would secure the revolution and rebalance the global scales in favour of the Soviets. As Khrushchev himself put it, referring to the placement of nuclear warheads so near American territory: "why not fling a hedgehog at Uncle Sam's pants."[1543] This was further seen as a method of matching the immediate threat of nuclear war created by US missiles on the Soviet border with Turkey and Italy, which granted the United States first-strike capability in the event that war did break out.[1544] Seventeen missiles had been discovered by the Soviet secret service on the Turkish border that year, in a nearly operational state, thereby raising the time constraints on Khrushchev to tilt the balance of terror in the direction of the USSR.[1545]

Technology Gap

A further concern for both sides of this conflict was the technology gap between the two powers, particularly in relation to their nuclear warhead delivery systems. A significant point of Kennedy's presidential campaign was what he claimed was the significantly greater nuclear arsenal of the USSR in relation to the United States, but this was entirely unfounded. In fact, by 1962, it was estimated that "Washington's nuclear superiority was on a ratio of about 16 to 1".[1546] The United States had also at this stage developed the 'Minuteman' missile, a new inter-continental ballistic missile that supposedly required only a minute to prepare for launch, as opposed to the number of hours that were required for older missiles in the Soviet arsenal.[1547] Similarly, the Polaris missile, an intermediate range missile capable of being launched from a submarine, was beyond the technical capabilities of the Soviets at this time.[1548]

The Soviet nuclear arsenal was more than enough to destroy any continent within its range, but the United States was well beyond this ballistic scope from occupied Europe, or from Kamchatka.[1549] By placing missiles in Cuba, the Soviet army would be capable of striking not only major European cities within an hour's notice, but also Washington, New York and Chicago. By installing the number of missiles sent to Cuba in 1962, the Soviets enabled missiles that could reach the US mainland.[1550] Estimates of a loss in the event of a nuclear strike were of one third of the American population, mirroring the losses from the Civil War, from which, Kennedy remarked, the country had yet to recover.[1551]

[1541] Timothy Fursenko and Alexsandr Naftali*, One Hell of a Gamble: Khrushchev, Castro and the Cuban Missiles Crisis 1958-1964* (London, 1997) 73.
[1542] Quoted in Serhii Plokhy, *Nuclear Folly* (London, 2021) 49.
[1543] Timothy Fursenko and Alexsandr Naftali*, One Hell of a Gamble: Khrushchev, Castro and the Cuban Missiles Crisis 1958-1964* (London, 1997) 171.
[1544] Arthur M Schlesinger Jr, *A Thousand Days* (Boston, 1965) 690.
[1545] The Jupiter missiles that the United States had stationed in Turkey were in fact not only the key concern of Khrushchev in establishing a similarly powerful arsenal near the US border, but were also viewed as potential causes of a future attack, more likely to draw an attack, rather than deter one; Barton J Bernstein, 'The Cuban Missile Crisis: Trading the Jupiters in Turkey?' (1980) 95 Political Science Quarterly 99.
[1546] Thomas Reeves, *A Question of Character* (London, 1991) 365.
[1547] Serhii Plokhy, *Nuclear Folly* (London, 2021) 50.
[1548] Ernest May and Philip Zelikow, *The Kennedy Tapes: Inside the White House During the Cuban Missile Crisis* (Cambridge, 1997) 14.
[1549] Serhii Plokhy *Nuclear Folly* (London, 2021) 136.
[1550] Raymond Garthoff, *Reflections on the Cuban Missile Crisis* (Washington DC, 1989) 208, table 1.
[1551] Serhii Plokhy *Nuclear Folly* (London, 2021) 29.

Tilting the strategic balance

The installation of missiles in Cuba altered the strategic balance of weapons of mass destruction, then overwhelmingly in the United States' favour, by tipping it towards the Soviet Union.[1552] In lieu of the ability to keep up with the research speed of the United States nuclear programme, with former space programme founder Sergei Pavlovich Korolev's R-7A rockets requiring 20 hours for fuelling and remaining largely unreliable,[1553] Khrushchev sought to establish short- and medium-range missiles closer to the United States, thereby eliminating any advantage held by Washington.

However, a key difficulty arose in transporting such enormous weaponry to an island off the coast of Florida. The plan, codenamed Operation Anadyr, envisioned sending 50,874 military personnel to Cuba,[1554] all transported by ships with missiles and nuclear warheads on board. But these details were not addressed in the initial proposal – what mattered to Khrushchev and the Soviet Presidium was the overarching objective, rather than the vital minutiae of its implementation.[1555] Schlesinger comments:

> It was a staggering project – staggering in its recklessness, staggering in its misconception of the American response, staggering in its retention of the ground rules for co-existence among the superpowers which Kennedy had offered in Vienna.[1556]

General Issa Pliev was appointed commander of the Soviet task force in Cuba, which had been sent ahead to determine places for potential missile silos and launch sites, very preferably covered to ensure that they would not be seen by American U2 spy planes. When pressed on the results of the survey, the task force stated that it would be impossible to secretly deploy rockets on the island due to the lack of natural shelter by way of forest, adding that "there's no place to hide a chicken, let alone a rocket."[1557] Still, the Soviets were undeterred, and proceeded to send Soviet merchant ships "stuffed with soldiers and military equipment."[1558] A huge degree of secrecy was enforced, and the measures implemented to ensure secret transport, including covering portholes between decks with canvas blinds, led to temperatures for personnel onboard reaching 50 °C.[1559] KGB officers were also placed on board the ships to prevent defectors, and to ensure that secrets were not given up on ships such as the *Omsk* and the *Nikolai Burdenko*.[1560]

But the increased traffic to Cuba, along with the inevitable construction required to make sites appropriate for launching missiles, meant that the American secret service quickly noticed the missile build up, without being certain as to their exact nature. Domestic political pressures forced the US to investigate these findings further,[1561] but only defensive weapons were reported as detected in August 1962. These included surface to air missiles for shooting down invading warplanes, which were tolerable: just about. But putting the United States under threat of attack was a different matter.[1562] In September, President Kennedy told the press that if Cuba should ever become "an offensive military

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[1552] Donald M Kagan, *On the Origins of War and the Preservation of Peace* (London, 1995) chapter 5 and see p. 510.
[1553] Serhii Plokhy, *Nuclear Folly* (London, 2021) 51.
[1554] Timothy Fursenko and Alexsandr Naftali, *One Hell of a Gamble: Khrushchev, Castro and the Cuban Missiles Crisis 1958-1964* (London, 1997)188.
[1555] *Ibid* 180.
[1556] Arthur M Schlesinger Jr, *A Thousand Days* (Boston, 1965) 681.
[1557] Serhii Plokhy, *Nuclear Folly* (London, 2021) 72.
[1558] Timothy Fursenko and Alexsandr Naftali, *One Hell of a Gamble: Khrushchev, Castro and the Cuban Missiles Crisis 1958-1964* (London, 1997) 193.
[1559] Serhii Plokhy, *Nuclear Folly* (London, 2021) 90.
[1560] *Ibid* 92.
[1561] During a campaign trip in Indiana, Kennedy was forced to address criticism from Senator Homer E Capehart as to his failure to launch a full-scale invasion of Cuba; Thomas C Reeves, *A Question of Character* (London, 1991) 369.
[1562] John McCone, CIA Director, quickly determined that the surface to air missiles were in place to protect long-range missile installations; *Ibid* 366.

base of significant capacity for the Soviet Union" that he would order "whatever must be done" to protect the security of the United States and that of its allies.[1563]

At the time he spoke, unknown to him, his ideological adversary was well advanced in preparing bases in Cuba for the launch of Soviet intermediate-range and medium-range ballistic missiles. Ultimately, in mid-October 1962, the President of the United States learned, through U2 photographic reconnaissance flights, that missile bases were being constructed under Soviet control in Cuba.[1564] It was impossible to characterise these weapons as defensive. Ground to air missiles would defend Cuba, but ballistic missiles were designed to travel and deliver nuclear bombs at a 1,000 mile distance. In response, Kennedy favoured immediate bombing, unaware that nuclear warheads had already been installed.

Fears in Washington centred on the response of the Soviets to any destruction of missiles in Cuba. In particular, concerns were raised regarding the prospect of an invasion of West Berlin, seen by Khrushchev as "a rotten tooth which must be pulled out".[1565] Such a decision would start a war against NATO, per Article 5 of the Treaty, thereby constituting an attack on the United States and requiring retaliation on a much greater scale.[1566]

American discovery

Whatever the consequences, Kennedy, facing pressure domestically and from NATO allies, could not allow the situation to continue. In his radio and television address,[1567] breaking the news of the crisis on Monday 22nd of October, the President made it clear that the missiles must be removed.[1568] There was some resistance to a confrontational response,[1569] given the stakes of nuclear war, with some considering this to be too similar an act to the placement of nuclear missile in Turkey to warrant escalation. However, within the President's *ad hoc* committee of advisors, 'ExComm', consisting of a number of "hard-liners who were determined not to give an inch to Khrushchev or Castro",[1570] it is possible that Kennedy was seen by some as not taking sufficient steps to respond to the perceived Soviet aggression.

The preferred option of the leaders of the Joint Chiefs of Staff was to initiate a surprise strike against the missile bases before they became operational, as they believed then, coupled with a blockade to prevent further offensive weapons being delivered.[1571] Most military leaders were also in favour of a full scale invasion, taking control of the entire island and ousting the Castro regime.[1572] This was viewed as the last moment at which such an invasion could take place, as with the missiles in place, and upon becoming operational, this would effectively deter any such invasion and secure the Cuban

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[1563] Ernest May and Philip Zelikow, *The Kennedy Tapes: Inside the White House During the Cuban Missile Crisis* (Cambridge, 1997) 37.

[1564] Serhii Plokhy, *Nuclear Folly* (London, 2021) 131.

[1565] Ernest May and Philip Zelikow, *The Kennedy Tapes: Inside the White House During the Cuban Missile Crisis* (Cambridge, 1997) 168 and see also 285. For Khrushchev's attitude, see Arthur M Schlesinger Jr, *A Thousand Days* (Boston, 1965) 337.

[1566] Kennedy acknowledged that any such invasion would leave only one option open to the United States – the launch of nuclear weapons; Serhii Plokhy, *Nuclear Folly* (London, 2021) 152.

[1567] John F Kennedy, Oval Office Address on the Cuban Missile Crisis, 22 October 1962 <https://www.youtube.com/watch?v=vrPkIYb9iog>. Last accessed on 2 March 2022.

[1568] The text of the address, and of the Kennedy-Khrushchev communications, is in Laurence Chang and Peter Kornbluh, *The Cuban Missile Crisis, 1962: A National Security Archive Documents Reader* (New York, 1992) 1151-1154. See Ernest May and Philip Zelikow, *The Kennedy Tapes: Inside the White House During the Cuban Missile Crisis* (Cambridge, 1997) 275-282.

[1569] The Guardian and a group of intellectuals headed by Bertrand Russell attacked the quarantine as an escalation and considered that the Soviet action merely demonstrated the threat the Russians were under from NATO missiles; Arthur M Schlesinger Jr, *A Thousand Days* (Boston, 1965) 698-699.

[1570] Thomas Reeves, *A Question of Character* (London, 1991) 370.

[1571] Serhii Plokhy, *Nuclear Folly* (London, 2021) 174.

[1572] Andrei Kokoshkin, 'Reflections on the Cuban Missile Crisis in the Context of Strategic Stability' (2012) 16.

communist regime. Ultimately, this proved correct, with the Castro regime remaining in place long after many other Soviet-allied regimes collapsed.

The total destructive power involved on both sides of the crisis should not be underestimated. On a visit to Washington in 1962, a British delegation told the White House that it would take less than a dozen nuclear bombs to completely destroy the island.[1573] Significantly greater amounts of warheads were present in Cuba, and in the arsenal of the United States. There was a total of 99 nuclear bombs in Cuba during the crisis, including 45 1-megaton warheads; 12 2-kiloton warheads; 6 12-kiloton bombs for delivery by aircraft; and 36 12-kiloton warheads for cruise missiles, or the equivalent of 45,500 kilotons of TNT. Another calculation is that individual bombs equalled 333 kilotons; while the bombs used on Hiroshima and Nagasaki were each 'only' 14 kilotons.[1574]

The blockade: two letters

On Monday, 22 October Kennedy instituted a blockade of naval traffic in and out of Cuba, a move ratified by the Organisation of American States.[1575] The following Wednesday, Soviet ships approaching Cuba stopped or turned back. This was viewed in Washington as the Soviets 'blinking', losing the game of nuclear brinkmanship[1576] that had been taking place throughout October 1962. This was a crossroads point for the crisis, with Senator Richard Russell highlighting that the US response would determine whether the nation would continue to be viewed as a first-class power.[1577] The following day, the captain of the dry cargo ship *Mednogorsk*, at the time carrying weaponry to Cuba, received orders to turn back towards its home port,[1578] with other Soviet ships similarly turning back over the course of the week.

At 6pm on the subsequent Friday, an emotional letter arrived from Khrushchev, offering to withdraw missiles from Cuba in return for a guarantee that the United States would respect the communist regime's sovereignty.[1579] Indicating a clear victory for the Kennedy administration in this conflict, concerns remained as the offer was "too vague to constitute the basis for a settlement."[1580] In addition, further action would be required in order to remove a pro-Soviet regime so close to the American border in future if these demands were met, though this would undoubtedly be an easier prospect in the absence of nuclear missiles in there. Despite its apparent signalling of American victory, the Joint Chiefs of Staff nonetheless continued to recommend an air strike against the missile sites,[1581] notwithstanding the fact that this would have killed hundreds of Soviet soldiers.

Just 12 hours later, a more structured letter arrived from Moscow,[1582] this time with a much less appealing offer, involving the withdrawal of offensive weapons from Cuba in return for the removal of US missiles from Turkey. Rather than further negotiate with Khrushchev as to the terms of the second agreement, Kennedy chose simply to ignore the second letter, and accept the first one.[1583]

1573 Arthur M Schlesinger Jr, *A Thousand Days* (Boston, 1965) 195.
1574 The calculations are made on the basis of information in Ernest May and Philip Zelikow, *The Kennedy Tapes: Inside the White House During the Cuban Missile Crisis* (Cambridge, 1997) 217 and see 242, 243, 247, 285, 286, 299 and 315.
1575 Robert Kennedy, *13 Days: The Cuban Missiles Crisis* (London, 1969) gives the relevant details and documents and see also Robert Dallek, *An Unfinished Life: John F Kennedy 1917-1963* (London, 2013) chapter 16.
1576 Robert Powell, 'Nuclear Brinkmanship with Two-Sided Incomplete Information' (1988) 82(1) American Political Science Review 155.
1577 Ernest May and Philip Zelikow, *The Kennedy Tapes: Inside the White House During the Cuban Missile Crisis* (Cambridge, 1997) 258.
1578 Serhii Plokhy, *Nuclear Folly* (London, 2021) 179.
1579 Laurence Chang and Peter Kornbluh, *The Cuban Missile Crisis, 1962: A National Security Archive Documents Reader* (New York, 1992) 185.
1580 Ernest May and Philip Zelikow, *The Kennedy Tapes: Inside the White House During the Cuban Missile Crisis* (Cambridge, 1997) 271.
1581 Dan Martins, 'The Cuban Missile Crisis and the Joint Chiefs' (2018) 71(4) Naval College War Review 101.
1582 Laurence Chang and Peter Kornbluh, *The Cuban Missile Crisis, 1962: A National Security Archive Documents Reader* (New York, 1992) from page 197.
1583 For discussion surrounding the inconsistency between the two letters, see Ernest May and Philip Zelikow, *The Kennedy Tapes: Inside the White House During the Cuban Missile Crisis* (Cambridge, 1997) 509.

Surprisingly, this strategy was successful, and put the wheels in motion for the eventual removal of Soviet missiles from Cuba and the oversight of this process by the United States.

This worked primarily because both leaders were terrified of nuclear war, and the devastating loss that would be caused by such a conflict. Khrushchev's decision to remove the missiles from Cuba may not have caused a great deal of benefit to the Soviet Union, the risks of defying the United States and accepting the potential of an outright conflict between the superpowers made this course of action a "value-maximising choice".[1584] Negotiations in this light were significantly higher staked than those held during prior conflicts, and so neither side was willing to push the other beyond what they saw as a breaking point. If there was resolve to resort to nuclear weapons, it did not come from the leadership. Khrushchev sold the offer to the Presidium as a victory: Cuba was safe from American invasion and so the need for nuclear missiles had dissipated. And, in fact, in many ways it could be argued to have been a success, with the eventual removal of Jupiter missiles from Turkey in 1963. While the US State Department "denied any kind of 'deal' over the missiles,"[1585] the effect of the crisis was these particular missiles were taken from striking range of the Soviet Union; though later replaced with Polaris submarines in the Mediterranean. The world returned to relative peace, but there were key encounters over the coming days that brought the world even closer to the precipice of nuclear war.

The threat of nuclear destruction, however, was too great for either side to bear, and the Soviet establishment was aware that any fallout would have destroyed both the nation and its ideology. But they did engage in some degree of brinkmanship, even after the blockade was imposed, and conflict seemed all but inevitable. While a number of ships did indeed turn around, as seen by the American intelligence, the largest ship, the *Aleksandrovsk*, was raced towards Cuba, accompanied by four diesel-powered Soviet submarines armed with nuclear missiles.[1586] In spite of what the Americans had assumed, Khrushchev's second letter was not sent after his moderate position was silenced by the Presidium,[1587] but rather the Soviet leader had changed his mind, determining that the United States was in a weak position for further negotiations. [1588]

Three cliff-edges

As negotiations were ongoing, both private and public, between the two nations, three incidents took place over the course of the crisis that could have sparked nuclear war, wholly independently of the wills of the leaders. Thus, the course of war became, as von Clausewitz predicted, uncertain.

A status of DefCon 2 had been declared by Kennedy,[1589] requiring nuclear weapons to be affixed to fighter jets proximate to Russian territories as B52 bombers circled towards the Iron Curtain before pulling back over the Aegean Sea. This alone was exceedingly dangerous, as the potential for an erroneous flight into enemy territory was always high, with Khrushchev himself remarking that an "American airplane committing the violation might very well be taken for a nuclear-armed bomber, and that might prompt us to take a fateful step."[1590]

[1584] Mark L Haas, 'Prospect Theory and the Cuban Missile Crisis' (2001) 45 International Studies Quarterly 247.
[1585] Mustafa Aydin, 'Determinants of Turkish Foreign Policy: Changing Patterns and Conjunctures during the Cold War' (2000) 36(1) Middle Eastern Studies 122.
[1586] Serhii Plokhy *Nuclear Folly* (London, 2021) 169.
[1587] The prevailing thought was that there had either been a coup in Moscow leading to the sending of the second letter, or that he had simply been swayed by the Kremlin's 'hawks'; VI Esin, 'Caribbean Crisis of 1962: Open Questions and the More Significant Lessons' (2013) International Relations and International Politics 11.
[1588] Timothy Fursenko and Alexsandr Naftali*, One Hell of a Gamble: Khrushchev, Castro and the Cuban Missiles Crisis 1958-1964* (London, 1997) 273-277.
[1589] Graham Allison, 'The Cuban Missile Crisis at 50: Lessons for US Foreign Policy Today' (2012) 91(4) Foreign Affairs 14.
[1590] Serhii Plokhy, *Nuclear Folly* (London, 2021) 284.

Such an error did in fact almost occur, as a miscalculation of location by a U2 spy plane put the world minutes away from Soviet fighter jets being destroyed by air-to-air US nuclear rockets. U2 planes were, at the time before the use of satellites, the pinnacle of surveillance technology,[1591] capable of flying higher and faster than any jet on earth,[1592] but not immune to ground-to-air rockets. These planes were particularly useful in determining when nuclear weapons were being tested, as western monitoring stations would only note the radioactive fallout consequent on air movements over thousands of miles prior to the introduction of the U2.[1593] In an attempt to more effectively monitor the other side, the United States sent U2 planes to the borders of the Soviet Union as part of Project Star Dust,[1594] collecting air samples to later test for signs that nuclear tests had been undertaken, all within a seven hour flight from the United States. These flights were significantly safer than those used for aerial photography, as, unlike photographic missions, there was no requirement for the violation of Soviet airspace. This meant that these spy planes were able to chart a course from Alaska towards the North Pole and skirt the fringes of Siberia in collecting their samples. But this brought with it another issue. Close to the magnetic North, electronic navigation instruments became useless, leaving pilots relying on a sextant, an 18th century navigational tool, to ascertain location by reference to the stars. Where pilots were already so close to Russia's borders, at risk of starting an international incident, such primitive tools made flights highly dangerous and, in the case of Charles Maultsby, one pilot that undertook such a flight on 27 October 1962, further complicated by the appearance of the northern lights, making the stars virtually invisible in the night sky.[1595] At 07.59 Alaskan time, Maultsby breached Soviet airspace and began to receive radio communications from an unknown source directing him deeper into Soviet territory.[1596] He had begun to drift over Kamchatka and two Soviet jets were dispatched to potentially engage the intruder. Monitoring this alarming development, his Alaskan airbase sent fighter jets to prevent his interception.[1597] Because of the DefCon 2 emergency status, the jets sent from the United States were armed with tactical nuclear weapons that would have been used had the U2 not managed to conserve fuel by gliding back to US airspace, with the Soviet MiG jets opting to not pursue, having swiftly burned up all their fuel in pursuit of the much faster spy plane.[1598] Maultsby's bad luck in flying during a northern lights display had almost caused an international incident, and potentially the first use of nuclear weapons in combat since 1945, but both side's limited fuel capacities allowed for the world to step back from the brink.

The Cuban blockade also proved dangerous for escalation of the conflict, with ExComm meeting transcripts showing a clear recognition by Kennedy, a former Navy officer in World War II, of the potential for disaster in intercepting the Soviet ships.[1599] This was particularly significant in relation to the Soviet submarines surrounding the island, which could not be communicated with by a surface vessel without knowledge of a specific Soviet radio channel. Shrewdly, the President wished to leave Soviet submarines out of the quarantine zone, but was persuaded by Navy leadership that Soviet vessels would merely be encouraged to distance themselves from Cuba.[1600] But consenting to this

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[1591] For examples of the aerial photography captured by this spy plane, see Emily Hammer and Jason Ur, 'Near Eastern Landscapes and Declassified U2 Aerial Imagery' (2019) 7(2) Advances in Archaeological Practice 107.
[1592] Other aircraft faced the difficulty of fuel boiling off and evaporating at the altitudes flown at by the U2, Gregory W Pedlow and Donald E Walzenbach, *The CIA and the U-2 Program 1956-1974* 61.
[1593] Nuclear testing at this time was particularly rampant on both sides of the Cold War conflict, with each nuclear program's "driving imperative" being the other's success; Vitaly I Khalturin et al, 'A Review of Nuclear Testing by the Soviet Union at Novaya Zemlya' (2005) 13(1-2) Science and Global Security 29.
[1594] James P Friend and Herbert W Feely, Project Star Dust (1962) Isotopes Inc Westwood NJ.
[1595] Serhii Plokhy, *Nuclear Folly* (London, 2021) 226.
[1596] Patricia Lewis et al, 'Too Close for Comfort' (2014) 9.
[1597] Serhii Plokhy, *Nuclear Folly* (London, 2021) 228.
[1598] *Ibid* 228.
[1599] Ernest May and Philip Zelikow, *The Kennedy Tapes: Inside the White House During the Cuban Missile Crisis* (Cambridge, 1997) 353.
[1600] Serhii Plokhy, *Nuclear Folly* (London, 2021) 266.

interception was a particularly dangerous decision, as the military in fact planned to use charges underwater to force submarines to surface. It is hard to know if the President realised this.

Soviet submarine B-59, diesel powered but with nuclear torpedoes on board, was first detected by US destroyers that Thursday. It was tracked for four hours, but contact was lost until Saturday, as the B-59 had to surface to replenish its air tanks. It was forced to the surface by the *USS Cony*, with practice depth changes and hand grenades.[1601] Though the initial depth charges were unarmed, they exploded with such violence that the Soviet commander, Valentine Savitsky, could not tell the difference between the explosions from those caused by fully-armed charges: "it was as if you were sitting in an iron barrel that was being beaten with a sledgehammer".[1602] Interpreting the depth charge explosions as an attack, Savitsky ordered the preparation of nuclear torpedoes for firing at the US navy ships, but was temporarily dissuaded from this course of action by Vasily Arkhipov, the submarine's second in command, after a heated argument broke out between the two.[1603] Nonetheless, Savitsky knew that he was obliged to defend the submarine and, after a US plane flew low over the coning tower and fired flares as the US Navy ships shone spotlights on the ship, he became determined to fire the torpedo, which was only slightly less powerful than the nuclear bombs used in 1945 in Hiroshima and Nagasaki.

Seeing this discourtesy, the US commander ordered an apology to be flashed out via Morse code to the Soviet submarine by Gary Slaughter, a 23-year old Navy ensign.[1604] He could have had no idea that he was not only clearing up a misunderstanding, in that the initial charges had never been intended to damage the submarine, but also preventing the potential outbreak of nuclear war. A mix of the Cyrillic Transliteration Table, the International Signals Book and the Morse Code was used by Slaughter and his lead signalman to offer the apology. Again, it seems a mere stroke of luck that the apology was seen at all, as Savitsky had at this stage descended from the bridge to give his attack order upon submerging.[1605] But, as they were descending, a signals officer had delayed the party by getting "stuck with his searchlight in the shaft of the upper hatch of the conning tower",[1606] enabling Arkhipov to see the apology just in time. The apology was received, the message was relayed, and the submarine was ordered to disarm the nuclear missiles. Largely thanks to serendipity on both sides, no shots had been fired at this stage of the crisis.

But an even worse trial was to come and this time it was not military men on deck or in the air but President Kennedy who had to decide whether to strike back or not.

The third key event of the month came about with the first missile firing of the whole crisis, killing Major Rudolf Anderson USAF. He piloted a U2 spy plane, taking the daily photographic film of the island for interpretation as to the state of readiness of the missile bases. As he did a second pass over the island, he was shot down by a Soviet rocket on Saturday, 27 October, at 10.22 am,[1607] which was particularly perilous; as the standing policy of the United States was immediate retaliation against any aggressive action,[1608] presenting an opportunity to plunge the world into mass conflict. The President's advisors pressed him that because an American plane had been shot down, the Soviet side had

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[1601] *Ibid* 267.
[1602] Quoted in Serhii Plokhy, *Nuclear Folly* (London, 2021) 267.
[1603] Karen Saradzhyan and Simon Saradzhyan, 'Was the Cuban Missile Crisis the Most Dangerous Episode of the Cold War?' (2017) 1(2) 21st Century 103.
[1604] Serhii Plokhy, *Nuclear Folly* (London, 2021) 257.
[1605] *Ibid* 271.
[1606] *Ibid.*
[1607] Timothy Fursenko and Alexsandr Naftali, *One Hell of a Gamble: Khrushchev, Castro and the Cuban Missiles Crisis 1958-1964* (London, 1997) 278.
[1608] *Ibid* 280.

escalated the conflict.[1609] Aircraft were standing on alert for the purpose of a retaliatory strike.[1610] Perhaps wary of the potential impact of a decision to retaliate, the President insisted that the information on the loss of a surveillance plane be very clear that it was not due to accident, such as a bird strike, but inescapably due to military action.[1611]

At 3.30 pm on that afternoon the Pentagon had released a press statement which indicated that any interference with surveillance over Cuba would be met with counter-action. The statement reflected, in part, uncertainty as to whether a plane had been lost. The military establishment was, that same afternoon, determined to recommend that the Soviet-Cuba missiles problem be dealt with by a series of air strikes. This was to be followed by an invasion seven days later. They would only back away from that plan if there was irrefutable evidence, by the next day, Monday, that the missiles on Cuba were being dismantled and rendered inoperable.[1612] During the afternoon meeting between the President and his close advisers, it was confirmed that a plane had been shot down and that the pilot was dead. With the prospect of an immediate and unpredictable escalation should he respond, Kennedy required more than absolute certainty that the loss was due to military fire. He did this by asking if the Cubans had announced that they had destroyed the plane. No announcement had yet been made.[1613] It was made later, but it did not change his mind.

Secretary of Defence McNamara's reaction to the shooting down and killing of the USAF pilot seemed, on the transcripts of the meetings, to vary with the prevailing mood. In response, however, to the President pointing out that it was not yet known if the plane had been shot down, he seemed less concerned than Kennedy as to this detail. He was, perhaps, more concerned that an opportunity for action had been presented by the situation. He commented: "I think - certainly I'd say - it was shot down. Because the probabilities are that it was shot down, and we want an excuse to go in tomorrow and shoot up that SAM site and send in our - ". [1614] The President's attitude was to postpone the decision until there was more information.[1615] In the result, there was no resort to the 'first plausible excuse' justification that characterises acts of aggression and the moment of high emotion was allowed to fade.

Using and abusing 'the high moral ground'

But when you see the high moral ground free – why not occupy it? Major Anderson's death was used to pressure the Soviet Ambassador, Anatoly Dobrynin, into realising the seriousness of the situation.[1616] He was called in to the Justice Department and told in no uncertain terms by the President's brother, Attorney General Robert Kennedy, that it could bring about a "chain reaction".[1617] Perhaps in preparation for a later invasion, or perhaps to show the seriousness of his purpose, the President called up twenty four reserve air squadrons.[1618] The President's first suggested response to this escalation in the crisis was to call a NATO meeting before any decision was taken.[1619] His later response was to allow more time for the diplomatic efforts that were already in hand to yield a result.

[1609] Unidentified voices at a meeting on Thursday, 18 October, 1962, quoted in Ernest May and Philip Zelikow, *The Kennedy Tapes: Inside the White House During the Cuban Missile Crisis* (Cambridge, 1997) 164.
[1610] *Ibid* 298.
[1611] Meeting of Tuesday, 23 October 1962, quoted in *Ibid*, 299.
[1612] See *Ibid,* Transcript of the Meeting on Saturday, 27 October quoted at page 563.
[1613] Transcript of same day's transaction, quoted in *Ibid* 575.
[1614] *Ibid* 575.
[1615] Transcript of the same day's transactions quoted in *Ibid* at pages 601, 610.
[1616] *Ibid* 607 quoting a memo prepared by Robert Kennedy.
[1617] Fursenko and Naftali 282.
[1618] Ernest May and Philip Zelikow, *The Kennedy Tapes: Inside the White House During the Cuban Missile Crisis*(Cambridge, 1997) 613.
[1619] See the transcript of Saturday, 27 October 1962: Quoted in May and Zelikow 576.

In one way, the military loss might be used to positive effect, especially as the situation might be regarded as critical in the light of what had happened. The Secretary General of the United Nations was told: "if they fire on us, tell them we will take them all out".[1620] If there was no satisfaction from this approach by "tomorrow night figure that Monday we are going to do something about the SAM sights".[1621] When President Kennedy was told, later on Saturday evening, that the Cubans had announced that they had shot down a U2, he was asked to authorise attacks on enemy fighter aircraft if there were further attacks on surveillance planes when they returned to Cuba to take more photographs the next day. His response was to require a further deferral of retaliatory action, to the disbelief of the military establishment, until Tuesday 30 October. [1622] The President reasoned:

> Under the schedule, we could not do it until Monday morning, because we will have to go back to NATO again on Monday in which we say the situation is getting worse and so on and so forth. Give them that last chance.[1623]

President Kennedy's response presents the almost opposite extreme of a reaction based on demonising the opponent, acting out of considerations of vanity based on national prestige, or deceptively using an incident as an excuse for extreme reaction. Vice-President Johnson, in the absence of the President from the room in which the discussion was taking place on the afternoon of Saturday, October, 27th, 1962, seemed deeply disturbed that America might withdraw nuclear missiles from Turkey; Kennedy's preferred option for seeking a way out of the crisis. He voiced the thought that the Russians might use any concession as a sign of weakness and so seize West Berlin:

> Look, the whole thing is they shot down one plane, and they gave up Turkey. Then they shoot down another and they give up Berlin. You know, like a mad dog - he tastes a little blood and he...[1624]

Despite the attractiveness of the folksy language, it is chilling to think how matters might have developed.

Take advice: reject advice

President Kennedy had to consult the Joint Chiefs but he was aware in talking the them, as an ex-Navy man himself, that even leadership could have a tendency to make promises beyond their capabilities. General Earle Wheeler's contribution to the debate perhaps may illustrate the dynamic behind what was driving the Joint Chiefs:

> The announcement of a Soviet base in Cuba would immediately have a profound effect on all of Latin America at least and probably world-wide because the question would arise: Is the United States incapable of doing something about it or perhaps unwilling to do something about it? In other words, it would attack our prestige...Increasingly, they can achieve a sizeable increase in offensive Soviet strike capabilities against the United States, which they do not now have...This short-range missile course gives them a sort of quantum leap in their capability to inflict damage on the United States. And so I say, from a military point of view, I feel the lowest-risk course of action is the full gamut of military action by us...[1625]

[1620] Transcript of the meeting on Saturday, 27 October 1962: Quoted in May and Zelikow 612.
[1621] Saturday, 27 October 1962: Quoted in May and Zelikow 612.
[1622] Donald M Kagan, *On the Origins of War and the Preservation of Peace* (London, 1995) 537.
[1623] Saturday, 27 October 1962: Quoted in May and Zelikow 627.
[1624] May and Zelikow 592 and see 595.
[1625] Statement recorded on tape at a meeting between the President, his advisers and the representatives of the Joint Chiefs of Staff on Friday, 19 October 1962: Quoted in May and Zelikow page 180.

Before addressing the nation, and revealing the crisis to the public for the first time, on Monday, 22 October 1962, President Kennedy invited a cross-party group of senators and congressmen in to the White House for a briefing. While there was some sympathy, the isolation of ultimate decision is shown not to be helped by trying to get people to agree with you. Senator Richard Russell, Chairman of the Senate Armed Services Committee, warned that the United States was at a crossroads: "We're either a first-class power or we're not"; that the Soviet Union, "those people" as he characterised them, had "all the warning they could expect"[1626] and that "we've got to take a chance somewhere, sometime, if we are going to retain our position as a great world power..."[1627] Military action would be, according to Senator Russell, an act of "self-defence."[1628]

Stress and decisions

Stress skews decisions. But worse than stress is the temptation to resort to unreal thinking. One can lead to the other. Imagining that what has clearly been unsuccessful in the past may somehow succeed when conditions have not changed is evidence of unreal thinking. There are occasions when the mental process of a slide into unreality appears to be in evidence in the tape recordings of the debates about the crisis between Kennedy and his advisers over its 13 most intense days. On the first day of the debates, when the only clear principle is the objective that the nuclear missiles should be removed from Cuba, there was uncertainty as to what action to take. The participants were unsure as to how the American public and the international community would react to measures such as air strikes against, or an invasion of, Cuba.[1629] Anything that would make a bombing or invasion strategy more acceptable was therefore to be welcomed. The Soviets had not yet been discovered of misinforming the United States about the nature of the missiles in Cuba.[1630] The strategy of an apparently legal partial blockade of Cuba, or quarantine which was the nicer word chosen, and one which did not constitute an act of war, had yet to evolve. An immediate surprise air strike seemed a possible solution, but one that would be difficult to justify in the court of international opinion. Secretary of Defence McNamara suggested orchestrating an uprising against Castro in Cuba. This was the foundational idea for the Bay of Pigs invasion by Cuban exiles; once an anti-Castro force was established on the island the people were supposed to immediately rise up against the communists. But such a scheme had recently entirely failed, prompting an entirely new series of plans for subversion of the Cuban regime named Operation Mongoose.[1631] Robert McNamara, the Secretary of Defence, nonetheless, clung to this idea:

> There's a real possibility you'd have to invade. If you carried out an air strike, this might lead to an uprising, such that in order to prevent the slaughter of free Cubans, we would have to invade to re-introduce order into the country and we would be prepared to do that.[1632]

A self-constructed cathedral of justification somehow arose out of the mists of confusion and uncertainty. The idea was that America would re-introduce order into another country by an invasion and would plunge into war to save democratic opponents of Castro from being slaughtered. The

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[1626] Recorded on tape at a meeting between the President and his advisers and political leaders on Monday, 22 October 1962; Quoted in May and Zelikow at 260.

[1627] Recorded at the same meeting and quoted in May and Zelikow at page 265.

[1628] Recorded at the same meeting and quoted in May and Zelikow at page 270.

[1629] Debate on Tuesday, 16 October, 1962: Quoted in May and Zelikow 47-116.

[1630] Ernest May and Philip Zelikow, *The Kennedy Tapes: Inside the White House During the Cuban Missile Crisis* (Cambridge, 1997) 106-107 and see the Kennedy speech exploiting the denial of Soviet Foreign Minister, Andrei Gromyko that there were no offensive weapons on Cuba at 277.

[1631] Raúl Rodríguez Rodríguez, 'Canada and the Cuban Revolution: Defining the Rules of Engagement 1959-1962' (2010) 16(1) Canadian Foreign Policy 74.

[1632] Transcript of the 16 October 1962: Quoted in Ernest May and Philip Zelikow, *The Kennedy Tapes: Inside the White House During the Cuban Missile Crisis* (Cambridge, 1997) 67. See also 68.

strong ideological colour to this pronouncement, and its far-fetched illusion that an uprising will result from American bombing, suggests a process at some remove from reality.[1633]

Deceit

McNamara's attitude also raises the issue of deceit. In so many war situations, lies falsely justify a first strike. This is not just a handy method of overcoming a hated enemy. The evidence shows that resort to this tactic characterises naked aggression and mass murder.[1634] Robert Kennedy was explicit in articulating a similar idea to McNamara that takes hold of his mind on the first day of the crisis. On Tuesday, 16 October, the President's advisors searched for a justifiable way to respond. Particularly significant to the United States was the military base at Guantánamo Bay, established by way of a treaty of 1903.[1635]

A mere line of barbed wire therefore separated the territory of the potentially hostile parties. Robert Kennedy brought up an incident that lead to the Spanish-American War of 1898 that resulted in the United States invading Cuba and detaching it from Spain. A ship, the USS Maine, was blown up in Havana harbour in circumstances believed by some to be the creation of a plausible excuse for action.[1636] Robert Kennedy stated:

> Let me say, of course, one other thing is whether we should also think of whether there is some other way we can get involved in this, through Guantanamo Bay or something. Or whether there's some ship at...you know, sink the Maine again or something.[1637]

This dangerous outburst had a background. For whatever trait of character, the Attorney General seems to have been attracted to such a tactic. He suggested faking a Cuban attack on Guantánamo, using anti-Castro activists; an idea which would bring Latin American countries into supporting an invasion.[1638] Other ideas the CIA and he shared included assassinating Castro, downing a US passenger plane and blaming it on the Cubans, or, similarly to the Maine, sinking a US warship, or, a boatload of Cuban refugees fleeing Castro, or, developing "a Cuban Communist terror campaign in the Miami area, in other Florida cities and even in Washington…"[1639]

A mind to which the engineering of a deliberate deception to justify a war remains a human mind, a part of our collective inheritance. As Solzhenitsyn writes: "линия, разделяющая добро и зло, пересекает сердце каждого человека": "The line separating good and evil cuts through the heart of every human being".[1640] At this stage in the debate, ideas were spoken as they occurred. As matters progressed, Robert Kennedy's pretext for invading Cuba was not received in the collective embrace of the either the President or the other participants in the debate. It would seem that they were open to seeking a solution based on the reality before them. Moreover, they were open to argument based

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1633 Comments later the same day at Ernest May and Philip Zelikow, *The Kennedy Tapes: Inside the White House During the Cuban Missile Crisis* (Cambridge, 1997) 87, and 96-98.
1634 Generally see Peter Charleton, *Lies in a Mirror: An Essay on Evil and Deceit* (Dublin, 2006).
1635 For further information regarding the international leasehold of the United States over this area, see Joseph Lazar, 'Cession in Lease of the Guantanamo Bay Naval Station and Cuba's Ultimate Sovereignty' (1969) 63(1) American Journal of International Law 116.
1636 This theory, however, is somewhat contested. In Tom Miller, 'Remember the Maine' (1998) 28(11) Smithsonian at 5, it is suggested that, far from being caused by any of the Cuban, American or Spanish forces involved in the region at the time, it was possibly simply an internal accident which arose at an opportune moment.
1637 Transcript of Tuesday, 16 October 1962: Quoted in May and Zelikow 100.
1638 Timothy Fursenko and Alexsandr Naftali, *One Hell of a Gamble: Khrushchev, Castro and the Cuban Missiles Crisis 1958-1964* (London, 1997) 96-97 and 137.
1639 'Possible Actions to Provoke, Harass or Disrupt Cuba' a memorandum by the US Army special group quoted in the Guardian 20 November 1997. They also had more innocent plans for leaflets and photo faking Castro eating the "most delectable Cuban food" to stir up internal unrest.
1640 Aleksandr Solzhenitsyn, *The Gulag Archipelago* (Paris, 1974) 168.

on an ethical approach to the problem. It is fair to credit an argument of Robert Kennedy's, two days later, as influencing the decision away from an immediate military strike, in fact away from world catastrophe:[1641]

> I think it is the whole question of, you know, assuming that we do survive all this, the fact that we are not...what kind of a country are we...we did this against Cuba. We've fought for fifteen years with Russia to prevent a first strike against us...now, in the interest of time, we do that to a small country. I think it is a hell of a burden to carry.[1642]

The participants in the debate were not closed to a consideration of real moral argument. That matters. A fair-minded consideration of the right and wrong of a situation is to be distinguished from the deceptive justifications for violent action which the collective shadow throws up as part of its dynamic.[1643] Khrushchev, too, had a moral compass, or the conflict would have likely escalated. By contrast, Castro appeared much more volatile – the sort of figure that Gary Sick was likely referencing when stating that an occasional international actor could stun the world stage by choosing not to move a piece calculatingly as in a game of chess but to take the chess board and fling it into the ceiling,[1644] leaving others to scramble to re-establish the game.

Over the course of debates, President Kennedy emerges as having some sneaking regard for Khrushchev, rather than merely holding a deep hatred for his global competitor. People are often marked by their first job or jobs. Kennedy was a military man, he understood strategy and he understood how things go wrong if you don't watch unfolding events like a hawk; von Clausewitz' second rule of war;[1645] that once begun, war follows its own course. He was a politician, so he saw manoeuvres by his opponent not as a personal attack but just as a means of gaining the advantage. The President assessed the Soviet action as "a rather useful ploy"; if the US attacks Cuba, the USSR has a cloak of justification for invading West Berlin, he said.[1646] In fact, he admired the strategy of his opponents[1647] and had some open regard for the toughness of Khrushchev.[1648] As the crisis went on, some of his advisers stressed that in order to negotiate their way out of this problem, they should be prepared to negotiate the presence of US nuclear missiles elsewhere in the world. This would undoubtedly be a loss for the United States, but the President refused to rule the strategy out. He thus was not ensnared by the trap of national and personal prestige.[1649] McNamara argued that even the US base at Guantánamo was negotiable.[1650] As we know, ultimately the less dangerous idea of a blockade of Cuba gained ascendancy, from which President Kennedy explicitly excluded aircraft; "the only way to stop a plane is to shoot it down ... at least at the first stage we ought to just confine it to

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1641 Donald M Kagan, *On the Origins of War and the Preservation of Peace* (London, 1995) 518.
1642 Thursday, 18 October 1962: quoted in Ernest May and Philip Zelikow, *The Kennedy Tapes: Inside the White House During the Cuban Missile Crisis* (Cambridge, 1997) 149. George Ball, Under Secretary of State, had earlier written a memo arguing against a surprise strike by comparing such an action to the Japanese attack on Pearl Harbour: The document is reproduced in Laurence Chang and Peter Kornbluh, *The Cuban Missile Crisis, 1962: A National Security Archive Documents Reader* (New York, 1992) 121-2.
1643 For instance, see Laurence Chang and Peter Kornbluh, *The Cuban Missile Crisis, 1962: A National Security Archive Documents Reader* (New York, 1992) 119-120.
1644 Gary Sick, *All Fall Down* (London, 1985).
1645 Carl von Clausewitz, *Principles of War* (London, 1942).
1646 Friday, 19 October 1962: Quoted in Ernest May and Philip Zelikow, *The Kennedy Tapes: Inside the White House During the Cuban Missile Crisis* (Cambridge, 1997) 175.
1647 Meeting with the British Ambassador on Friday, 22 October 1962: quoted in Ernest May and Philip Zelikow, *The Kennedy Tapes: Inside the White House During the Cuban Missile Crisis* (Cambridge, 1997).
1648 Thursday, 25 October 1962, Ernest May and Philip Zelikow, *The Kennedy Tapes: Inside the White House During the Cuban Missile Crisis* (Cambridge, 1997) 412.
1649 Memo of Adlai Stevenson, U.S. Ambassador to the U.N., to the President, 18 October 1962: Quoted in Ernest May and Philip Zelikow, *The Kennedy Tapes: Inside the White House During the Cuban Missile Crisis* (Cambridge, 1997) 118/9.
1650 See Ernest May and Philip Zelikow, *The Kennedy Tapes: Inside the White House During the Cuban Missile Crisis* (Cambridge, 1997)193.

ships."[1651] The world might have regretted his inclusion of submarines, as how are they to be brought to the surface?

Love your enemy?

Crucially, where there is less hatred, negotiators can be disposed to allow opponents a way out, and will not seek their humiliation.

Even the blockade was flexible in how it was to be operated by the Americans. The President shortened the line of quarantine to allow the Russians more time to think of their response as their ships approached Cuba.[1652] Even the enforcement was discretionary. A Soviet tanker on the quarantine line was hailed and, after identifying itself, was allowed to proceed without boarding.[1653] An East German passenger and cargo ship, unlikely to stop, was allowed to pass without challenge[1654] and a Swedish vessel which refused to stop was allowed to pass unhindered.[1655] Understanding that things can easily go wrong, especially under stress, Kennedy expressly ordered the Russian ships be given the space to stop or turn around. He instituted a direct line to the Navy so that there would be no firing save on his express instructions.

Fundamentally, Kennedy, as well as being prepared to fight if necessary, was also prepared to pay some price for a negotiated end to the presence of offensive Soviet missiles on Cuba. The President stressed to his advisers that some price was going to be exacted.[1656] Kennedy rejected an argument that Soviet planes and technicians would still remain in Cuba if the missiles there were traded out by removing the U.S. missiles in Turkey, by saying:

> Yeah, but our technicians and planes and guarantees would still exist for Turkey. I am just thinking about what we are going to have to do in a day or so, which is 500 sorties, and seven days, and possibly an invasion, all because we would not take the missiles out of Turkey. We all know how quickly everybody's courage goes when the blood starts to flow, and that's what is going to happen to NATO. When we start these things and they grab Berlin, everybody is going to say: "Well, that was a pretty good proposition." Let's not kid ourselves that we've got . . .That's the difficulty. Today it sounds great to reject it, but it is not going to, after we do something.[1657]

How was the crisis solved?

The pressure of nuclear war undoubtedly played a role in resolving the crisis, but, more importantly, some aspect of human goodness was allowed rein. One would imagine there were other unacknowledged factors as well. What role was played by the families of the protagonists, by the people who could speak fearlessly to powerful leaders? What about Nina Petrovna Khrushcheva, or Jackie Kennedy? Both were dignified people, and private, too – neither left a memoir. We may never know, but it is likely that they played a factor.

[1651] Wednesday, 24 October 1962: Quoted in Ernest May and Philip Zelikow, *The Kennedy Tapes: Inside the White House During the Cuban Missile Crisis* (Cambridge, 1997) 373.
[1652] Ernest May and Philip Zelikow, *The Kennedy Tapes: Inside the White House During the Cuban Missile Crisis* (Cambridge, 1997) 343.
[1653] Thursday, 25 October 1962: Quoted in Ernest May and Philip Zelikow, *The Kennedy Tapes: Inside the White House During the Cuban Missile Crisis* (Cambridge, 1997) 394.
[1654] Same day: Ernest May and Philip Zelikow, *The Kennedy Tapes: Inside the White House During the Cuban Missile Crisis* (Cambridge, 1997) 436.
[1655] *Ibid* 493.
[1656] Friday, 26 October 1962, *Ibid* 458.
[1657] Saturday, 27 October 1962, *Ibid* 548.

When it came down to it, had Khrushchev been a vicious fool, there would have been no drawing back. But throughout the crisis, he undoubtedly retained unshakeable limits as to how far matters would be allowed to go. In his letter to Kennedy he, with almost artistic sensibility, wrote: "we and you ought not to pull on the ends of the rope in which you have tied the knot of war … because you yourself understand perfectly of what terrible forces our countries dispose."[1658] There was only one person capable of making the decisions to draw back from the crisis in Cuba and the way he announced it to the Presidium of the Communist Party of Russia shows humanity:

> Where was a time, when we advanced, like in October 1917; but in March 1918 we had to retreat, having signed the Brest-Litovsk agreement with the Germans. Our interests dictated this decision – we had to save Soviet power. Now we found ourselves face to face with the danger of war and of nuclear catastrophe, with the possible result of destroying the human race. In order to save the world, we must retreat. I called you together to consult and debate whether you are in agreement with this kind of decision.[1659]

In truth, however, there was very little debate in Moscow about any of these decisions. Kennedy was shocked at their summit in Vienna, six months earlier, to have met someone with whom he just could not reason.[1660] There are only notes of the Presidium debates because Khrushchev did not make a decision to install recording equipment in the Kremlin; unlike Kennedy in the White House. But it was certainly a near-impossible undertaking to put rocket-sized missiles into open areas of Cuba and hope that the Americans would not notice; after all the Russians knew about U2 spy planes and could hardly have forgotten the 'U2 incident' of April 1960.[1661] The atmosphere in such meetings did not appear conducive to real debate. And yet Khrushchev ultimately drew back.

Castro, on the other hand, did not want the confrontation to end in anything other than total victory. He viewed this crisis as an opportunity to end American interference in Cuba, as "the moment to eliminate such danger forever."[1662] Khrushchev interpreted the "forever" as an invitation to launch nuclear missiles, which was a step he was not prepared to take. Explicitly, Castro wrote that an invasion by the USA of Cuba was expected imminently and that the only solution was for Khrushchev and the Soviet Union to launch a first strike, killing millions. In his memoirs the Soviet leader wrote: "When this was read to us, we, sitting in silence, looked at one another for a long time."[1663]

He held back

As for Kennedy, it is possible that greater debate could be had with him during the course of the crisis. There is a curious passage towards the end of the memoir of Pablo Casals, the great musician, who was also an outspoken peace activist. Engaged by Jackie Kennedy to give a concert at the White House, he was relaxing after rehearsing. President Kennedy walked in. They talked in private, and at length, the President asking him questions and focusing intently on what he had to say.[1664] And this

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[1658] Quoted in Serhii Plokhy, *Nuclear Folly* (London, 2021) 201.
[1659] Quoted in Timothy Fursenko and Alexsandr Naftali*, One Hell of a Gamble: Khrushchev, Castro and the Cuban Missiles Crisis 1958-1964* (London, 1997) 284.
[1660] Arthur Schlesinger, *A Thousand Days: John F Kennedy in the White House* (London, 1963) 331.
[1661] Quincy Wright, 'Legal Aspects of the U-2 Incident' (1960) 54 American Journal of International Law 836.
[1662] Quoted in Timothy Fursenko and Alexsandr Naftali*, One Hell of a Gamble: Khrushchev, Castro and the Cuban Missiles Crisis 1958-1964* (London, 1997) 286.
[1663] Quoted in Serhii Plokhy, *Nuclear Folly* (London, 2021) 286.
[1664] Pablo Casals, *Joys and Sorrows* (New York, 1970) 153. One is reminded of the Grimms Brothers' tale 'The Water of Life' where only the youngest brother listens to the old man at the gate and only he is successful.

same character comes across in the transcripts of the crisis meetings at the White House; the President is not offended when people contradict him or issue advice which they know to be the opposite of his own views.[1665] Views critical of his own stance from both the military and political interest groups are not regarded by him as an affront to his own position or prestige. People call him only occasionally by his title "Mr. President". More often, they simply refer to him in his presence as "you" or, most frequently, people simply give their opinion without addressing him in any way, formal or informal. Even at moments of crisis, there is humour and laughter. He is careful over detail; have the Navy got the message, is the letter to Chairman Khrushchev drafted right?

All of the Cuban crisis debates in the White House take place on a basis where the participants are communicating with each other on a human level and where there is little or no attempt, and this is also a grave danger in the build up to war, to feed the leader with information he is judged to want to hear or with views of which he is known to approve. He is told: "You are in a pretty bad fix, Mr. President": which he treats as a joke.[1666] He is treated to a tirade from General LeMay, the very belligerent Air Force chief of staff who wanted to bomb Cuba even after a solution to the crisis had been found, to which he replies: "Thank you, General".[1667] The arguments of the political leaders opposed to his view point are listened to with patience and responded to by the quiet statement of his own argument. When it is necessary for him to reach a decision he announces it, only after real debate, by simply saying "I think that..." and giving his reasons.

Perhaps in private President Kennedy was not as articulate as in his public utterances, but also in private there is no attempt to hide behind a persona of high intelligence or to phrase his utterances in such a way as to disguise their content with rhetoric. All of his statements are simple. He is not embarrassed into concentrating on the form of what he is saying in detraction from its expression. Sentences are left unfinished or are phrased with grammatical errors. There is a genuine interest in what other people are saying and, above all, in why they hold the views which they propound. He is willing to enter debate – and regards it as his function to do so. Kennedy is by no means a dominant presence in the transcripts of the debates. He is not, apparently, in the habit of interrupting his officials. In terms of the space his statements occupy, and the character of what he says, his contributions are modest. He never utters monologues and in general speaks only to respond to what others have said or to make executive decisions.[1668]

At the height of the crisis, when the Americans did not know if the Soviet ships would stop or if one of their submarines would attempt to cross the interdiction line, the President, normally drawing strength from pressure had too much to bear. His brother describes it:

> I think these few minutes were the time of gravest concern for the President. Was the world on the brink of a holocaust? Was it our error? A mistake? Was there something further that should have been done? Or not done? His hand went up to his face and covered his mouth. He opened and closed his fist. His face seemed drawn, his eyes pained, almost grey. We stared at each other across the table. For a few fleeting seconds it was almost as though no else was there and he was no longer the President. Inexplicably, I thought of when he was ill and

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[1665] For example, see the meeting with the Joint Chiefs of Staff on Friday, 19 October 1962: quoted in Ernest May and Philip Zelikow, *The Kennedy Tapes: Inside the White House During the Cuban Missile Crisis* (Cambridge, 1997) 174 -188 and the meeting with his own advisers on Saturday, 27 October 1962: quoted in *ibid* at 565 and his meeting with political leaders on Monday, 22 October 1962: quoted in *ibid* 245-275.

[1666] Meeting on Friday, 19 October 1962: quoted in *ibid* 182.

[1667] Same meeting quoted in *ibid* 180.

[1668] If you want a contrast, by the way, read Albert Speer on Hitler and his way of conducting meetings; Albert Speer, *Inside the Third Reich* (New York, 1971).

> almost died; when he lost his child; when he learned that our oldest brother had been killed; of personal times of strain and hurt.[1669]

Perhaps these were qualities that Kennedy developed coming from a large family. Then there was his independence of mind; it is hard to know if he subscribed to any definite ideology. Certainly, no notion of the position of the United States as the supreme power in the world surfaces as propelling him on towards protecting the vanity of his group.

Everything was questioned. This was simply a part of his character from childhood, interrupting the lectures on Christianity of his mother Countess Rose Kennedy with questions like: "What happened to the donkey that carried Our Lord into Jerusalem?"[1670] His orientation was popular; people write that his Bay of Pigs saying "victory has a hundred fathers; but defeat is an orphan" came from a 1952 movie on Rommel in North Africa, but this was simply yet another example of his strong sense of self. It is possible that the Kennedy brothers were influenced by 'The Guns of August,' Barbara Tuchman's 1962 book on the origin of the Great War,[1671] but Neville Shute's 'A Town Like Alice',[1672] and especially the 1956 movie, possibly had a greater impact as maybe did 'Fail Safe', the 1962 novel by Eugene Burdick and Harvey Wheeler.[1673] It shows, perhaps, that whatever you do for the good is worthwhile and may have some influence for the better somewhere. None of this is to be dismissed.

Conclusion

It was not just on the three narrated occasions that the world came to the brink of catastrophe but during every single minute of this confrontation: one that pitted annihilating power against both chance occurrence and human decency. On this occasion, the deep historical trends establishing socialism in the former Russian empire as a utopian solution for humanity that was to be spread throughout the globe intersected with overthrown American ideals within an equally vast sphere of influence which railed against their opposing principles. As a factor of time, neither side could predict that their technologies of early nuclear and rocket propulsion and the advent of computerised technology would lead to the undermining of both their immediate fears with solutions. But, it is arguable that these technical solutions have made the world an even more dangerous place. While in the early 1960s, Soviet submarines could not match the destructive power and nuclear propulsion of American Polaris technology, whether missiles were stationed on Cuba or not, sufficient damage could still be wreaked by that side on Western power so as to set off a global nuclear winter. Neither could the Soviet side, at that stage, match the guidance systems that enabled the huge range of American nuclear ballistic missiles, but with the retaliatory power the Soviet side possessed, how could that matter?

Physical photographs needed to be taken at that time for each side to spy out what the other was doing but, within a decade, pilots such as Gary Powers and Rudolf Anderson did not need to risk their lives as satellite imagery came from outer space. Similarly, as the Soviet side caught up with nuclear propulsion under the sea and the unleashing of nuclear missiles from undetectable locations on the seabed, the entire notion of who had missiles and where these were became robbed of primary strategic significance. But, then again, it has not just been superpowers but also small states which have developed destructive nuclear capability, holding these weapons as an ultimate threat and also as

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[1669] Robert Kennedy, *Thirteen Days: A Memoir of the Cuban Missile Crisis* (New York, 1969) 71-72.
[1670] Robert Dallek, *An Unfinished Life: John F Kennedy 1917-1963* (London, 2013), chapter 2.
[1671] Barbara W Tuchman, *The Guns of August* (New York, 1962).
[1672] Nevil Shute, *A Town Like Alice* (Portsmouth, 1950).
[1673] Eugene Burdick and Harvey Wheeler, *Fail-Safe* (New York, 1999).

symbol of inviolability. At least, that is what is said in defence of sheer madness. It is foolish to think that the danger has passed.

As John Stoessinger emphasises in his study *Why Nations Go to War*,[1674] the role of leaders, their belief-systems, and the random threat of miscalculation will remain in our age of climate heating, stressed resources and nuclear proliferation. These are primary engines which may or may not drive us into ultimate conflict. Certainly, in any close study of the Cuban crisis, both emerge as prime determinants: Khrushchev with his miscalculations of such simple matters as tree cover and the strength of the American spy network and such major principles as the Americas as the US sphere of influence; Kennedy stunned by the lengths to which Soviet power would go to preserve its influence and badly assessing the mood of the Cuban people after his enabling of a failed invasion. Personalities, as in the danger of individuals in everyday life and in the opposite of the enhancing virtue of friendship, when gifted with ultimate power, or on seizing it, magnify the puny strength of a human being into the titanic powers of nations. Kennedy pushed the world to the brink out of principle; but was intent on giving peace every possible chance: Khrushchev threw over the chess board; but realised that while playing a strategic game was diverting, any ultimate principle he held would have vaporised in the destruction of the very humanity his ideology purported to serve.

What remains?

What remains, in reflecting on the hideous twists and turns of nuclear-armed wrestlers at the edge of the historical precipice, is the terrible sense of how much power people give to their leaders and how, as a result, our lives are in the hands of others; of characters as diverse in personality as Castro, Khrushchev and Kennedy.

And even they were largely powerless at times; global security in October 1962 hinged also on a few chance encounters – Charles Maultsby gliding safely out of Soviet airspace towards Alaska and a Morse code apology flashed in the orthography of Saints Cyril and Methodious at a second to atomic midnight by the *USS Cony*.

Nuclear war was only averted by a mix of chance and also by some salutary, but sane, wish of two of the three leaders involved to avoid a truly disastrous outcome.

[1674] Why Nations Go to War (1972, 11th edition, New York) passim.

Criminal law- Protecting the mentally subnormal against sexual exploitation

Introduction

Two cases brought under s. 4 of the Criminal Law (Amendment) Act 1935 highlight the fact that the legal regime designed to protect the mentally subnormal against sexual exploitation is totally inadequate and urgently needs reform. A brief discussion of the facts of both cases will be followed by an analysis of the weaknesses inherent in the present law. Recommendations for reform will then be advanced.

D.P.P. v. J.S.

The accused was an employee of a firm and had weekly dealings with the prosecutrix in the course of his professional activities. It was alleged that over a period of years he had had consensual sexual intercourse with her. Medical evidence classified the prosecutrix as being moderately mentally handicapped, according to a scale graded in terms of mild, moderate and severe. She was of normal appearance and aged about 35. She had had, some years before meeting the accused, a child outside of wedlock. On her becoming pregnant again a complaint was made to the Gardai. The accused was then charged under s.4 of the 1935 Act with having unlawful carnal knowledge of a feeble minded woman. On examination on deposition by counsel for the accused in the District Court, it was discovered that she could carry on a fairly normal conversation on matters related to her everyday household life. She had no knowledge of more general affairs, politics or the outside world. The case came on in the Circuit Court for trial early in 1973.[1] She was the first witness called by the prosecution. Upon counsel for the prosecution objecting to her taking the oath, she was examined as to her capacity to understand its nature, in accordance with the procedure laid down by *People v. Keating* .[2] Upon being questioned by counsel for the prosecution and subsequently by the trial judge it emerged that she could not answer questions as to the nature of the oath, or the nature of a lie. Upon the judge asking her what were the moral and legal consequences of telling a lie, no response whatever was received.

In these circumstances the trial judge declined to allow her to be sworn, and as there was no independent evidence of sexual intercourse a *nolle prosequi* was entered. The prosecutrix later recovered an award from the Criminal Injuries Compensation Tribunal arising from the incident.

D.P.P. v. M.W.

The case of *M.W.* came on for trial in the Circuit Court around the same time as the previous case. Medical evidence again classified the prosecutrix as moderately mentally handicapped. Her handicap apparently resulted from a car crash some years previously. She was again quite normal in appearance and could converse on a similarly limited range of topics. Her actual speech was marred by a physical defect. Sexual intercourse was alleged to have occurred in a car in a Dublin suburb and the allegation was that it was non-consensual. Accordingly, there were two counts in the indictment, in addition to the charge of having unlawful carnal knowledge with a feeble-minded woman, as in the previous case, a charge of rape was also proferred.

Upon an application to the trial judge [3] the charge of rape was proceeded with upon the appointed day and the other charge left to be tried at a later date.[4] At the trial the prosecutrix was allowed to be sworn as, on examination, the trial judge ruled that she had sufficient understanding and intelligence to justify the reception of the oath. This trial ended on· a direction because of flimsy and contradictory evidence as to the lack of consent to sexual intercourse.

1. Before Judge David Sheehy SC Both cases dealt with in this note are considerably older than the others treated in this part of the Journal, but the Editors felt they deserved a wider public.
2. [1953] I.R. 200.
3. Judge Francis Marin S.C.
4. Applying s. 6(3) of the Criminal Justice (Administration) Act 1924.

Upon trial of the s.4 charge, the prosecutrix was again examined as to her competency to take the oath.[5] This time the trial judge[6] considered that it would be improper for the oath to be administered to her. It must be noted that her answers on the second occasion to the judge's questioning in relation to this issue were less satisfactory than. on the occasion of the first trial.

Again, there being no independent evidence of sexual intercourse, the case collapsed and the prosecution entered a nolle prosequi.

Both these cases illustrate the serious problems which have now arisen in attempting to enforce an inadequate law which supposedly protects the mentally subnormal against sexual exploitation. This law will now be examined in greater detail.

Common Law

It has always been accepted that where a woman's intellect is so weak that she is incapable of distinguishing right from wrong, and is incapable of giving any consent or exercising a judgement upon the question of consent to sexual intercourse, then rape may occur notwithstanding that there is apparent consent. The accused person must be aware of the existence of this defect.[7] The common law cases are contradictory in nature and the principle expounded by the English common law is in itself undear.[8] In the Australian case of *D.P.P. v. Morgan* [9] a clear definition was given. The lack of understanding required would be very low indeed as defined by the Court:

> "It must be proved that she had not sufficient knowledge or understanding to comprehend (a) that what is proposed to be done is the physical act of penetration of the male organ or, if that is not proved, (b) that the act of penetration proposed is one of sexual connection as distinct from an, act of a totally different character."

Glanville Williams considers[10] that this definition is correct in law and socially desirable. He believes it is necessary to have a low requirement of understanding in order to protect men who have sexual intercourse with willing but sexually innocent girls from being convicted of rape and in order to allow women of subnormal intelligence proper sexual expression.

Statute

Section 4 of the Criminal Law (Amendment) Act 1935 attempts to protect the mentally subnormal from sexual exploitation. This provides:

> "Any person who, in circumstances which do not amount to rape, unlawfully and carnally knows or attempts to have unlawful carnal knowledge of a woman or girl who is an idiot, or an imbecile, or is feeble-minded, shall, if the circumstances prove that such a person knew at the time of such knowledge or attempt, that such woman or girl was then an idiot or an imbecile, or feeble-minded (as the case may be), be guilty of a misdemeanour and shall be liable on conviction thereof to imprisonment for any term not exceeding two years. No prosecution for an offence which is declared by this section to be a misdemeanour shall be commenced more than twelve months after the date on which such offence is alleged to have been committed."

The reader will note that the categorisation of mental handicap is not in accordance with current medical· practice and a difficulty which arises in these cases is attempting to use the medical evidence

5. This is required to be done in each case where a charge is brought under s 4 of the Criminal Law (Amendment) Act 1935. See *People v Keating* [1953] I.R. 200.
6. Judge John Gleeson S.C.
7. See s. 2 of the Criminal Law (Rape) Act 1981.
8. See Archbold *Criminal Pleading, Evidence and Practice* 4th. Edition, paragraph 20, 246.
9. [1970] V.R. 337.
10. See *Textbook of Criminal Law* (London, 1982) p.571.

in such a way that it fits within the definition of one of the categories of protected females. The definitions of these categorisations are unduly complex. A reading of s. 1 of the Mental Deficiency Act 1913 will show why. This provides the following definitions:

1. "idiots"; persons who are deeply defective in mind from birth as to be unable to guard themselves against common physical dangers.

2. "imbeciles"; persons in those cases where there exists from birth or from an early age mental defectiveness not amounting to idiocy yet so pronounced that they are incapable of managing themselves or their affairs, or in the case of children of being taught to do so.

3. "feeble-minded persons"; persons in whose case there exists from birth or from an early age mental defectiveness not amounting to imbecility yet so pronounced that they require care, supervision and control for their own protection or for the protection of others, or in the case of children, that they by reason of such defectiveness appear to be permanently incapable from receiving proper benefit from the instruction in ordinary schools.

It is very hard to know exactly what these definitions are attempting to say. The last one is particularly bad in that the last part of it would seem to be so widely cast as to include many persons not intended to be caught within the definition at all. Further, the definitions are mutually exclusive and seem to provide a defence on a charge of unlawful carnal knowledge with one category, that in actual fact the victim fitted within a different category. A well-drafted indictment should therefore probably charge an accused with three separate counts of unlawful carnal knowledge with each of the categories as an alternative.

Apart from this defect, rape is specifically made a defence within the meaning of the section. The logic of this escapes the present writer. The result is that the two charges can never be joined on the same indictment as the accused can always argue for a separate trial on the ground that he is prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment.[11] The result of this is that on the hearing of a charge under s. 4 of the Criminal Law (Amendment) Act 1935 counsel for the accused may adduce evidence in cross examination which suggests that the circumstances of sexual intercourse amounted to rape without in any way prejpdicing himself in respect of any later charge for that offence which may be brought.

Where the evidence suggests that either rape or as. s 4 offence has been committed, the prosecution could avoid the problem adverted to above by proceeding with the rape charge first. A guilty plea by the accused would provide him with a defence to any subsequent s. 4 charge, but he would be convicted of the more serious offence of rape. A not guilty plea by the accused would be admissible in evidence in any subsequent s. 4 proceedings brought in the event of the accused's acquittal on the rape charge. The accused will generally succumb to a Morton's fork: either he committed the offence of rape, or, if not, the s. 4 offence.

The law would be much better if the three separate definitions were abolished and replaced with a simple and understandable statement. This was done in the United Kingdom by s. 7 of the Sexual Offences Act 1956. This makes sexual intercourse with a woman who is defective a criminal offence. Defective was the operative word and a clear and simple definition was:

> "A state of arrested or incomplete development of mind which includes subnormality of intelligence and is of such a nature or degree that the patient is incapable of living an independent life or of guarding himself against serious exploitation, or will be so incapable when of an age to do so."[12]

11. Criminal Justice (Administration) Act 1924, s. 6 (3)/

12. This definition derives from s. 4(2) of the Mental Health Act 1959 because s.127(1)(b) of that Act equated the meaning of 'defective' in the 1956 Act with that of 'severe sub normality in the 1959 Act. Section 4 however, was repealed by Schedule VI of the Mental Health Act 1983.

The Problem of the Oath

There is no provision for giving unsworn evidence in civil cases. In criminal cases a limited exception exists by virtue of s. 30 of the Childrens Act 1908 as amended by s. 28 (2) of the Criminal Justice (Administration) Act 1914. This enables a child "of tender years", who does not, in the opinion of the court, understand the nature of an oath, to give evidence not upon oath, if, in the opinion of the court, the child Iias sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth. This duty in Court to tell the truth. The enactment suggeste6d75by the present writer would be along the following lines;

> "Upon the trial of a person on a charge of having unlawful sexual intercourse with, or of raping, a defective female, the person alleged to be the victim of such an offence may give unsworn evidence if, in the opinion of the trial judge, that person understands that it is their duty to tell the truth to the Court and are aware that it is morally wrong to lie."

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Blasphemy: Religion Challenges Freedom of Speech

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1. As place and time changes, human expectations of what is right changes also. In the Europe of the 21st century we are habituated to the idea that there is no one law that is right for every person in every situation. In itself, this idea, as an encapsulation of relativism in liberal thought has aspects of unassailability which in their absolute nature reflect an almost religious belief. Our concept of the mutability of law means that everything is up for discussion, that no one law or set of laws is sacred. Hence, in order for consensus to emerge as to how society is to be ordered, freedom of speech is essential. That freedom, in itself, goes deeper. Tyranny demands the totality of our lives: that we should act, think and speak as the despot demands. From the societies that predated the revolution in France in 1789, to the suffocating spying by citizen on citizen in aid of total knowledge and total control that characterised the Soviet Bloc up to 1989, the lesson of history is obvious: that where you can be arrested for speaking out against your rulers, your form of government is odious. Freedom of speech is thus not only a bulwark against totalitarianism but its absence is a litmus test that lights up fundamental defects in the entire organisation of society. Where people organise themselves by setting apart ideas as beyond discussion, it may be argued that like the monarchs of old who claimed a sacred status, they are submitting to the erosion of every right that modern liberal societies see as the essence of what they are.

2. Along comes religion and its adherents say: we object to you insulting us, to making our beliefs an object of satire, we have rights as well, in this case the right to privacy of belief without being cut off from the society of which we are a valuable part through ridicule. They go so far as to argue that attacks on what faith holds most sacred should be a criminal wrong and that those who purport to exercise that form of speech should lose their freedom in jail. The very idea seems anathema; that freedom to speak should be curtailed by criminal sanction. It is beyond the limits of what can be tolerated. It is outside the competence of the law. Yet, for thousands of years it was so. Little by little, however, in the Christian world blasphemy has retreated. Increment by increment, the consciousness of Islam, of surrender to God and to the word of God made manifest by the Prophet, has become part of Europe and with it has come the need for mutual respect as between our liberal post-Christian societies and citizens who hold as absolute and sacred that religion is beyond satire.

3. Should European societies adjust? And if so, how? And should that adjustment involve the protection of religion as a space into which mockery must not intrude? These are the questions posed by this paper.

A brief history of blasphemy in Britain and Ireland

4. Blasphemy consists of the attribution to God of that which is not of God, such as malice or deceit. Claiming that there is no God or that religion is pointless is not blasphemy; Cornish - Oxford History of the Laws of England (Oxford, 2004) 636. Cannon 2323 of the Catholic Church, however, defines blasphemy as "spoken or written words of insult to God or His Saints or sacred things." The earliest and most famous eye-witness account of condemnation for alleged blasphemy is recorded in the Gospel of Matthew at chapter 26; the 'blasphemous' statement a positive answer to the question are you the Christ? The very last person given a jail sentence in England for

blasphemy, and the last person officially prosecuted, was the ironically named John Gott. A freethinker, atheist and socialist, his 1921 offence was indeed mild by today's standards; as emerges from the judgment of Lord Trevethin upholding the sentence of four months:

> It does not require a person of strong religious feelings to be outraged by a description of Jesus Christ entering Jerusalem "like a circus clown on the back of two donkeys". There are other passages in the pamphlets equally offensive to anyone in sympathy with the Christian religion, whether he be a strong Christian, or a lukewarm Christian, or merely a person sympathizing with their ideals. Such a person might be provoked to a breach of the peace.

5. In reality, whatever the definition, the crime of blasphemy has been treated as the mockery of the Christian religion. Over the centuries as an unwritten common law it has developed, but not enough.

6. The earliest recorded case is that of John Taylor from Surrey. He proclaimed in 1676 that he was "A King's son" and "younger brother to Christ" and that religion was "a cheat", referring to his proclaimed older brother in scurrilous terms. He was thought to be mad but the overseers of Bedlam proclaimed him sane. Hale J presided over his trial, proclaiming that Christianity was "parcel of the laws of England" and that to reproach that religion "is to speak in subversion of the law." The convict was pilloried in three different places holding a warrant stating that his punishment was for "blasphemous words tending to the subversion of all government." As the Enlightenment took hold, intellectuals in England questioned more and more the literal truths of the New Testament. Thomas Woolston of Sidney College Cambridge essayed on the (lack of) truth in his 'Six Discussions on the Miracles of our Saviour', claiming that what was written was allegorical. In jailing him, the courts through Raymond CJ ostensibly allowed a degree of freedom of speech stating that "we do not meddle with any difference of opinion … we interfere only where the very root of Christianity is struck at." The 1840's saw convictions for the publication of Thomas Paine's 'The Rights of Man'. By this time the law was shifting from the treason foundation laid down in Taylor's case to the protection of society against public insults that could lead to violence; in other words social order justification carrying the component of a tendency to promote a breach of the peace. Lord Macauly opined that all "ought to be at liberty to discuss the evidences of religion" but also said that no one should "be at liberty to force upon unwilling ears and eyes words and sights that cause irritation". The notion that the British state was constitutionally based on Christianity as interpreted in the Anglican Communion resurfaced in 1838, when a controversialist called Michael Augustus Gathercole, a convert from Presbyterianism to Anglicanism saw red when two convents of nuns were established in Darlington near where he was now resident vicar. His language was both intemperate and inaccurate. He declaimed the cloisters "brothels for the priests of the Popish religion". In his view, ever incendiary, the convents "ought to be burnt to the ground." He was careful to say that he would rescue the deluded religious sisters beforehand. His three months in jail from Baron Alderson he regarded as conferring the crown of martyrdom. Nonetheless, this bizarre case is important because in summing the law up for the jury, Alderson B proclaimed it lawful to "attack Judaism or Mahomedanism or … any sect … save the established religion of the country … because it is … part of the constitution …" More and more, the question of "tone and style and spirit" of the criticism of religion, as Lord Denman put it, became central to the law; *R v Hetherington* (1841) 4 St Tr (NS) 536. What was required was an intention "to wound the feelings of mankind or to excite contempt or hatred against the church by law established" or, and this is a surprising twist that went nowhere "to promote immorality." In John Gott's case from 1921, it was the evidence of passers-by calling him

disgusting that was central to the prosecution case; in other words – proof that a breach of the peace might be occasioned, meaning that people might attack him. However, when 'Gay News' published a verse fantasising about homosexual acts on Christ's body after crucifixion, in 1976, people were upset, but no prosecution was publicly initiated, merely a private prosecution leading to a suspended jail sentence.. Public readings of this verse intended to provoke prosecution resulted in nothing except disgust and turning away.

7. In Ireland, the last attempt at prosecution occurred in the context of a campaign to liberalise the Constitution of 1937 and to allow married couples to divorce and remarry; *Corway v Independent Newspapers (Ireland) Ltd* [1999] 4 IR 484 and [2000] 1 ILRM 426. In 1995 a newspaper participating in the sometimes fraught debate published a cartoon showing three male politicians refusing Holy Communion: "Hello Progress – Bye Bye Father?" was the caption. A private prosecution for blasphemous libel failed in the High Court because according to Geoghegan J "it is of the essence of blasphemy … that the words or pictures complained of constitute an attack on some tenet of the Christian religion." The essence of the offence, as this great judge put it, was not merely "shockability". This cartoon was offensive but not blasphemous. Mr Corway's appeal to the Supreme Court also failed. Barrington J, faced with a plethora of contradictory authorities said that "it is impossible to say of what the offence of blasphemy consists." The task under the Constitution of defining the offence was "for the legislature not for the courts." As we will see, since that time there have been worse provocations, but no more prosecutions or attempts at prosecutions.

8. Christianity had retreated from the public sphere, liable to be insulted at will and adherents content to avert their eyes and ears. Shifts in attitude occur, after all.

Shifts in attitude

9. It would be hubris for us to imagine that freedom of speech is beyond discussion. Equally, we should not imagine that we have gotten everything right. History shows us that fundamental shifts hollow out the assumptions of society and replace them with something else. Attitudes change. Our attitudes may be contrasted to what has gone before. What was once sacred becomes de-sacralised and new aspects of common consciousness become accepted in place of what went before. But what era would we prefer to be in, what law against freedom of expression would we be prepared to tolerate? Let us take two examples: Russia and Ireland.

10. On May 26th 1896, Nicholas Romanov was anointed as autocrat over the Russian Empire. The religious service saw him enter the sanctuary as if a clergyman and receive communion in the manner of a priest. For anyone other than the monarch to walk through the royal doors of the iconostasis would have been blasphemy. When the First World War effectively destroyed the common assumptions of the Europe of the time, the Bolshevik usurpation of power laid the agenda for the destruction of the Orthodox Church which, to that point, had been under the patronage of the emperor. The Church reinstituted the office of patriarch, suppressed under Peter I in order to monopolise royal power. In 1922, with famine raging due to the destruction of effective farming practices in favour of common ownership, Patriarch Tikhon was accused of sabotage. The penalty was the confiscation of Church property. For Orthodox Christians the communion vessels used in the Divine Liturgy are the same as the Holy Grail of Christ but, being made of gold, these were extorted as valuables that could be sold in supposed relief of the famine; thus smashing the power of the Church and establishing atheism as the unquestionable state religion. With the fall of communism from 1989, the Church was again drawn towards the centre of Russian power. But even against this newfound closeness, blasphemy has not been made a

criminal offence in Russia and nor have sanctions against those who insult religion been extreme. Hooliganism is an offence which covers a multitude in that country; from misbehaviour and drunkenness on the street to the Punk prayer to the Mother of God "to drive Putin away" chanted in February 2012 in the Cathedral of Christ the Saviour by a feminist music group. Although two members of the group were sentenced to two years imprisonment, for "hooliganism motivated by religious hatred", this form of blasphemy was not specifically provided for: it was simple hooliganism. Nor did everyone agree with the sentence. Many believers felt that arrest and a warning would have been enough. Perhaps in consequence of the incident, a kind of a blasphemy law was introduced in Russia in 2013 making it an offence to offend religious sensibilities. Article 148 of the Criminal Code as amended, provides that it is an offence, carrying up to three years in jail or a heavy fine, to perpetrate "public acts expressing manifest disrespect of society and carried out with the goal of insulting religious believers." The law is not restricted to Christians and it seems it is an offence to insult Jews and Muslims. This law was not used when in April 2014 the director of Novosibirsk Opera, Boris Mezdrich, was sacked after a scandal erupted over the theatre's take on Wagner's opera Tannhauser. The recasting of the plot was plain silly. Jesus Christ was depicted as living in the Venusberg and having an affair with the goddess, where everyone at her court was naked. The opera was advertised by a poster which depicted a crucifix nestling in a woman's crotch. In our relaxed times, we might say "all very juvenile" and furthermore, believer or not, you might be expected to ignore it. Russia perhaps does not place such a premium on freedom of expression as other countries. But the director was not prosecuted. Perhaps Russians are used to, and respect, artistic experiment.

11. Closer to home, in the Ireland of the 1960s, attacks on the mysteries of the Christian faith caused uproar. Hence, they were rare. No one was however physically attacked. People deplored mocking treatments of the New Testament such as the 'Life of Brian' film from 1979. In fact it was banned in Ireland and in Norway. In Britain, 39 local authorities banned showings of the film and others insisted on an 18 year old certificate or cuts. Norway lifted the ban only in 2008; Ireland never did. Since the makers believed in the integrity of their creation, they refused to show the film at all if cuts were made or if the original certificate of 14 year old viewers was disturbed. Richard Webster in 'A Brief History of Blasphemy: Liberalism, Censorship and The Satanic Verses" (London, 1990) commented that despite the blasphemy being what he calls mild, public broadcasters shunned the film not because of the law on blasphemy but because of fear of causing offence to Christians. Thus, the true dynamic was not "the force of law but … the internalisation of this law." The brouhaha nonetheless made people travel to see it and it grossed as number one that year in England.

12. In 1968 an attack on television by Gay Byrne, the host of the 'Late Late Show', that was more a simple expression of opinion, on the Catholic Archbishop of Dublin` for spending money on churches rather than on housing for the poor, resulted in hundreds of letters of protest to the national broadcaster RTÉ, many very angry. Move on 20 years: in 1997, a comedian called Tommy Tiernan appeared on that talk show and in a seven minute routine, pretended to be a sermon at Mass, poked fun at the crucifixion of Christ and at the idea of the Lamb of God. By the end of the show, over three hundred phone calls of protest had been received and some in Dublin drove to RTÉ headquarters because the phone lines were blocked. The comedian waited in his dressing room well into the early hours of the morning to avoid the anger outside. RTÉ did not repeat the program during the week, as was usual. On an attempt being made to raise the matter in the Senate, a Dublin University senator mocked attempts to "protect … the omnipotent". With the apparent change from a Catholic country to an atheist-liberal one that some consider Ireland has undergone,

mockery has become the order of the day in relation to the Catholic faith at least. It has become a soft target. Move on another ten years: in 2009, the son of a former Minister of Government, under the stage name David MacSavage, initiated a satirical television program which attacked every aspect of Irish society. Literally nothing was sacred over the four series of the 'Savage Eye' program. As well as attacking politics, the Irish language, nationalism, the English, the President of the Republic, the police, medical consultants, Belfast people and old-fashioned attitudes, MacSavage trained his guns in a particular way on the Catholic Church. In one episode, the visage of a bishop giving a press conference about the sexual abuse of children was distorted as he speaks into a demon. In another, a mother forced to rush to hospital with her baby and left with the choice of leaving her young lad in the temporary care of a drug addict or a trendy priest, chooses the junkie. Even the sacrament of Communion was mocked and one sketch effectively likened the reception of the sacrament to an addiction to heroin or crack cocaine. Many were upset. If a whisper of protest were ever raised, I am unaware of it. While one MacSavage episode featured a woman, himself, in a burka and a niqab, a full-face veil, being interviewed for the beauty contest 'The Rose of Tralee' this outlier of lack of taste in comedy has certainly not mocked Islam or the Prophet of Islam.

Where attitudes have continuity

13. Islam regards the Holy Qur'an as the sanctuary of the Almighty. The human person who originally recited it to his followers, the Holy Prophet of Islam, is the final word of all the prophets travelling back through the Old and New Testaments. Thus the word of the Prophet is final and as God's word is unchangeable and unassailable. It is not to be contradicted by statements in those other books, much less by mere logic. As the Messenger of God, the person of the Prophet is inviolable. Whereas much current speculation refers to images of him being possible within Islam in the early Middle Ages, for the past several centuries, at least, any image of him is an affront of a most serious kind. Mockery of the Prophet, of what he said, of the tenets of divine law and of what is contained in Islamic Revelation is regarded as a direct and unholy affront. During the time when the Prophet was alive on this earth, enthusiasts executed a poet in Medina who wrote satirical verses deriding his Mission. This has never changed. We, as modern people, may unwisely sneer at the idea of an image being a violation. Well, more and more countries are initiating privacy laws and images taken in private circumstances without permission may attract damages; witness the image of a member of the British royal family sunbathing privately. Images on our television screens are now altered to distort the faces non-involved or innocent persons who are captured by cameras at important events. The same applies to their car registration numbers. In Europe, it was common for people to believe that the image of a person constituted the presence of that person so that capturing it constitutes a form of theft of personality. I have personal experience of this. In an Irish-speaking community, I can remember taking out my camera to have an elderly woman flee in horror. Perhaps this is only a residue, but these ideas are deep-seated. Because we have generally lost them does not mean that they should not be treated with respect. Those without acquaintance with the Orthodox Church will be puzzled at the reverence shown to icons, literally images, of the saints; but it is the same idea but a beneficial one: through the image the saint is present.

14. None of this has changed and nor will it likely ever change. It is interesting to read what Ayaan Hirsi Ali writes in 'Heretic: Why Islam Needs a Reformation Now' (New York, 2015) about what she sees as the faults of Islam. Her position is more than difficult. She, after all, is living under protection because of scripting a documentary that included words from the Qur'an projected on a living person and because of threats is under protection.

15. Her collaborator on that project was murdered. Lest there be any misunderstanding here, I find that appalling, immoderate and unjustifiable by any appeal to God or to man. Equally, that is the only thing to be said about the most famous death sentence for blasphemy. The facts are well known. Briefly, in 1988 a British-Indian author published a novel ascribing a satanic name to the Messenger of Islam and portraying him as false, manipulative and fabricating the message rather than receiving it from God through an angel; Salman Rushdie – 'The Satanic Verses'. Other aspects of the book are even more insulting, ascribing names in a brothel to the wives of the Prophet, revered as the 'Mothers of Islam'. Grand Ayatollah Khomeini proclaimed "In the name of God Almighty" that "the author of the book … as well as those publishers who were aware of its contents have been sentenced to death." The Ayatollah called on "all intrepid Muslims to execute them quickly … so that no one will dare to insult the Islamic sanctions." An attempt at a blasphemy prosecution by Muslims failed before the High Court in London, on the basis that the law protected only Christianity; the case of *R v Gathercole* [1838] 168 ER 1140 was the precedent. The law was exposed, whether one agrees with the notion of any restriction on free speech as possible in a liberal society or not, as unfit for purpose in a society that claims the allegiance of all citizens. Most recently, Zainub Priya Dala has, like John Taylor in 1676, apparently been confined for a time to a mental asylum in South Africa for expressing admiration of that author. In Lahore in Pakistan, to this day the tomb of Ilm-Deen is covered with flowers on a daily basis, a tribute to a man executed for murder perpetrated to uphold the honour of Islam. At his grave, a framed copy of the charge takes pride of place; 'At killer's shrine, praise for modern murder' Jon Boone, Guardian 12 March 2015. On 6th April 1929, he killed a publisher who had put out a book with an offensive commentary on the Prophet of Islam. Today, a security officer called Mumtaz Qadri is under death sentence for murdering the person he had been charged with protecting Salmaan Taseer, the governor of the Punjab. He turned his machine gun on the governor. The motivation was that the murdered politician had spoken out against his country's blasphemy laws, shocked by an allegation against a Christian woman Aasiya Noreen, so easy to make and even if not supported by evidence likely to whip up vicious reprisals, that in the course of a row with a neighbour while doing farm work that she had insulted the Prophet of Islam. With the weight of Christian testimony only half that of Muslim evidence, her defence that her neighbour was being malicious was discounted and she was sentenced to death. At her sentencing, according to a journalist who wrote her memoirs, "a euphoric hoard" invaded the courthouse crying "kill her" when the sentence was pronounced.

16. Every law can go wrong. Laws without balance or moderation are unwelcome. But, let us remember here that there are many laws which restrict freedom of speech. Otherwise, we would not have laws against injurious falsehood, passing off and defamation. We do not have in Europe either a universal constitution or a principle against the punishment as a crime against hateful immoderate speech. The United States of America have the First Amendment to the Constitution which requires that attacks on religion be ignored; *Joseph Burstyn Incorporated v Wilson* 343 US 495 (1952) . Some also believe, perhaps reasonably, I do not know, that such totemic protection of free speech has unintended consequences.

17. Freedom of speech is far from absolute. Rather, the reality is that such restrictions are increasing. To propose and to frame a new law is the job of politicians and their advisors and not the task of judges. Before going to the issue of whether any new law is needed, let us briefly examine current restrictions and ask whether the law in Ireland or in the UK or elsewhere might a model of where society might move?

The law in Ireland protecting religion/constricting free speech

18. The Constitution of Ireland, dating back to 1937, guarantees under Article 40.6.1.i that citizens should be able "to express freely their convictions and opinions", subject to "public order and morality". It further makes it imperative that Ireland should have laws making it an offence to publish "blasphemous, seditious, or indecent matter" the punishment for which is a matter for the legislature. Hence, there must now be a law against blasphemy. And there is. Section 36 of the Defamation Act 2009 makes it an offence punishable only by a fine of up to €25,000 to "publish or utter blasphemous matter". What comes within the definition of the offence? Well, the offence is complete where the accused "publishes or utters matter which is grossly abusive or insulting in relation to matters held sacred by any religion" with the effect that it causes "outrage among a substantial number of the adherents of that religion". To be guilty, the accused has to intend, in other words to have as his or her purpose, "to cause such outrage." It is a defence, however, that "a reasonable person would find genuine literary, artistic, political, scientific or academic value in the matter to which the offence relates." While a religion is not defined, "an organisation or cult" which has "making a profit" as its "principal object" or which "employs oppressive psychological manipulation of its followers, of for the purpose of gaining new followers", is excluded. Certainly, the prosecution of such an offence would be difficult. Firstly, the prosecution would have to prove grossly insulting words or images. Secondly, expert evidence from a member of the religion insulted would have to be given that the insult outraged a substantial number of the adherents. That expert witness, probably a minister of religion, could be cross-examined about psychological manipulation and finance: in the hands of less than responsible counsel this could result in more severe insult than was offered in the first place. Lastly, while the burden of proof would be on the accused to raise a reasonable doubt in this respect, he or she could call testimony from reasonable people to the effect that while outrageous, what was involved was art or that it was a serious academic argument; so the Russian opera production would escape. There have been no prosecutions under the legislation. Unlike the old blasphemy law, however, the law is commendably available for the protection of all faiths.

19. Like many countries in Europe, Ireland makes it an offence to incite hatred. This has to go beyond bullying and has to have an exclusionary component. Section 1 of the Prohibition of Incitement to Hatred Act, 1989 provides that "hatred" under the Act is to be interpreted to mean hatred directed "against a group … on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation." Under section 2 it is an offence to intentionally, that is purposefully, "publish or distribute written material" or "to use words, behave or display written material" outside a private residence which "are threatening, abusive or insulting and are intended or, having regard to all the circumstances, are likely to stir up hatred." The accused has a defence, in other words the burden of raising a reasonable doubt is on him or her, where he or she did not intend "to stir up hatred" of unawareness of the nature of the material. Broadcasts are specifically provided for. On conviction, a sentence of two years imprisonment may be imposed and there can be a hefty fine.

20. In Ireland it is also an offence to disrupt a religious service. On the wording of the Ecclesiastical Courts Jurisdiction Act 1860 this applies, it seems, only to Christian services. As applied by schedule I of the Statute Law Revision Act 2007, it is an offence that carries a fine or two months in prison to act in a "riotous, violent or indecent" manner but only in any "cathedral" or "church" or in "any place of religious worship duly certified". As far as I can tell, synagogues and mosques are not so registered. If they are registered then it is possible to argue that under the Places of Worship Registration Act 1855, then to "molest, let, disturb, vex or trouble, or by any other

unlawful mean disquiet or misuse" any "preacher duly authorised to preach therein" or "any clergyman in holy orders ministering or celebrating any sacrament or any divine service, rite or office" in such places, including a "burial ground" is an offence. But, that is doubtful as the wording seems entirely Christian. An example is standing up during a service and shouting at the priest. There have been some convictions under this section. Should disrupting a divine service of worship be a crime?

21. It stands to reason why there should be such an offence. If you don't like a church or a synagogue or a mosque, you don't have to go there. If you attend in order to disrupt the meditations of others in a nasty way, as the Act describes, then surely this is a crime?

22. Defining the elements of a crime is easy. Defining when society ought to be allowed to punish behaviour as a crime is very difficult, especially where rights to privacy or to freedom to speak are involved. Let's come back to that.

Law in the United Kingdom protecting religion/constricting free speech

23. Blasphemy was abolished in the UK by s.79 of the Criminal Justice and Immigration Act 2008. It was no longer considered necessary in a secular society and the anomalies in the law meant that it was no longer serviceable. Rather than replace it, the law was abolished. That does not mean, however, that there is no law that might be used against those who want to stir up hatred. Part III of the Public Order Act 1996 makes the promotion of racial hatred an offence. Race under this law embraces "a group of persons … defined by reference to colour, race, nationality or ethnic or national origins". So, whether you want to stir up trouble by insulting Greek people or make insulting remarks about the Irish or Australian aborigines, this may be the offence. You can, however, say whatever you want in private. Section 18 provides that it is a defence to speak inside your own or another person's "dwelling" where you don't believe that you can be heard out on the street or next door. This kind of offence requires "threatening, abusive or insulting words or behaviour" or the display of written material to the same effect, where the accused "intends to stir up racial hatred" or where racial hatred is "likely to be stirred up" by that kind of conduct.

24. Section 19 provides for the offence of publishing or distributing written material which is intended, or likely to stir up, racial hatred. The public performance of a play which is intended, or likely to stir up, racial hatred is provided for under section 20. Section 21 provides for the offence of the distribution, showing or playing of a recording which is intended, or likely to, stir up racial hatred. Section 22 provides for offence of broadcasting of "threatening, abusive or insulting images or sounds" which are intended, or likely to, stir racial hatred. The Act also provides for powers of entry and search of a property where it is suspected such material or recordings are situated.

25. So, why not religious hatred? Is it not already covered in the legislation? No, religion was not. Clearly Parliament thought there was a risk that extreme conduct could be caused by whipping up the feelings of religious adherents. Part 3A of the Public Order Act, 1986 as inserted by the Racial and Religious Hatred Act 2006 provides for the offence of hatred against persons on religious grounds. The definition is slightly different to racial hatred. "Religious hatred" means "hatred against a group of persons defined by reference to religious belief or lack of religious belief". In a similar way to the law against racial hatred, section 29B makes it a criminal offence to use words, behaviour or display of written material which is intended to stir up religious hatred. But the words or behaviour have in themselves to be "threatening". That is not as was originally intended by the government. They proposed "threatening, insulting or abusive" as applies to racial hatred. So, it is weaker than racial hatred; perhaps reflecting the opposition of many civil libertarians such as the

comedian Rowan Atkinson who claimed: "To criticise a person for their race is manifestly irrational and ridiculous but to criticise their religion; that is a right. That is a freedom." So the British legislation could cover threatening abuse against a religion but it could not cover arguments that a religion got everything wrong, or made no sense. It could not cover the reproduction of religious images or their inappropriate use, such as decorating a pub with Orthodox icons. It depends probably on the language. If moderation characterises the approach and if debate is the motive, then free speech is unlikely to trespass against the law.

26. Such questions as to whether legislation includes hatred of religion under anti-hate laws and whether to make the mode of expression of criticism of religion or of adherents violent and not merely disrespectful are ones which either make a law work or not. In reality, laws may be shibboleths, useless but a sop and as such likely to infuriate those to whom they were a fig leaf in place of real protection.

Anti free-speech laws generally

27. Laws against stirring up ethnic or group hatred are a modern commonplace in Europe. There is such a law in France and Jean Marie le Pen was a number of times prosecuted under it. Under the Fabius-Gayssot legislation of July 1990 it is also a crime to contest the crimes against humanity as found by the Nuremberg Tribunal of 1945-1946. While some may say that there have been many genocides, the attempted murder of the Jewish people by the Nazi occupiers of much of Europe between 1933 and 1945 was the most organised, methodical and poisonously ideological, admitting of no exceptions and utterly conscience-less. It was accompanied by murder against political opponents, gay people, Gypsies and the attempted beheading of the Polish, Czech and other nations by elite-destruction. Jean Marie le Pen's offence was to trivialise the gas chambers used for the systemised mass murder of European citizens of Jewish faith:

> Je suis passionné par l'histoire de la Deuxième Guerre mondiale, je me pose un certain nombre de questions. Et je ne dis pas que les chambres à gaz n'ont pas existé. Je n'ai pas pu moi-même en voir. Je n'ai pas étudié spécialement la question. Mais je crois que c'est un point de détail de l'histoire de la Deuxième Guerre mondiale.

28. Ten year later, he repeated his "point de detail" remark and was fined again. Of course, it is just plain stupid but, more than that, it is offensive as well. Other events in history, such as the deliberate deprivation of the Ukrainian people of the produce of their land under Soviet occupation in 1932-1933, the Holomodor, the murder of the Armenian people in Ottoman Turkey starting in 1915 are either disputed as to their facts or how they should be classified. There is no European country making denial of the Armenian genocide a crime, nor the Rwanda genocide. Central to the danger of repetition of any crime, however, is that the perpetrators deny it. Central to the healing of any psychosis is that the sufferer turn and face his or her own shadow. So, there is a point to such law. Many of those who oppose Holocaust denial laws, as any sweep of the World Wide Web will show, foster peculiar views and that is putting it mildly. So, in Europe we have Holocaust denial laws in Switzerland, Austria, Hungary, Belgium, the Czech Republic, the Netherlands, Poland, Portugal, Romania and Slovakia. In countries such as Spain, such laws have met with constitutional difficulties based on free speech and other countries such as Ireland have yet to adopt similar legislation, in our case because of government priorities and because of the difficulty of drafting. For my part, I agree with Professor de Smet of the Université Libre de Belge:

> Le négationnisme est l'une des pires formes de racisme. Elle en est aussi sa version la plus « respectable », se parant des oripeaux de la science. C'est pour cela qu'il faut continuer à le sanctionner; La Libre Belgique, April 28, 2006.

29. In addition, anti racial hatred laws are a commonplace in Europe. In so far as I can see, most follow a model similar to that in Ireland.

30. These are based on international obligations. Article 20 of the International Covenant on Civil and Political Rights of 16 December 1966 requires that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law". It is hard to quarrel with that. The details of such laws are beyond my competence and of the scope of this paper.

European Court of Human Rights

31. In Article 8 the European Convention on Human Rights guarantees to everyone "the right to respect for his private and family life, his home and his correspondence." Of course, this is not absolute, there may be interference "in accordance with the law and is necessary in a democratic society" where "interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others" is involved. There have been a few cases, none in favour of the pro-blasphemy side of this debate – note the provocative characterisation!

32. In an appeal from the 'Gay News' poem conviction, resulting in a suspended sentence, the European Commission on Human Rights ruled that the protection of the religious feelings of citizens was a legitimate aim. Of course, elsewhere the decisions on the Convention establish that there should be minimal interference and only to the extent posed by the necessity of intervention.; *Gay News & Lemon v U.K* (1983) 5 EHRR 123. Protection from gratuitous insult to religious feelings was a necessary aim in a democratic society, insulted by the film 'Council in Heaven', in this case Austria, according to the court in *Otto Preminger Institut v Austria* (1995) 19 EHRR 35. There is an entitlement not to be offended. A short film about Saint Teresa of Avila called 'Visions of Ecstasy', again insulting the crucifixion, was banned in Britain. This according to the Court, served a legitimate purpose, that of protecting Christians against serious offence in their beliefs; *Wingrove v UK* (1997) 24 EHRR 1. In *Tatlav v Turkey*, (App. No. 50692/99) (Unreported, European Court of Human Rights, 2nd May, 2006) a journalist published a book, the thrust of which can be seen from the indictment under that country's blasphemy law:

> l'islam est une ideologie qui manque tellement de confiance en elle-meme, que ceci se revele dans la cruaute de ses sanctions. (...) elle (...) conditionne [les enfants] des leur plus jeune age, avec des histoires de paradis et d'enfer.

and;

> il n'aura plus besoin d'histoires de Dieu a partir de cet age-la (...) la politique de l'Islam envers l'enfant aussi, n'est faite que d'une violence barbare (...)

and;

> les religions manifestent leur manque de confiance en elles-memes, par leur tendance a reprimer la pensee libre, et en particulier toute analyse et critique a leur regard.

and;

> toutes ces verites concretisent le fait que Dieu n'existe pas, que c'est la conscience de l'analphabete qui l'a cree (...) ce Dieu qui se mele a tout, y compris a la question de savoir combien de coup de batons seront infliges a l'adultere, quelle partie du corps du voleur sera amputee, et jusqu'a la frange du pauvre Ebu Leheb

and; certain criticisms of the personality of the Prophet of Islam that will not be repeated here. The Holy Book of Islam is described as "plus primitive que la plupart des livres plus anciens ecrits par les homes."

33. Differentiating its prior decision in *IA v Turkey*,(App. No. 42571/98) (Unreported, European Court of Human Rights, 13th September, 2005) the Court differentiated the tone of a vicious criticism and held that the expression of views was protected by the Convention but gratuitous in insult was not. That brought the law pretty close to the English model of the 19th century on blasphemy as to what was not permissible; vulgar insult and abuse.

Model for pure freedom

34. Americans find the entire idea of anti-expression laws puzzling. The First Amendment of the Constitution of the United States of America passed in 1791, was the law allowing the showing of the obnoxious film that was at the heart of the Supreme Court decision in *Joseph Burstyn Incorporated v Wilson*, 343 US 495 (1952).. The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

35. The application of this has developed, some would say in not so sensible ways. In the United States there are not, as far as I can tell, pure incitement to hatred laws. Instead, crimes can be aggravated by reason of a racial hatred or religious motivation. So it is a crime to assault someone but a worse one to assault a person because they are Catholic or African-American. Looking back to 1942, Justice Murphy summarised the case law to read that Constitutional problems were not raised by "the lewd and obscene, the profane, the libellous" or by what he called "fighting words", meaning statements "which by their very utterances inflict injury or tend to incite an immediate breach of the peace." You can see a similar approach in the British anti religious hatred law; there has to be a threat in the words, threatening to another person or perhaps so threatening that the religious person would be infuriated. But, we do not know. What we do know is that in *Brandenburg v Ohio* 395 US 444 (1969), the Supreme Court of the United States ruled that their "constitutional guarantee of free speech and free press" exclude the states from forbid statements except "where such advocacy is directed to inciting imminent lawless action and is likely to incite or produce such action." Thus, statements that pose an immediate danger of a breach of the peace can be forbidden and, even there, the proponent of hate speech has to have this as his or her intention.

But, I wonder if that is what we want?

Proposed preliminary view

36. Hatred is an integral potential of the human personality. Hatred is the driving engine of crimes of violence. It is irrational, immune to argument, easy to conjure up in the right conditions and similarly contagious. In our Europe, remembering the dreadful crimes perpetrated against vulnerable minorities it makes sense to outlaw hate speech. My experience of dozens of murder cases suggests a tentative answer to the question of which comes first, the chicken or the egg? Hatred always precedes a planned homicide. Further, because violence is triggered by emotion

and, paradoxically, because homicide is generally only possible if phylogenetic restraints are overcome, appeals for support, the formation of a gang and concerted action typify group upon group violence; Charleton – *'Lies in a Mirror: An Essay on Violence and Deceit'* (Dublin, 2006).

37. As against that, we have our precious liberty. Article 11 of La Déclaration des Droits de l'Homme et du Citoyen de 1789 states:

> La libre communication des pensées et des opinions est un des droits les plus précieux de l'Homme: tout Citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminés par la Loi.

38. In Europe, we are far from the approach advocated by Lord Devlin that a private breach of morality is to be treated as a form of treason on society and thus outlawed. Rather, minimal interference in the liberties of citizens as advocated by Paine and Mill that society should be based on freedom because fair decision making can only be upheld and sound policies are alone achieved where every action of government is subject to discussion and to criticism; for a discussion see Cox – '*Blasphemy and the Law in Ireland*' (Dublin, 2000). This argument is the variant of John Philpot Curran's statement in Green Street Courthouse in Dublin that the price of liberty is eternal vigilance; a quality that cannot be achieved in the darkness of ignorance.

39. However, the origin of principles informs their application just as the background to an agreement illuminates the meaning of the text in which it is expressed. Liberty in Europe is founded upon freedom to enquire and to discuss and to criticise. The object of such freedom is to function as the fundamental bulwark against tyranny. Just as violence and hatred are bedfellows, so are the protection of tyrants and the suppression of speech. That, it seems to me, is what is important here. We do not allow racists complete freedom of speech for two reasons: firstly, this kind of abuse of the freedom to speak is linked to idiocy, at the mildest, and, at the worst, to the conjuring up of chaos; secondly, while what they say matters to themselves and their band of potential followers, it has nothing whatever to do with good governance. That is where it is reasonable to argue that the protection of religion from calculated hatred can be a legitimate aim of the law. Religion now has nothing to do with the law. The most deeply held beliefs of believers as to what is sacred do not impact upon discussions as to how economic policy is to be run or as to how good administration is to be achieved or as to how proper standards among politicians may be enforced. That is what our political discourse is about nowadays precisely because we have complete freedom of discussion. Of course there are residual areas where religious ideas of the soul intersect to a degree with policy on such matters as human reproduction. One suspects, however, that more and more discourse is based not on supernatural questions but on questions of the shared nature of our humanity.

40. Thus, the protection of religion from contumelious abuse will not in any way undermine public discourse or create the conditions for the return of tyranny.

41. In the 70 years since the Second World War, we have had more freedom in Europe, the countries dominated by Europe have achieved their own liberty. Often, this is only after a fashion as the vaunted hopes of freedom have been smothered by tyrants. We only have to look back on that span to see how chaos once reigned here and there is no sense in feelings of superiority over those whom we once ruled. The result of the removal or weakening of autocracy in Yugoslavia, in Syria, in Libya, in Iraq, in Somalia and in dozens of other places has been instability or in the worst cases the total failure of state control. The result has been, and will continue increasingly to be, the influx of refugees and migrants seeking a better life in Europe. Over generations, they may become

habituated to our notions of liberty of expression, but since it took us more than a few generations to work out these ideas ourselves, that is to be expected. Immigrants will not tolerate insults to what Carl Jung would have called the archetype of their self, synonymous in his psychology as the god-image. Integration is going to be harder to achieve where, for reasons best appreciated by themselves, immigrants are insulted. Respect for the values of others constitutes the basic condition for peace; the late Commandant Kevin White, personal communication. What is wrong with having that? By insisting on polite discourse, what do we lose?

42. As lawyers, more than most, we are aware of the temptation of Ἡρόστρατος, (Herostratos) who burned down the Temple of Artemis in Ephesus in the 4th century BC for no better reason than that he wished to achieve notoriety. Mischief, the desire to cause trouble, is recognised by the compilers of folk takes from the Grimms to Perrault to Yates as a key temptation in human nature. Recent examples include the killers of John Lennon and of the plane full of people over the French Alps. One suspects as well that those 'clergy' who gained notoriety by threatening the burning of the Holy Book of Islam in America were similarly motivated. Why leave them with a free ride, the result of which may be the inflaming of serious trouble in our society? As of May 5th 2015 a plot was apparently foiled to attack a group that were planning to have a 'draw in' of the Messenger of Islam. The result was two deaths. http://www.theguardian.com/us-news/2015/may/04/texas-shooting-the-group-behind-the-muhammad-cartoon-contest. Is this kind of thing good for us?

43. And then, lastly, there is the question of remedy. Accepting, as I do, as good sense and good law, Article 8 of the La Déclaration des Droits de l'Homme et du Citoyen:

> La Loi ne doit établir que des peines strictement et évidemment nécessaires, et nul ne peut être puni qu'en vertu d'une Loi établie et promulguée antérieurement au délit, et légalement appliquée.

44. This is mirrored in Article 7 of the European Convention on Human Rights. We must be ready: bí úlamh! If chaos breaks out through a few people choosing a few carefully selected insults, words and actions, we must be able to respond in Europe by stating: this was a crime, it will be investigated. In no way can we pander to notions of disproportionate response: that is clearly wrong. But like the desire for revenge, the state exists to administer just retribution on behalf of all its citizens so that private justice with its excesses is abolished.

45. By the state having a remedy, clearly defined, proportionate and respectful of divergence, the law may be seen to be above sectional interests and the protector of the most sacred trust of society – to establish peace for all citizens. Is this a question of the careful drafting of an appropriate legal instrument or is it the recreation of the offence of blasphemy by the back door?

Appendix

Persons killed/under protection due to threats of Islamic extremists

Sinéad Lardner*[1675]

1.Charlie Hebdo[1676] - Paris

Charlie Hebdo, a satirical weekly newspaper that features cartoons, reports, polemics and jokes attracted attention for its controversial cartoon depictions of Muhammed. It has published articles

1675 Sinéad Lardner, Judicial Researcher's Office.

1676 BBC News, 2015. 'Charlie Hebdo attack: Three days of terror' 14th January 2015, Available from <http://www.bbc.com>

on numerous occasions mocking Catholicism, Judaism, Islam and various other groups. On the 7th January, 2015, Said and Chérif Kouachi, identified as belonging to the Islamist terrorist group Al-Qaeda, forced their way into the offices of Charlie Hebdo in Paris. They killed eleven people and injured eleven others. Stéphane Charbonnier a French satirical caricaturist joined Charlie Hebdo in 1992, later becoming the director of publication in 2009. Charbonnier became subject to death threats from Islamists and was under police protection following the time the magazine was firebombed in 2011. He was killed in the shooting in January 2015.

2.Salman Rushdie – British Indian novelist[1677]

Salman Rushdie, a British-Indian novelist became the centre of controversy following the publication of his fourth novel *The Satanic Verses* which provoked protests from Muslims in several countries. He was the subject of many death threats and a fatwa calling for his assassination was made by Ayatollah Ruhollah Khomeini, the Supreme Leader of Iran in 1989. Rushdie was then placed under police protection by the British Government.

3.Theo Van Gough - Amsterdam[1678]

Theo Van Gogh, a provocative media personality in the Netherlands, was shot and stabbed by a young radical Mohammed Bouyeri, a Dutch-Moroccan Muslim, on an Amsterdam street in November 2004 who accused him of blasphemy against Islam. Van Gogh drew attention to himself with deliberately inflammatory political theatre that escalated; his final film was an avant-garde indictment of the religion's treatment of women. Van Gogh had collaborated with Ayaan Hirsi Ali, a Somali refugee turned politician, on a short film titled 'Submission: Part 1', in which verses of the Quran were written on the bodies of naked women to protest their treatment by men. Hirsi Ali received police protection after the film was shown on Dutch television. Van Gogh had in fact, refused such protection.

4.Raza Anjum- British/Asian [1679]

Raza Anjum a Muslim councillor (resides in Britain), travelled to Pakistan in December 2010, and spent three weeks meeting political leaders urging them to release Asia Bibi, a mother-of-five found guilty of defaming the Prophet Mohammed, a conviction that human rights campaigners say is unsafe. He has received threatening phone calls, which he has reported to the police. In one particularly threatening phone call, he was told to 'stop supporting Christians or he would be made a terrible example out of' and has received five violent threats upon his return.

5.Paris Dipersico – Canada[1680]

Dipersico, who commented 'Islam is a religion of 'peace' and Muslims will kill you to prove it' was dragged from his bicycle, tied up among trees, and then beaten unconscious by two Muslim men. One of the attackers stated; 'the Jews are paying you to write this against Islam'. Dispersico has also received death threats through facebook and no longer leaves his home after dark, has installed video surveillance and must notify the police when he leaves his home.

[1677] Robertson, G. 2012. 'Looking back at Salman Rushdie's The Satanic Verses.' 14th September 2012, Available from <http://www.theguardian.com>

[1678] Gladstone, R, 2015 'A Timeline of Threats and Acts of Violence over Blasphemy and Insults to Islam' *The New York Times,* 7th January, Available from; <http://www.nytimes.com> [28 April 2015].

[1679] Crilly, R, 2011 'Muslim councillor receives death threats over blasphemy case' *The Telegraph*, 2nd February , Available from ; <http//www.telegraph.co.uk>[28th April 2015]

[1680] Lucida, C. 2011. 'Cultural Muslim Beaten Up By Muslims for His Book on Muslims' Available from http://cameraluc.blogspot.ie [28 April 2015]

6.Nakoula Basseley Nakoula – US Resident (Born in Egypt)[1681]

'Innocence of Muslims', a controversial anti-Islamic movie trailer that was written and produced by Nakoula Bassley Nakoula (who has legally changed his name to Mark Basseley Youssef) was perceived as denigrating of the Islamic prophet Muhammad. The trailer sparked violent protests against United States embassies around the world. Social media websites were inundated with death threats following the release of the movie trailer. Script Adviser Steven Klein has also received death threats due to his involvement in the film and has allegedly been advised by the FBI to move residence.

7.Raheel Raza - Canada[1682]

Raheel Raza is a human rights activist who is a strong advocate for gender equality, particularly for Muslim women. Raz, who is the author of "Their Jihad…Not My Jihad," and a professional speaker and diversity consultant, received a Fatwa along with numerous death threats for being the first woman to lead mixed male-female Islamic prayers in 2005 in Canada.

8.Jerry Falwell[1683] - American Baptist

Falwell, an American Baptist pastor remarked that Muhammad 'was a terrorist' in an interview on September 30th, 2002. His remarks set off deadly riots in India and prompted death threats. An Iranian cleric, Mohsen Mojitahed Shabestari then issued a fatwa calling for Falwell's death. Falwell apologized saying he 'intended no disrespect' to any sincere, law-abiding Muslim.

9.Farag Fouda[1684]

Farag Fouda, a columnist for the Egyptian weekly magazine October, was fatally wounded by an assassin from a Muslim extremist group after being accused of blasphemy by a committee of clerics at Al-Alzhar University. The jihadist group Al-Gama'a al-Islamiyya claimed responsibility for the murder. Based in Cairo, Fouda was noted for his critical articles and incisive satires about Islamic fundamentalism in Egypt. In many newspaper articles, he pointed out weak points in Islamist ideology and specifically criticised leading Islamist figures. He believed he was defending Islam against distortion by other Islamists.

10.Dimyana Obeid Abd Al Nour - Egypt[1685]

Dimyana Obeid Abd Al Nour, a Coptic Christian teacher was detained in Egypt on charges of 'defamation of religion'. Three students alleged that she insulted Islam and the Prophet Muhammad during a class on 'religious life'. According to information received by Amnesty International, some of the students allege that that Dimyana Obeid Abd Al Nour stated that she 'loved Father Shenounda' the late Patriarch of the Egyptian Orthodox Church and touched her knee or her stomach when she spoke about the Prophet Muhammad in class.

[1681] Gladstone, R, 2015. 'A Timeline of Threats and Acts of Violence Over Blasphemy and Insults to Islam.' *The New York Times.* 7 January. Available from <http://www.nytimes.com> [28 April 2015].

[1682] Raza, R. *A warning From a Dial – A – Fatwa.* Available at http://www.raheelraza.com [28 April 2015]

[1683] Mark, B. Banks. A, 2007. 'Jerry Falwell, Architect of Religious Right, Dies at 73' Available from: <http://www.archives.adventstreview.org> [28 April 2015]

[1684] Gladstone, R, 2015. 'A Timeline of Threats and Acts of Violence over Blasphemy and Insults to Islam.' *The New York Times.* 7 January. Available from ,<http://www.nytimes.com> [28 April 2015].

[1685] Amnesty International, 2013. 'Egypt: Release teacher accused of blasphemy.' *Amnesty International, 10 May, 2013.* Available from http://www.amnesty.org [28 April 2015]

11.Naguib Mahfouz- Egyptian Writer[1686]

Naguib Mahfouz was on an Islamic fundamentalist 'death list'. The appearance of 'The Satanic Verses' reignited the controversy surrounding Mahfouz's novel Children of Gebelawi. The novel is an elaborate parable of the religions of the Middle East. Death threats against Mahfouz followed, including one from the "blind sheikh," Egyptian theologian Omar Abdul-Rahman. Mahfouz was given police protection, but in 1994 Islamic extremists succeeded in attacking the 82-year-old novelist by stabbing him in the neck outside his Cairo home. He survived, permanently affected by damage to nerves of his right upper limb. After the incident Mahfouz was unable to write for more than a few minutes a day and consequently produced fewer works. Subsequently, he lived under constant bodyguard protection. Finally, in the beginning of 2006, the novel was published in Egypt with a preface written by Ahmad Kamal Aboul-Magd. After the threats, Mahfouz stayed in Cairo with his lawyer Nabil Mounir Habib until his subsequent death.

12.Alber Saber Ayad- Egypt[1687]

Alber Saber Ayad, a 27 year old computer science graduate and activist, was found guilty by a Cairo Court of disseminating material on the internet that defamed religions. On September 13th 2012, a large mob of angry Muslims gathered outside of the computer graduates home calling for him to face them. Troubles began for Saber soon after the trailer for the controversial film The Innocence of Muslims hit the Arab world. In an environment where religious passions and political rebellions go hand-and-hand it was only a matter of time before an outspoken atheist like Saber became a target of someone's rage. As the protests against the video moved from Libya to Egypt rumours started to circulate about Saber character. According to Saber's accusers not only did he post The Innocence of Muslims on an atheist Facebook page, but he also made disparaging comments about Muslims and the Prophet over the internet, and publicly ripped up a copy of the Quran. These accusations are denied by Saber's lawyers—but the facts are of little significance to those who have cheered the case against Saber. There have been reports that Saber was attacked with a razor blade whilst in jail after fellow inmates discovered why he was imprisoned.

13.Rumany Mourad[1688] - Egypt

Rumany Mourad, a Coptic Christian Lawyer was convicted of 'defamation of religion' in Assiut, Egypt. He was sentenced to one year in prison which was complained as being 'lenient' and demands for the application of the death penalty has been called for. Two fellow lawyers accused him of insulting Islam during a private conversation they had with him in 2012. When his court case began on the 27th April, 2013, his lawyer did not attend due to threats to his safety.

[1686] McFadden, R.D. 2006 'Naguib Mahfouz, Chronicler of Arab Life, Dies at 94.' *The New York Times*. 30th August, 2006. Available from http://www.nytimes.com>

[1687] Amnesty International, 2012. 'Egypt: 'Outrageous' guilty verdict in blasphemy case an assault on free expression' *Amnesty International*. 12th December 2012. Available from http://www.amnesty.org [28th April 2015]

[1688] Amnesty International, 2013. 'Egypt's Worrying Rise in Criminal Blasphemy Cases' *Amnesty International* 11th June, 2013. Available from: <http://www.amnesty.ie> [28 April 2015]

Colloque Franco Britannique Irlandais

Paris, juin 2015

Le blasphème: la religion et la remise en cause de la liberté d'expression

Peter Charleton, Cour Suprême, Irlande avec Emma Libreri

Allocution d'ouverture

Chers collègues, il est impossible d'aborder ce sujet sans mémoire des événements terribles du 7 janvier, 2015. Après ce massacre insupportable et injustifiable, notre chef du gouvernement, Taoiseach Enda Kenny, est venue à Paris où il a dit ; « Nous sommes tous français aujourd'hui ». Cela est la seule réponse appropriée à un tel attentat à la liberté.

Ce sujet a été proposé par moi, plusieurs mois avant ces événements. Je l'ai suggéré parce que la nature de l'Europe change continuellement. Tout pays représenté ici aujourd'hui soutient une vaste population des immigrés qui s'étendent toujours et l'Islam, en particulier, fait partie du discours publique et des croyances diverses soutenues par l'Europe. On ne peut pas ignorer qu'un grand nombre de nos citoyens sont fortement de l'avis que les attentats à la religion ne sont pas du tout légers, pas du tout drôles ni pas du tout supportables. Tandis que la liberté d'expression est enracinée dans nous-tous comme européens, on doit réfléchir sur l'importance de ce principe. Dans quelles circonstances doit-il être protégé et est-ce qu'il peut être modifié pour assurer qu'une grande partie de la population peut se sentir, vraiment, qu'elle est respectée par la majorité ? Ceux-ci sont les thèmes de ce discours.

Introduction

La liberté d'expression est un outil essentiel dans une société libérale pour qu'un consensus puisse émerger en ce qui concerne l'organisation de la société. Cette liberté, en tant que telle, est plus profonde. La tyrannie exige la totalité de la vie des citoyens; ils doivent agir, penser et parler dans la manière exigée par le despote. Entre les sociétés précédant la révolution française et l'espionnage étouffant qui caractérisent la république soviétique jusqu'à 1989; la leçon de l'histoire est évidente; si on peut se voir arrêté pour avoir critiqué le gouvernement, cette forme de gouvernement est odieuse. Ainsi, la liberté d'expression exerce une double fonction; le respect de cette liberté constitue un rempart contre le totalitarisme, tandis que l'absence du principe indique des défauts fondamentaux dans l'organisation de la société concernée. On peut plaider que lorsque les gens s'organisent en marquant certains sujets comme indiscutables, ils se soumettent, comme les anciens monarques qui se sont établies autours d'un droit divin, a l'érosion des droits qui constituent l'essence autoproclamée des sociétés libérales modernes.

Mais à ce stade la religion intervient avec ses adhérents, en exigeant leurs propres droits, c'est-à-dire le droit à la liberté de conscience, dont la liberté religieuse est une composante. Ils s'opposent à des affronts et des ridicules qui s'adressent à leur foi. Certains prétendent que les attentats aux principes, qu'ils considèrent les principes les plus sacrés, doivent être sanctionnés par le droit criminel et que les personnes qui veulent s'exprimer dans une telle manière doivent être privées de leur liberté par emprisonnement. L'idée que la liberté d'expression peut être limitée par des sanctions criminelles, semble anathème ; au-delà de la limite de ce qu'on peut supporter ; au-delà de la compétence et du domaine de la loi. Pourtant, pour des milliers d'années c'était fait, principalement par des lois qui punissent le blasphème. Mais peu à peu, dans le domaine chrétien, le blasphème a reculé. De l'autre côté, incrément par incrément, la conscience islamique a augmenté en Europe, avec ses principes de l'abandon à la volonté de Dieu et à la parole de Dieu

exprimée par le Prophète. À cause de cette augmentation on se trouve confronté par le besoin d'assurer un certain respect mutuel entre nos sociétés libérales postchrétiennes européennes et les citoyens qui croient absolument que la religion est sacrée et au-delà des sujets qui peuvent faire l'objet de la satire.

Dans ces circonstances; les sociétés européennes, doivent-t-elles s'ajuster? Et si oui, comment ? Est-ce que c'est nécessaire ou bien légitime que cet ajustement concerne la protection de la religion en elle considérant comme sujet dans laquelle la satire et le ridicule doivent être absolument hors limites ?

Du blasphème à **la liberté d'expression**

En 1676, John Taylor, un homme de Surrey, en Angleterre, a proclamé qu'il était « le petit frère du Christ » et que la religion était « une escroquerie ». Le juge Hale, en présidant du procès de Taylor, a proclamé que la religion chrétienne faisait « partie intégrale des lois de l'Angleterre » et que la reproche de cette religion constitue « la parole subversive contre le droit ». Dans les années 1840s, il y'en a eu pas mal de convictions pour la publication de l'ouvrage de Thomas Paine « Les Droits de l'Homme ». À ce stade, la mise au point de la loi, se voit transformé de la perspective de trahison, qui fut tellement importante dans le procès de Taylor, à la protection de la société contre les insultes publiques capables à entraîner à la violence. De plus en plus, la question du « ton, style et de l'esprit » des critiques qui s'adressent à la religion, comme Lord Denman l'a dit dans le procès de *R v. Hetherington* en 1841, occupe une place centrale dans la considération de l'import de la loi. Il fallait une intention « d'enflammer les sentiments de l'humanité ou de provoquer le mépris ou la haine a l'égard de l'église établi par la loi » ou bien, dans un tournant surprenant qui n'a rien achevé « de promouvoir l'immoralité », pour que les sanctions prévues par la loi puissent se voir engagées. Cependant, lorsque « Gay News » a publié un vers fantastique imaginant la réalisation des actes homosexuels sur le corps de Christ après sa crucifixion, en 1976, les gens ont été fâché, mais aucune poursuite criminelle n'a résulté, seulement une poursuite privée qui a entrainé une condamnation suspendue. Les lectures publiques, effectuées dans le but de provoquer une poursuite publique, n'ont eu aucun résultat sauf le dégoût et le repoussement des gens qui les ont entendues.

La Constitution irlandaise de 1937 garantit aux citoyens, à l'Article 40.6.1.i, la capacité « d'exprimer librement leurs convictions et leurs opinions » en précisant que cette liberté est qualifiée par des concernes de « l'ordre publique et la moralité ». Mais la Constitution prévoit aussi l'impérative d'introduire en Irlande, les lois qui sanctionnent la publication des ouvrages « blasphématoires, séditieux ou indécents ». Elle prévoit que la manière dans laquelle ses infractions sont sanctionnées, relève dans le domaine de la compétence législative. Ainsi, selon notre Constitution, il faut avoir une loi contre le blasphème en Irlande. Et on a une telle loi. La section 36 de la loi sur la diffamation de 2009 crée l'infraction de « la publication ou l'expression des ouvrages blasphématoires », en prévoyant que la seule sanction constitue une amende qui peut s'élever jusqu'à €25,000. Mais quelle est la portée de la définition de l'infraction ? Eh bien, la commission de l'infraction s'achève lorsque l'accusé « publie ou exprime des ouvrages qui sont grossièrement injurieux ou insultants et qui concernent des sujets considérés sacrés dans n'importe quelle religion » et lorsque cette publication ou expression provoque « l'indignation parmi un nombre substantiel des adhérents de la religion concernée ». Donc, pour qu'il soit coupable, l'accusé doit avoir l'intention, c'est-à-dire le but de son comportement doit être, « de provoquer cette indignation ». Mais l'accusé peut faire appel à une défense s'il est considéré qu' « une personne raisonnable trouverait une valeur politique, scientifique ou académique dans l'ouvrage concerné ». Même si la religion n'est pas définie par la

loi de 2009, une « organisation ou culte » qui a « l'objet principale » de « faire du profit » ou qui « utilise la manipulation psychologique oppressive de ses adhérents, ou pour attirer des nouveaux adhérents » ne bénéfice pas des protections de cette loi.

Mais on n'a jamais eu une poursuite pour une infraction de la section 36 de la loi de 2009. En Irlande, la dernière tentative de poursuite pour le blasphème a eu lieu dans le procès de *Corway v Independent Newspapers (Ireland) Ltd* [1999] 4 IR 484 and [2000] 1 ILRM 426, lors d'une campagne de libéraliser la Constitution de 1937 par la modification de ses provisions pour permettre le divorce. En 1995, au cours du débat, parfois tendu, un journal a publié un dessin-animé de trois hommes-politiques en train de refuser l'Eucharistie avec le sous-titre « Bonjour Progrès – Adieu Ô Père ? ». Une poursuite privée pour le blasphème a échoué dans la Haute Cour, parce que, d'après le Juge Geoghegan « c'est l'essence du blasphème…que les paroles ou les images qui font le sujet de la plainte, constitue un attentat à n'importe quelle doctrine de la religion chrétienne ». L'essence de l'infraction, comme ce juge formidable a dit, n'était pas seulement « la capacité de scandaliser ». Le dessin-animé était offensif mais pas blasphématoire. Monsieur Conway a fait appel à la Cour Suprême, mais il a encore échoué. Le Juge Barrington, confronté par une pléthore des autorités contradictoires, a dit que « c'est impossible de dire en quoi consiste l'infraction du blasphème ». Et le juge a rappelé que la tâche de définition, selon la Constitution, relevait du domaine du pouvoir législatif et donc ne fait pas partie du pouvoir des Cours. Comme on verra plutôt, depuis ce moment-là, on a eu des pires provocations mais pas plus de poursuites ou mêmes des tentatives de poursuite.

En 1997, un comédien qui s'appelle Tommy Tiernan, est apparu dans émission bien connu en Irlande, le Late Late Show. Dans un numéro qui a duré sept minutes, il a ridiculisé la crucifixion de Christ et l'idée de l'Agneau de Dieu. Avant la fin de l'émission, plus de trois cents personnes ont appelé la chaîne RTE pour poser des plaintes et quelques personnes à Dublin ont même conduit au siège lorsqu'ils ont trouvé que les lignes téléphoniques ont été toutes occupées. Le comédien a dû attendre dans son dressing-room jusqu'aux premières heures de la matinée pour échapper l'agitation en dehors de la chaîne. RTE n'a pas rediffusé l'émission pendant la semaine, comme d'habitude. Quand quelqu'un a tenté d'aborder le sujet dans le Senat, un sénateur de l'Université de Dublin a ridiculisé les tentatives « de protéger…l'omnipotent ». Avec la transformation apparente de pays fortement Catholique jusqu'au pays libéral athéiste, la ridicule a devenu l'ordre du jour, au moins en ce qui concerne l'église Catholique. Elle se voit transformé dans un point faible.

Une décennie plus tard, en 2009, le fils d'un ancien Ministre du Gouvernement, sous le nom de scène David MacSavage, a créé une émission satirique qui a porté des attentats à tout aspect de la société irlandaise. Rien a été sacré tout au long des quatre séries de l'émission « The Savage Eye ». Aussi que les attentats qui s'adressent au système politique, a la langue gaélique, au nationalisme, aux anglais, a la Présidente de la République, a la police, aux consultants médicaux, aux gens de Belfast et aux normes démodées, MacSavage s'est focalisé particulièrement sur l'église Catholique. Dans un épisode particulier, le visage d'un évêque en train de donner une conférence de presse au sujet de l'abus sexuel des enfants est déformé et il parle à un démon. Dans un autre épisode, une mère qui doit se précipiter a l'hôpital avec son bébé, choisit un drogué pour s'occuper de son autre petit enfant au lieu d'un prêtre branché. Même l'Eucharistie a fait l'objet de ridicule et un sketch particulier a effectivement comparé la réception du sacrement à la prise de drogue. Beaucoup de personnes ont été fâché. Mais s'il y avait murmure ou plainte, moi, je n'en étendu pas.

Maintenant, la religion chrétienne se voit en recul de la sphère publique, susceptible aux attentats à volonté et ses adhérents détournent les yeux et les oreilles. Les attitudes transforment, c'est la vie !

Selon la foi islamique, la parole du Prophète est finale et, en tant que la parole de Dieu, elle est incontournable et immuable. Depuis des siècles, au moins, n'importe quelle image de lui constitue l'un des pires affronts. Le ridicule du Prophète, de sa parole, des doctrines du droit divin et du contenu de la Révélation Islamique, est considérée comme affront directe et profane. Pendant la vie du Prophète, les enthousiastes ont exécuté un poète à Medina qui a écrit des vers satiriques dérisoires concernant sa Mission. Ça n'a pas changé. En fait, les faits de la sentence de mort, probablement la plus célèbre, sont bien-connu. Bref, en 1988, un écrivain indo-britannique a publié un roman qui a associé un nom satanique au Messager de l'Islam en le décrivant comme quelqu'un de faux, manipulateur qui n'a pas reçu le message de Dieu d'un ange mais l'a inventé ; Salman Rushdie – 'Les Versets Sataniques'. Il y a des autres aspects du roman, plus offensifs, qui associent les noms d'un bordel aux femmes du Prophète, révérées en tant que « Mères de l'Islam ». Le Grand Ayatollah Khomeini a proclamé « au nom de Dieu tout puissant » que « l'écrivain du roman…aussi que les éditeurs qui sont informés de son contenu sont condamnés à la mort ». L'Ayatollah a fait appel au « tout musulman intrépide de leur exécuter rapidement…autant que personne osera insulter les sanctions islamiques ».

Dans les soixante-dix ans suivant la Deuxième Guerre Mondiale, on a profité d'encore plus de liberté ici en Europe et les pays autrefois dominés par l'Europe ont atteint leur propre liberté. Souvent, cela s'achève seulement de manière illusoire et l'espoir de liberté est étouffé par des tyrans. On ne doit que repenser a cette période pour voir comment le chaos a régné et il n'y a aucun sens dans les sentiments de supériorité quant à ceux qu'on a autrefois dirigés. Le résultat de la suppression ou de l'affaiblissement de l'autocratie en Yougoslave, en Syrie, en Libye, en Iraq, en Somalie et dans les dizaines d'autres pays est l'instabilité ou pire, l'échec total du contrôle de l'Etat. Par conséquence, on voit et on va continuer à voir de plus en plus, l'arrivée en masse des réfugiés et des migrants qui cherchent une meilleure vie en Europe. Au cours des générations, ils vont arriver, peut-être, à s'habituer à nos normes de liberté d'expression, mais étant donné qu'on n'a pas pu nous-mêmes résoudre ses idées qu'après quelques générations, il faut s'y attendre. Les immigrants ne supporteront pas des insultes à ce que Carl Jung appellerait l'archétype de soi, synonyme, d'âpres sa psychologie, à l'image de dieu. L'intégration va s'achever beaucoup plus difficilement où, pour des raisons mieux apprécies par leur-mêmes, les immigrants sont insultés. Le respect des valeurs des autres constitue la condition basique à la paix (Feu Commandant Kevin White, communication personnelle). Et quel est le problème à cet égard ? En insistant sur le discours poli, a-t-on perdu quelque chose ?

Toute loi peut se tromper ou être mal appliquée. Les lois sans équité ou modération sont importunes. Mais, rappelons à ce stade qu'il y a beaucoup de lois qui imposent des limitations à la liberté d'expression y compris les lois qui sanctionnent le mensonge préjudiciable, la commercialisation trompeuse et la diffamation. On n'a pas, en Europe, ni une constitution universelle ni un principe contre la sanction criminelle des discours haineux. Pourtant, la tâche de préciser les circonstances dans lesquelles la société devrait avoir le droit d'apporter des sanctions criminelles à un certain comportement est une tâche difficile, surtout lorsque les droits à la vie privée ou à la liberté d'expression doivent être considérées.

La liberté d'expression et l'incitation à la haine

Cela dit, les lois contre l'incitation de la haine sont banales dans l'Europe moderne. Il y a une telle loi en France et Jean Marie le Pen a été poursuivi plusieurs fois pour l'avoir violée. La loi Fabius-Gaysott de juillet 1990 apporte des sanctions criminelles à la contestation ou la négation des crimes contres l'humanité déclarées par le Tribunal de Nuremberg de 1945 à 1946. Il y a bien sur beaucoup de génocides qui ne font pas le sujet des lois comme celle de Fabius-Gaysott mais la tentative de destruction de la population juive par les nazis qui ont occupé une partie importante de l'Europe entre 1933 et 1945 a été le génocide le plus organisé et le plus méthodique, soutenu par une idéologie toxique sans n'importe quelle exception et marqué par une manque de conscience absolue. Il a été accompagné par le meurtre des opposants politiques, des homosexuels, des itinérants et la tentative d'élimination des nations polonais et tchèque aussi que des autres, par la destruction élite. Un élément central en ce qui concerne le danger de répétition d'un crime, est la négation de ce crime par ceux qui l'ont perpétré. Un élément centrale dans un processus de guérison c'est que ceux qui ont souffert, tourne pour faire face à l'ombre. Alors, le but de ces lois est évident. Et pas mal de ceux qui opposent les lois contre la négation de la Shoah, comme presque toute recherche en ligne nous démontre, ont des opinions étranges, pour employer un euphémisme. Donc, en Europe on a des lois qui sanctionnent la négation de la Shoah en Suisse, en Autriche, en Hongrie, en Belgique, en République Tchèque, aux Pays Bas, en Pologne, au Portugal, en Roumanie et en Slovaquie. Dans certains pays, l'Espagne par exemple, des telles lois ont rencontré des difficultés constitutionnelles en ce qui concerne la liberté d'expression. Les autres pays, comme l'Irlande n'ont pas encore adopté une telle loi, dans notre cas à cause des priorités de notre gouvernement et les difficultés de la faire au brouillon. De plus, les lois contre la haine raciale sont communes en Europe. Pour autant que je puisse en juger, la plupart suivent le modèle qu'on a en Irlande.

La haine fait partie intégrale de la personnalité humaine. La haine constitue la force motrice des crimes de violence. Elle est irrationnelle, intouchée par des arguments, facile à faire apparaître dans les conditions favorables et contagieuse dans ces mêmes conditions. En notre Europe, l'histoire et le mémoire des crimes terribles qui ont été perpétré contre les minorités vulnérables nous démontrent l'objectif d'une telle loi. Moi, j'ai participé dans pas mal de procès pour meurtre et mon expérience suggère que la haine précède toujours, un homicide précipité. En plus, étant donné que la violence est déclenché par l'émotion et, paradoxalement, étant donné que l'homicide n'est généralement possible que si les contraintes phylogénétiques sont surmontées ; les appels à soutien, la formation d'une bande et l'action concertée typifie la violence entre groupes. Charleton – *'Lies in a Mirror: An Essay on Violence and Deceit'* (Dublin, 2006).

De l'autre côté, on a notre liberté précieuse. L'Article 11 de La Déclaration des Droits de l'Homme et du Citoyen de 1789 déclare:

> La libre communication des pensées et des opinions est un des droits les plus précieux de l'Homme: tout Citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminés par la Loi.

En Europe, notre approche se centre sur l'intrusion minimale dans la liberté des citoyens, prônés par Paine et Mill, fondé sur la prémisse selon laquelle la société doit s'organiser autour de la liberté parce qu'un processus de décision juste ne peut être soutenu et des politiques intelligents ne peuvent s'achever que lorsque toute action du gouvernement peut être discutée et critiquée. Pour un discours plus profonde de cette idée, consultez Cox – '*Blasphemy and the Law in Ireland'* (Dublin, 2000).

Cependant, l'origine des principes informe leur application dans la même manière que le milieu d'un accord éclaire la signification du texte dans lequel il est exprimé. La liberté en Europe, est fondée sur la liberté de se renseigner, de discuter et de critiquer. Le but de cette liberté, c'est de fonctionner en tant que rempart fondamental contre la tyrannie. De même que la violence et la haine sont associées, la protection des tyrans et la suppression du discours en sont aussi. C'est cela qui est important, a mon avis. On ne donne pas le droit a la liberté d'expression illimité aux racistes pour deux raisons ; premièrement, cet abus de la liberté d'expression est lié, au moins, à l'idiotie, et au pire, à l'incitation du chaos ; deuxièmement, tandis que la parole des racistes porte une certain signification pour eux et leurs adhérents éventuels, cela n'a rien à voir avec le bon gouvernance.

La liberté d'expression et la religion

En ce qui concerne le critique de la religion, le point de vue de pas mal des libertaires civils peut se voir dans l'affirmation du comédien Rowan Atkinson : « La critique d'une personne fondée sur sa race est manifestement irrationnelle mais la critique de sa religion est un droit. C'est une liberté ».

Pourtant, la protection de la religion visée à l'abus outrageant ne va ni miner le discours publique dans n'importe quelle manière ni créer les conditions favorables au retour de la tyrannie. Ainsi, il est raisonnable de plaider que la protection de la religion visée à la haine calculée peut être un objectif légitime de la loi. Les croyances profondément enracinant des adhérents religieux relatifs à des choses qui sont considérées sacrées ou pas, n'ont aucune impact aux discours relatifs à la politique économique d'une société ni à l'achèvement d'une bonne administration ni au renforcement des bons principes parmi des hommes politiques. Et c'est ce genre des sujets qui dominent les discours politiques de nos jours, précisément à cause du fait qu'on a une liberté de discussion illimité. Bien sur il y a des sujets résiduels dans lesquels les idées de l'âme religieuse se croisent dans une certaine manière avec la politique, la reproduction humaine par exemple. On soupçonne, néanmoins, que le discours se base, de plus en plus, pas aux questions super naturelles mais aux questions relatives à la nature partagée de notre humanité.

Dans notre capacité d'avocats, on est peut-être plus conscient que d'autres, de la tentation d' Ἡρόστρατος, (Herostratos), qui a mit le feu au Temple d'Artemis à Ephesus au quatrième siècle A.C., simplement parce qu'il a voulu accomplir la notoriété. L'espièglerie, le désir d'être la source d'ennui, est reconnue par les compilateurs des contes folkloriques entre les frères Grimms et Perrault, jusqu'à Yates en tant que tentation clé de la condition humaine. Les exemples les plus récents comprennent les tueurs de John Lennon et des passagers de l'avion, plein de gens, au-dessus des Alpes français. On soupçonne aussi que ces « clergé » qui ont accompli la notoriété en menaçant la mise au feu du Livre Saint de l'Islam avaient des motivations similaires. Pourquoi doit-on leur permettre de profiter du système avec le résultat potentiel de l'inflammation des difficultés sérieuses dans notre société ? Le 5 mai 2015, un complot apparent a été déjoué, d'attaquer une groupe qui comptent organiser un « draw in » du Messager de l'Islam. Par conséquent, deux personnes ont été tues. http://www.theguardian.com/us-news/2015/may/04/texas-shooting-the-group-behind-the-muhammad-cartoon-contest. Est-ce que ce genre de chose ne nous porte aucune bénéfice ?

Et finalement, la question du remède. En acceptant le bon sens et la bonne loi, et je les accepte bien sur, Article 8 de La Déclaration des Droits de l'Homme et du Citoyen:

> La Loi ne doit établir que des peines strictement et évidemment nécessaires, et nul ne peut être puni qu'en vertu d'une Loi établie et promulguée antérieurement au délit, et légalement appliquée.

Ce principe est reflété dans l'Article 7 de la Convention européenne des droits de l'homme. Il faut qu'on soit prêt : bí úlamh! Si le chaos éclate, grâce aux insultes, aux paroles ou aux actions précisément choisies par certaines personnes, on doit avoir la capacité en Europe de répondre, en déclarent que ces actions constituent un crime et vont faire le sujet d'une enquête. On ne peut pas, dans n'importe quelle manière, céder à la notion d'une réponse disproportionnée, cela n'est pas juste. Mais similaire au désir de se venger, l'Etat existe pour administrer la rétribution juste à la part de tous ses citoyens pour que la justice privée avec tous ses excès soit abolie.

Si l'Etat prévoit un remède, précisément définie, proportionnée qui respecte la divergence, le droit pourrait s'établir au-dessus des intérêts catégoriques ; comme le protecteur de la confiance la plus sacrée de la société ; et créer des conditions qui favorisent la paix pour tout citoyen. Est-ce qu'il s'agit de la préparation précise d'un instrument légale appropriée ou bien de la réincarnation de l'infraction du blasphème par la porte arrière ?

EU DATA-NULLIFICATION: CONFUSION AND THE RULE OF LAW

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ABSTRACT. *Effective justice seeks for the truth and consequently must be founded on an analysis of all relevant evidence. Only where a manifestly greater societal interest intrudes, can there be a privilege against the production of testimony. For the Court of Justice of the European Union, however, an activist interpretation of Article 8 of the EU Charter, promoting security of data, has become an elevated privacy right which justifies nullifying crucial information, thus shielding criminals, undermining civil trials and obstructing searches for missing persons. No convincingly apodictic conclusion emerges from the several judgments of the Court, while the exceptions identified undermine, rather than support, any articulated core principle.*

KEYWORDS: *Judicial-activism; metadata; nullifying proof; victims' rights.*

I. INTRODUCTION: FORMING LAW, COURTS AND LEGISLATURES

Exclusionary rules of evidence can be inimical to the truth-seeking function of the administration of justice. In parallel with Civil Law systems, the Common Law uses compulsion to adduce all relevant evidence before the tribunal of fact. Axiomatic to satisfying the demands of the equitable maxim 'the law is entitled to the evidence of every man' is that the system is presented with all material evidence except for witnesses and data that are privileged by law.[1689] A rule of law to exclude relevant evidence is required and, in turn, must be supported by reasoning that, by its common sense, convinces society that some greater good justifies its loss. Rules of exclusion, thus, for any robust legal system, are an exercise in proportionality. In the European Union ("EU") supranational legal order, however, the jurisprudential evolution of the right to the protection of privacy and personal data as applied to the retention and access to telecommunications data for law enforcement has been ensnared by the protection of excessively abstract rights to the diminution of concrete fundamental rights protection.[1690]

No convincing balancing principle is found in the several pronouncements of the Court of Justice of the European Union ("CJEU") whereby the gathering of inert data as to telephone communications is described as "interception" or "surveillance of communications" and whereby, in consequence of the elevation of privacy in metadata,[1691] courts throughout the EU are shorn of what has become a fundamental tool in the search for truth. Evidence is simply made to disappear and that is not always justifiable, even as a bulwark against executive intrusion. Fundamental to the CJEU's approach is to undermine surveillance. The defining feature of bulk surveillance is that it allows public authorities to have access for specified purposes to large quantities of data, though "a significant portion of the retained data pertains to identifiers that are not targets at the time of collection".[1692]

Purpose, context and culture are, however, central to the understanding of surveillance.[1693] The exclusionary fate of most metadata evidence is a single cog, with the most profound consequences, in the wider machinery of social ordering that defines the surveillant society of

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1689 *The People (D.P.P.) v J.T.* (1988) 3 Frewen 141 (I.E.C.C.A.).

1690 See S. O'Leary, "Balancing Rights in the Digital Age" 59 (2018) Irish Jurist 59.

1691 Metadata or 'non-content data' refers to data about who communicated, when, for how long, and where. The CJEU refers to this as "traffic and location data", including (i) Subscriber: identifying the subscriber, (ii) Traffic: routing, duration, time, volume protocol, location, and network details, and (iii) Location: coordinates, direction, accuracy and network cell.

1692 U.S. National Research Council, *Bulk Collection of Signals Intelligence: Technical Options* (Washington D.C. 2015). Note, Collins Dictionary defines 'surveillance' as "the careful watching of someone, especially by an organisation such as the police or army".

1693 D. Lyon, "Surveillance" (2022) 11 Internet Policy Review 1.

Article available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/S0008197325100962

today.[1694] The internet, by its nature, "smudges the distinctions between monitoring and tracking activities of security agencies, police and corporate marketers and advertisers and the surveillance initiatives of everyday life".[1695] Academics warn of the implications of "surveillance capitalism…[defined as] the unilateral claiming of private human experience as free raw material for translation into behavioral data" on democracy and agency.[1696] While these ideas are concerning, their expression in the form of sweeping exclusionary rules of evidence, in nullifying metadata as a tool of litigation, is in error. Experience teaches that justice wears different faces. Hence, there may be differing solutions to the promotion of data privacy; but nullifying an entire category of cogent evidence from judicial scrutiny requires strong reasoning.

Metadata gathering for commercial purposes is not mass surveillance. It is the random collation of otherwise incomprehensible observations as to the use of mobile and fixed telephony and the routes traveled. That is no more than what a witness might observe who happens upon a criminal or a civil wrong. While, by definition, wide powers of surveillance raise legitimate privacy concerns, because of potential access of the state to wide data sets and the resulting risk of abuse, in themselves, these factors are not a reason for generally presuming that every item of retained data should be put beyond the use of the justice system. But, in a series of cases, the CJEU has proclaimed the need to protect any personal or professional use of data. That court has taken Article 8 of the Charter of Fundamental Rights of the European Union ("EU Charter"), merely guaranteeing within the EU "the right to the protection of personal data concerning him or her", as a justification for occluding vital information from the justice system.

The importance of these cases lies in their confirmation of the CJEU's expansive interpretation of its own jurisdiction, arguably bordering *Kompetenz-Kompetenz*, and in its willingness to exercise activist judicial review over EU legislation. Given the ubiquity of communications data, the approach has far-reaching consequences for evidence in the EU legal order; including the exoneration of suspects, crimes in action (kidnap for ransom, blackmail), trafficking (people, narcotics, or weapons), crimes of violence, including assault, harassment and murder (when communications data can corroborate new information, often some-time after the event).[1697] In the emphatic fashioning of a new principle of data nullification, furthermore, the CJEU's grafting of exceptions emerges as more likely to undermine any internal logic of whatever reasoning originated the doctrine, rather than highlighting the soundness of its general justification.

Where courts fashion law,[1698] the fabric of judicial pronouncement invariably purports merely to be development; the application of existing principle to novel challenges.[1699] Lawyers raised on the Common Law understand how necessity may parent judicial invention in pursuit of justice.[1700] Yet, even there, firstly, the warp of the new fabric will be closely scrutinised for conformity with the weft of acceptable precedent and, secondly, for judicial activism to prevail,

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[1694] David Anderson Q.C., writing as the Independent Review of Terrorism Legislation, observed in 2016 that "whether a broader or narrower definition is preferred, it should be plain that the collection and retention of data in bulk does not equate to mass surveillance. Any legal system worth the name will incorporate limitations and safeguards designed precisely to ensure that access to stores of sensitive data is not given on an indiscriminate or unjustified basis", see D. Anderson Q.C., *Report of the Bulk Powers Review* (Cm 9326, London 2016), at [1.9].

[1695] D. Lyon, "Surveillance Capitalism, Surveillance Culture and Data Politics" in D. Bigo, E. Isin and E. Ruppert (eds.), *Data Politics: Worlds, Subjects, Rights* (London 2019), 65.

[1696] J. Laidler, "High Tech is Watching You", available at https://news.harvard.edu/gazette/story/2019/03/harvard-professor-says-surveillance-capitalism-is-undermining-democracy/ (last accessed 17 June 2025). See also, S. Zuboff, *The Age of Surveillance Capitalism: The Fight for the Future at the New Frontier of Power* (London 2019).

[1697] D. Anderson Q.C., *A Question of Trust: Report of the Investigatory Powers Review* (London 2015), at [9.25].

[1698] In the United States, *Miranda v Arizona* 384 U.S. 436 (1966) established rights for those arrested and interrogated by the police, while *Mapp v Ohio* 367 U.S. 643 (1961) applied the exclusionary rule to unlawful searches and seizures to states as well as the federal government.

[1699] E.g. *The People (D.P.P.) v McNamara* [2020] IESC 34, [2021] 1 I.R. 472, at [32] (Charleton J.), in which the Irish Supreme Court radically restated the defence of provocation. Changes can also be problematic and critiqued for that very willingness to develop the law; see A. Chronopoulos, *Judicially Crafted Property Rights in Valuable Intangibles: An Analysis of the INS Doctrine* (London 2024).

[1700] O. Wendell Holmes Jr., *The Common Law* (London 1911), ch. 8.

the internal logic must be so especially sound as to support, perhaps excuse, the exercise of creativity in law.

A. Metadata Collection: Overview

Since the 19th century, governments have generally required access to user communications; justified by the fight against crime and national security.[1701] With the invention of the mobile phone, proof that a call was made no longer established location or that a particular occupant may have made it. As mobile devices became gracile, the sophistication of computer chips enabled storage of numbers and internet access through computer-enabled devices.[1702] All of these developments were commercial. Billing was justified by proof of use. Hence, analogue devices were used in telephone exchanges to record the length of calls and routing in fixed telephony. Issues of location did not then exist. Itemised phone bills showed this data. With mobile, a new element was added; that of shifting location. Second-by-second, when a device is in use, its location may be digitally discernible. For billing purposes, the time, duration, the mast from which a caller is routed and to which the signal connects the receiver supports a charge. Critically, this also provides potentially important information in searches for missing persons and for criminal and civil litigation. Where a user consents, as in the use of online direction-finding services, mobiles can be accessed to show traffic build up without the use of the device to make a call or message. With commercially held traffic data, the original routing mast and the receiving mast do not change even though both caller and receiver are travelling. If either move out of range, the signal is degraded or lost. The mast used to locate the device is usually, but not always,[1703] that which is closest to the caller and to the receiver with devices connecting to one of the thousands of individual geographic cells, generally encompassing a 40-kilometre radius.[1704]

From analogue landline invoicing to continuous digital connection with an active device, service providers first gathered data for billing but then began using location, travel, connectivity and consumer-trends as a saleable commodity. The first EU law intervention in telecommunications, within the competence of the 1957 Treaty of Rome, Articles 86 and 95, aimed at creating a genuine internal market, geared towards the abolition of exclusive commercial rights. The liberalisation and harmonisation process of the telecommunication's regulatory environment,[1705] generated a new interest, namely data processing. By the 1970s, to mitigate US market domination, the Commission published a "Community Policy on Data Processing". In 1993, the Maastricht Treaty introduced explicit telecommunications policy goals.[1706]

B. Use of Words: Mass Surveillance

In themselves, words may be chosen to carry an emotional charge. Multiple references in the decisions of the Court of Justice to "mass surveillance" and the "ability to examine the past"[1707] transports the inherently commercial and incomprehensibly-stored nature of billing information into the realm of George Orwell's *Nineteen Eighty-Four*.[1708] That is not so. As contact is made between telephonic devices, the service providers collect data for billing purposes. This activity

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[1701] D. Ventre and P. Guillot, *Electronic Communication Technology Interception Technologies and Issues of Power* (Newark, N.J. 2023), 9.
[1702] E.G. Hall, *The Electronic Age: Telecommunications in Ireland* (Dublin 1993).
[1703] A call made from a vehicle when the closest mast is occluded, for instance by a metal lorry, may route through a more distant mast.
[1704] Cell size depends on terrain; masts are usually built 200-500 metres apart in towns and 2-5 kilometres apart in rural areas but may be closer.
[1705] See J. Scherer (ed.), *Telecommunications Law in Europe: Law and Regulation of Electronic Communications in Europe*, 6th ed. (Haywards Heath 2013).
[1706] Now found in Consolidated Treaty on the Functioning of the European Union (OJ 2012 C 326 p. 47), arts. 170–72 (hereafter, "TFEU"), requiring "the Union [to] contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures."
[1707] *Tele2 Sverige A.B. v Post-och Telestyrelsen and others* (C-203/15 and C-698/15) [2017] Q.B. 771, at [180] (Saugmandsgaard Øe A.G.) (E.Ct.H.R.).
[1708] G. Orwell, *Nineteen Eighty-Four* (London 1949).

could be referenced as surveillance where consumers are monitored as to their presence in particular locations in order to track their movement. No such intention is present in either the process or, more especially, in the way the data is harvested and stored. On the contrary, the Commission Study on Data Retention posits that identification and location data have limited business value and are retained for much shorter periods of time than other types of data.[1709] What is collected, however, is data in potential, for proof, months after a communication to support a billable service. Across the European Union, the average legal threshold for invoice contestation is three months.[1710] Service providers may also retain data to comply with legal obligations such as tax and audit regulations. That data, unlike personal surveillance, is incomprehensible unless subject to specialised accessing and processing. No one within the EU is under surveillance because a commercial entity keeps information to support charges.[1711]

Since mobile use is near universal, billing data is vast.[1712] Keeping it on servers is problematic and transfer onto magnetic tape can be the preferred solution. These are neither accessible, comprehensible in themselves, nor of any interest to the service providers beyond proof of accurate charging. Where legislation provides that this inert data should be kept beyond the period natural to a commercial dispute,[1713] it is inert and requires multiple processes to retrieve and to turn it into intelligible language. Only at the end of specialist processing may comprehensible information emerge; excluding content, (which is not recorded) and limited to number A calling number B at # time and for # seconds. The Europol, Eurojust and the European Judicial Network 2024 Report on Cross-border Access to Electronic Evidence in Criminal Investigations and Proceedings, observes that it is often this type of data that constitutes the only investigative lead.[1714]

II. EU LEGISLATION: CJEU ACTIVISM

Article 2 of the Treaty on European Union ("TEU") founds the EU's legal order "on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities."[1715] Crime infringes human rights, going so far as the removal of all rights through violent death. The Charter of Fundamental Rights of the European Union ("The Charter"), while enshrining "the fundamental rights people enjoy in the EU" is cast as "a modern and comprehensive instrument protecting and promoting people's rights and freedoms in the light of changes in society, social progress and scientific and technological developments".[1716] According to the Preamble, the instrument "reaffirms" fundamental rights as these result from the "constitutional traditions and international obligations common to the Member States".[1717]

Article 8 has been used as the justification by the Court of Justice for data nullification, whereby definite proof of human rights violations is hidden from Member States' justice systems. In full, it is qualified, and merely provides:

[1709] European Commission, *Final Report: Study on the Retention of Electronic Communications Non-Content Data for Law Enforcement Purposes* (Luxembourg 2020), 16.

[1710] ibid.

[1711] In Member States, real-time interception and recording of communications require judicial authorisation by warrant on proof of reasonable suspicion of criminal culpability.

[1712] Hall, *The Electronic Age*.

[1713] Here, the only limitation is that the relevant provision of legal limitation not be exceeded for what would ultimately be classified as a contract dispute.

[1714] Europol, Eurojust and European Judicial Network, "SIRIUS EU Electronic Evidence Situation Report 2024", available at https://www.europol.europa.eu/cms/sites/default/files/documents/SIRIUS_E_Evidence_Situation_Report_2024.pdf (last accessed 4 December 2024).

[1715] Consolidated Version of the Treaty on European Union (OJ 2008 C 326 p. 13), art. 2 (hereafter, "TEU").

[1716] European Commission, "Why do we need the Charter?", available at https://commission.europa.eu/aid-development-cooperation-fundamental-rights/your-fundamental-rights-eu/eu-charter-fundamental-rights/why-do-we-need-charter_en#:~:text=The%20Charter%20enshrines%20the%20fundamental,and%20scientific%20and%20technological%20developments (last accessed 21 November 2024).

[1717] Charter of Fundamental Rights of the EU (OJ 2012 C 326 p. 391), preamble (hereafter, "The Charter").

> 1. Everyone has the right to the protection of personal data concerning him or her.
> 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
> 3. Compliance with these rules shall be subject to control by an independent authority.

Limitations to the exercise of fundamental rights are governed by Article 52(1) of the Charter, which provides that:

> any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms" and that "subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights or freedoms of others.[1718]

A. Undermining Justice

No legal provision may validly be read in isolation. Article 47 provides that all "whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article". That requires "a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law".[1719] Without the potential to access and analyse inert commercial metadata for strictly limited purposes in serious criminal investigations, much grave crime will remain undetected. Relevant evidence, by fiat of judicial-activism, will be excluded from use as proof.[1720] Investigators will be shorn of an indispensable tool for detecting violators. Justice should be an energetic search for the truth: and upon the truth alone is any fair verdict against an accused person or any response to human rights violations properly based.[1721] Cutting out the truth, in the form of useful and convincing evidence, leads to the distortion of the legal process and its severance from good sense. But, have we really arrived at this situation; and if so, how?

B. Development

The evolution of primary and secondary law *acquis* on data protection and retention across the European Union engages a complex history. Concisely, its development can be traced from a state-by-state approach to, in theory, the ultimate policy ambition of a harmonised model. While integration failures in this area loom large, the legal framework can be broadly understood as embracing (1) protection and (2) retention. These branch into sub-categories regarding data harvesting for serious criminal investigations:

(i) Data-seizure: Any electronic device according to the jurisprudence of the United States of America,[1722] Ireland,[1723] the United Kingdom,[1724] and Canada[1725] is subject to a specific

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[1718] ibid., art. 52(1). Directive 2002/58/EC (OJ 2002 L 201 p. 37), art. 15(1) reflects a similar provision (hereafter, "ePrivacy Directive")
[1719] The Charter, art. 47.
[1720] Europol, Eurojust and European Judicial Network, "SIRIUS Report", 16.
[1721] *Ó Grioſáin v Éire* [2009] IEHC 188, [2009] 4 J.I.C. 2308, at [10]: "Is é an ceartas an aidhm atá le gach imeacht dlíthiúil. Is í an fhírinne an cuspóir atá ag gach cleachtas breithiúnach" (Charleton J.) (Justice is the aim of every legal proceeding. Truth is the target of all judicial practice).
[1722] *Katz v United States* 289 U.S. 347 (1967).
[1723] *The People (D.P.P.) v Patrick Quirke* [2023] IESC 5, [2023] 1 I.L.R.M. 225.
[1724] *R. v C.B.* [2020] EWCA Crim 790, [2021] 1 W.L.R. 725.
[1725] J.A. Fontana and D. Keeshan, *The Law of Search and Seizure in Canada*, 8th ed. (Markham, Ont. 2010), 1181.

justification in a search warrant application. (ii) International data-transfers: EU law requires a company operating in the EU that transfers personal data to a company in a third country to abide by specific requirements for data transfers under the General Data Protection Regulation ("GDPR"). (iii) Third-party discovery: this is the mechanism in civil cases whereby the right of a court to have access to all relevant evidence is engaged.[1726] While civil law systems generally do not engage with discovery, there are mechanisms whereby a court can compel the production of what is relevant. (iv) Data retention in the investigation of national security threats, crime and the recovery of missing persons.

Member States with Civil Law systems were early adopters of data protection laws,[1727] while Member States with Common Law systems saw the incremental development of the tort of privacy. Internationally, harmonisation began with the Council of Europe's 1981 Convention 108.[1728] In 1990, the European Commission adopted proposals for the protection of personal data.[1729] The Commission considered that the diversity of national approaches to data retention threatened integration.[1730] The aim of national laws in the field, the Commission suggested, was to "protect the fundamental rights of individuals, and in particular the right to privacy" and to further the aim of an internal market.[1731] The original treaties of the European Communities are silent on data protection. The EU adopted its first comprehensive data protection instrument in 1995: Directive 95/46/EC on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data ("Data Protection Directive").[1732]

Directive 97/66/EC ("Telecommunications Directive") was one of the earliest frameworks addressing data retention and privacy in e-communications.[1733] It allowed for derogations from the obligations contained in the Directive where necessary for national security, defence, public security or law enforcement. It was replaced by the ePrivacy Directive. Most at issue has been the extent of derogations contained in Article 15 of the ePrivacy Directive which allows Member States to adopt legislative measures restricting the scope of the rights and obligations provided for in Articles 5, 6, 8(1), (2), (3), (4) and Article 9 of the Directive when necessary and proportionate to "safeguard national security, defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system".[1734] Formerly, the trend was for the Court to leave the assessment of Article 15 to Member States, but that has since changed, thus casting the Court into the political arena.[1735]

Following the terrorist attacks in New York, Washington D.C. and Pennsylvania in September 2001, communication data was declared a useful criminal justice instrument.[1736] After the terrorist attacks in Madrid in 2004, and London in 2005, the Council of Europe proposed the enhancement of EU security infrastructure.[1737] An EU-wide data retention measure was passed in

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[1726] In England and Wales, the Civil Procedure Rules 1998, Part 31, and in Ireland, the Rules of the Superior Courts (SI 1986/15), order 31, rule 29 require non-parties to disclose relevant documents or data that may support civil litigation.

[1727] E.g. the German State of Hesse adopted the first law on data protection in 1970, only applicable there.

[1728] Council of Europe, "Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data" (ETS No. 108, adopted 28 January 1981).

[1729] European Commission, "Proposal for a Council Directive concerning the protection of individuals in relation to the processing of personal data" (OJ 1990 C 277 p. 3).

[1730] ibid., rec. 5.

[1731] ibid., rec. 7.

[1732] Directive 95/46/EC (OJ 1995 L 281 p. 31). Data protection law was modernised in 2016 by the adoption of Commission Regulation (EU) 2016/679 (OJ 2016 L 119 p. 1) (hereafter, "GDPR"). The General Data Protection Regulation also repealed the Data Protection Directive. Discussion of this Regulation is beyond the scope of this analysis.

[1733] Directive 97/66/EC (OJ 1997 L 24 p. 1).

[1734] ePrivacy Directive, art. 15

[1735] E. Kosta and I. Kamara (eds.), *Data Retention in Europe and Beyond* (Oxford 2025).

[1736] Thierse and Badanjak, *Opposition in the EU*, 15.

[1737] The Council explicitly stated that "the priority should be given to the proposals under the retention of communication and traffic data and exchange of information on convictions with a view to adoption by June 2005", see Council of the European Union, "Declaration on Combatting Terrorism", available at https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/79637.pdf (last accessed 29 July 2025).

EU Directive 2006/24/EC ("the Data Retention Directive"), justified in the name of protecting the internal market.[1738] The Directive provided for the retention of communication data for a period of between six and 24 months for the purpose of investigating, detecting and prosecuting serious crimes. Required retention included the data necessary to trace and identify the source of communication and its destination; to identify the data, time, duration and type of communication; to identify users' communication equipment; and to identify location.[1739]

C. Case Law

The early contours of the CJEU's position on data retention thus reflects an enmeshment of factors, including fundamental rights protection, internal security and competence creep. Commentators largely fall into two camps: (i) privacy advocates who emphasise the growing volume of electronic communications and the extended techniques for their gathering and analysis in consequence of the digitalisation of our societies, or (ii) those, such as law enforcement authorities, who point to the decline in the proportion of electronic communication which they can access within a fragmented legal landscape.[1740]

In the 2014 decision *Digital Rights Ireland v Minister for Communications, Marine and Natural Resources and Others*,[1741] the CJEU invalidated the Data Retention Directive. The Court concluded that failings relating to both the retention and access regimes prevented it from attaining the necessary level of clarity and precision. This was classified as a "particularly serious" interference with fundamental rights "as the fact that the data are retained and subsequently used without the subscriber or registered user being informed is likely to generate in the minds of the person concerned that their private lives are the subject of constant surveillance".[1742] The right being, to use traditional terminology, that of privacy. But, as the body politic has developed an entirely separate and elevated right not to have one's data explored, scrutinised, revealed, or used in the justice system, save in exceptional and defined circumstances, the intrusion of this notoriously vague concept could be predicted to flower strangely. As it has. The Court held that the Directive:

- Allowed member states to introduce indiscriminate data retention regimes, and did not limit the retention to data that is at least remotely linked to a serious crime;[1743]
- Did not establish objective criteria to restrict the access and use of data by national authorities, and in particular did not foresee any prior review by a court or an independent administrative body;[1744]
- Did not provide for substantive and procedural safeguards relating to the access and subsequent use of data by national authorities;[1745]
- Imposed fixed ranges of retention periods, and did not allow national legislation to define them flexibly, according to the specific purposes of the retention;[1746] and
- Did not lay down rules concerning the security of the data retained by electronic communication providers, and in particular did not provide for the irreversible destruction of data and for their storing within the EU.[1747]

[1738] Directive 2006/24/EC (OJ 2006 L 105 p. 54) (hereafter, "Data Retention Directive"). The legal basis for the Data Retention Directive was controversial from the start. The Irish government initiated the first challenge of the Directive before the CJEU on the basis that the Data Retention Directive was not appropriately adopted, see Judgment of 10 February 2009, *Ireland v European Parliament and Council of the European Union*, C-301/60, EU:C:2009:68.

[1739] Data Retention Directive, art. 5.

[1740] Anderson, *A Question of Trust*, at [1.7].

[1741] Judgment of 8 April 2014, *Digital Rights Ireland Ltd. v Minister for Communications, Marine and Natural Resources and Others*, C-293/12, EU:C:2014:238 (hereafter, "*Digital Rights Ireland*").

[1742] ibid., at [37].

[1743] ibid., at [58]–[59].

[1744] ibid., at [60].

[1745] ibid., at [61]–[62].

[1746] ibid., [63]–[64].

[1747] ibid., at [66]–[68].

While the storage of data on an open-ended basis is potentially problematic, it does not follow that later use of metadata is unjustified. Following that pronouncement, challenges to national data retention regimes flared up throughout the EU with multiple references under the preliminary reference procedure of Article 267 TFEU. From 2016, the CJEU has repeatedly had to address issues exposed by their invalidation of the Data Retention Directive.

In *Tele2 Sverige v Watson and Others*,[1748] the CJEU developed *Digital Rights Ireland* to invalidate national statutes supposedly implementing the Directive, justifying their decision on the fact that the national legislation was exercising the derogation provided by Article 15 of the ePrivacy Directive. The Court posited novel propositions. Firstly, that only a system of "targeted data retention"[1749] would conform to a combined reading of the ePrivacy Directive and the Charter. Secondly, that any national law providing for the retention and access to traffic and location data was made subject to a series of mandatory requirements:

> …national legislation must, first, lay down clear and precise rules governing the scope and application of such a data retention measure and imposing minimum safeguards, so that the persons whose data has been retained have sufficient guarantees of the effective protection of their personal data against the risk of misuse. That legislation must, in particular, indicate in what circumstances and under which conditions a data retention measure may, as a preventive measure, be adopted, thereby ensuring that such a measure is limited to what is strictly necessary.[1750]

In the *dispositif*, the CJEU ruled that Article 15(1) of the ePrivacy Directive "read in the light of Articles 7, 8 and 11 and Article 52(1) of [the Charter]" precluded national legislation "which for the purpose of fighting crime, provides for general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication".[1751] Those same provisions precluded national legislators providing for access to the retained data "where the objective pursued by that access, in the context of fighting crime, is not restricted solely to fighting serious crime [and] where access is not subject to prior review by a court or independent administrative authority".[1752] At this point, using metadata to fight serious crime, potentially also to find missing persons, had not yet been nullified. Concepts of what was targeted, meaning geographic- or suspect-focused, and of distinctions between State security and protecting citizens from crime had, however, now branched off from the original concept of what was a permissible interaction with privacy.

But exempting serious crime from a targeted retention regime was quickly lopped off. In *La Quadrature du Net v Premier Ministre and Others,*[1753] the CJEU declared that the importance of the objective of safeguarding national security went beyond that of the other objectives in Article 15(1). General retention for state security was possible, but, for even the most serious crimes there had to be a level of prediction. The CJEU required this to be based on a rational suspicion that in a geographical area, criminal activity justified the retention of data, or that individuals could be monitored because they were already assessed as likely to be involved in serious crime. This was not evidence-based. It is pure imagination. Crime is international and if crime could be predicted to the point of total accuracy, criminal activity would wither away. The threat to national security,

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[1748] Judgment of 21 December 2016, *Tele2 Sverige A.B. v Post-och Telestyrelsen and others*, C-203/15 and C-698/15, EU:C:2016:970 (hereafter, "*Tele2*").
[1749] ibid., at [108].
[1750] ibid., at [109].
[1751] ibid., at [62].
[1752] ibid., at [114].
[1753] Judgment of 6 October 2020, *La Quadrature du Net and Others v Premier Ministre and Others*, C-511/18, C-512/18 and C-520/18, EU:C:2020:791 (hereafter, "*La Quadrature du Net").*

further, must be shown to be "genuine and present or foreseeable".[1754] Foreseeability, as a concept, creates interpretive difficulties since a future threat to national security could be foreseeable, but not necessarily imminent.[1755] In the exceptional circumstances where national authorities can access such data, even that retention could not be systemic in nature and would have had to be subject to review either by a court or an independent administrative body.[1756]

Hence, a state security threat can justify general retention with later access subject to the safeguard of judicial scrutiny. Outside of state security, crime detection requires foresight at an impossible level. Even the positive obligations that might arise under Articles 3, 4 and 7 of the Charter, establishing rules to facilitate effective action to combat criminal offences, could not have the effect of justifying interference with traffic and location data of practically the entire population "without there being a link, at least an indirect one, between the data of the persons concerned and the objective pursued".[1757] The Common Law concept of reasonable suspicion, a rational safeguard, here metamorphized into reasonable prediction based on current behaviour: otherwise, for the CJEU, grave crimes did not justify the retrieval of evidence in the form of metadata.

Persons identified as posing a serious criminal threat could be targeted once those persons had been detected beforehand on the basis of "objective evidence",[1758] or data could be retained on the basis of a geographic criterion, targeting areas of high crime or places particularly vulnerable to the commission of serious crimes.[1759] The CJEU also promoted expedited retention. In non-terrorist crime, data could be retained and later analysed, but only if based on a prediction. Reasonably suspecting someone of a crime that has happened requires a logical exercise in justifying a search or an arrest, but reasonable prediction as to what may occur in the future engages speculation. In line with its previous decisions, the CJEU emphasised the primacy of EU law over national legislation and to the designation in the Treaty on European Union of national security as the "sole responsibility of each member state".[1760] But, if law enforcement authorities were legitimately investigating a terrorist incident or threat, what if evidence as to murder was uncovered?

If there was any doubt, the decision in *Bundesrepublik Deutschland v SpaceNet A.G. and Telekom Deutschland GmbH*,[1761] confirmed that a legislative measure laying down a retention of traffic and location data (10 weeks and 4 weeks respectively) and rules intended to ensure the effective protection of the retained data against the risks of abuse and against unlawful access to those data sets could not be regarded as constituting a targeted retention scheme. As to the definition of "serious crime" the CJEU clarified its meaning in the *Procura* case.[1762] That preliminary reference assessed the compatibility with EU law of the Italian Public Prosecutor's Office's action seeking authorisation to access personal data retained by providers of e-communications services, with a view to identifying the perpetrators of two acts of aggravated theft, robbery, of a mobile phone. In its reference, the *Corte Supreme di Cassazione* said such a provision could give rise to data disclosure requests for "offences with a limited social disturbance and which are punishable only on foot of a complaint by a private party…[for example] low-value thefts such as mobile phone or bicycle theft".[1763]

[1754] ibid., at [168].
[1755] V. Mitsilegas et al., "Data Retention and the Future of Large-scale Surveillance: The Evolution and Contestation of Judicial Benchmarks" (2023) European Law Journal 176, 191.
[1756] Judgment of 6 October 2020, *La Quadrature du Net*, C-511/18, C-512/18 and C-520/18, EU:C:2020:791, at [139].
[1757] ibid., at [145].
[1758] ibid., at [149].
[1759] ibid., at [150].
[1760] TEU, art. 4.
[1761] Judgment of 20 September 2022, *Bundesrepublik Deutschland v SpaceNet A.G. and Telekom Deutschland GmbH*, C-793/19 and C-794/19, EU:C:2022:702 (hereafter, "*SpaceNet*").
[1762] Judgment of 30 April 2024, *Procura della Repubblica presso il Tribunale di Bolzano*, C-178/22, EU:C:2024:371.
[1763] Cited in ibid., at [21].

The CJEU upheld the provision in question, clarifying that it is for Member States to define "serious crime" for the purposes of Article 15 of the ePrivacy Directive.[1764] It elucidated that Member States "cannot distort the concept of serious offence" by including offences that are "manifestly not serious in the light of the societal conditions prevailing in the Member States concerned".[1765] To avoid the dilution of the concept of "serious crime", the CJEU held that access requests must be subject to prior review by a court or independent administrative body with the power to refuse or restrict access where the crime is not serious.[1766]

D. Practical Considerations: Proportionality and Necessity

The 2013 Edward Snowden revelations implicated state intelligence agencies in intercepting and monitoring the data flowing through sub-marine cables in far-reaching critical surveillance practices. Should privacy become the by-word for apex courts as a hierarchy of objectives emerges, with the victims of crime exacting the highest price? The resolution of that question has been an unending job for national courts. The preliminary reference procedure found in Article 267 TFEU has a role here as the tool for judicial dialogue between national and supranational courts. The supposed dialogue, however, has been criticised by the Supreme Court of Ireland as "rather one-sided".[1767] Proportionality, as a theoretically "rigorous, standard based doctrine" that aims to mitigate against subjectivity "inherent in the exercise of power", is the reputed safeguard.[1768] In reality, proportionality has implied the exercise of a value judgment in placing metadata exclusion over all other interests.

Practicality matters. On what evidence is it postulated that terrorist crime is more of a threat, hence justifying interference with privacy, than serious crime? There is no basis for believing that the entire foundation of police work grounded upon the build-up of suspicion could be forced through the opposite lens of prediction. On this logic, the *Procura* decision invites double criticism. Firstly, it begs the question of whether the CJEU's approach distorts privacy rights or whether it invites member states to recategorize singular investigations. That appears the response of the Italian legislature. Secondly, the CJEU's emphatic rejection of the relevance of the metadata belonging to a pre-identified criminal – as in the minor thief – to the proportionality test necessary for lawful access to metadata seems to be the antithesis of both the targeted retention model and the public nature of crime. Crime is not a private matter. This principle informs the prosecution of all criminal offences. This is demonstrable. The 1996 Veronica Guerin murder case (Section III (A)), the 1998 Omagh bombing (Section III (A)) and the 2015-2024 Graham Dwyer murder prosecution (Section III (D)), are articulated below to demonstrate the CJEU's approach as a contradiction of fact.

The decision in *Digital Rights Ireland* is the inaugural wrong-turning. There, the Court assessed proportionality considering the Directives' main object, namely crime prevention, and not its stated objective, that of market harmonisation; sitting uncomfortably with its finding in *Ireland v European Parliament and Council of the European Union*. It is also evident, that the CJEU has not treated all types of retained data in the same way. In addition to the terrorist and (highly qualified) serious crime exceptions – noting the differing tests for each – and the preclusion of the mass harvesting of data, internet piracy has recently generated another exception. In the *French*

[1764] ibid., at [46].
[1765] ibid., at [50].
[1766] ibid., at [60]. Prior to this ruling, Article 132(3) of Italian Legislative Decree No. 196/2003 was amended to classify offences for which telephone records may be obtained as 'serious', punishable by at least three years imprisonment. As to the criteria for assessing the existence of a serious interference with the rights guaranteed in Articles 7 and 8 of the Charter, the Court held, at [41], the "fact that the data to which the Public Prosecutor's Office requested access may not be the data of the owners of the mobile telephones at issue, but the data of the persons who communicated with each other by using those telephones after their alleged theft, is irrelevant".
[1767] *The People (D.P.P.) v Caolan Smyth* [2024] IESC 22, [2024] 6 J.I.C. 1705, at [97] (Collins J.).
[1768] L.D. Corte, "A Critical Comment on Proportionality in the Mass Surveillance Jurisprudence of the CJEU and the ECtHR" in Kosta and Kamara (eds.), *Data Retention*, ch. 4.

Data Network case,[1769] the CJEU considered a referral seeking an annulment of a French decree which authorised the public authority responsible for the protection of copyright and related rights infringements committed on the internet to access data, retained by service providers. The processing operation at issue enabled the matching of the civil identity associated with the IP address that appeared to have been used for copyright infringement, without prior review by a judge or independent authority. Offenders faced a graduated response; educational to punitive measures, or in the most serious cases, a referral to prosecution.

The Court held that access by a public authority to data relating to the civil identity associated with an IP address retained by providers of electronic communications services was justified under Article 15 of the ePrivacy Directive for the purpose of combatting counterfeiting offences. According to the court's earlier case law, IP addresses constituted traffic data for the purposes of the ePrivacy Directive. However, in grafting an exception in support of intellectual property law enforcement, the CJEU held that "[IP addresses] are distinct from other categories of traffic data and location data...[and they]…mainly serve to identify…[the owner] of the terminal equipment from which a communication is made".[1770]

Thus, the Court enabled scrutiny of email and internet telephony, "provided that only the IP address of the source of the communication are retained and not the addresses of the recipient of the communication, those addresses, do not, as such, disclose any information about third parties who were in contact with the person who made the communication".[1771] Yet, on the same point in *La Quadrature du Net* the Court considered that IP addresses "when used to track an internet user's complete clickstream and therefore his or her online activity, enable a detailed profile of the user to be produced…therefore retention and analysis of those IP addresses…constitute a serious interference with fundamental rights of the internet user".[1772] Puzzling is the emphasis the CJEU attached to effective criminal investigation and to the fact that, absent access to the data, there would be a "real risk of systemic impunity" not only for copyright infringement but for other offences committed online or "facilitated by the specific characteristics of the internet".[1773] From the outset, it is difficult to justify the level of gravitas the decision seems to attach to the detection of crime committed exclusively online compared to the preponderance of illegal activity which has online and offline elements. The decision also emerges as contradicting earlier case law where the Court held that while indiscriminate retention of data is permissible, it requires the crime to have a certain degree of seriousness, which usually does not apply to infringements of copyright online.[1774]

According to the Court, Member States must lay down, in its legislation, clear and precise rules relating to retention arrangements associated with IP addresses, which must meet strict requirements:

- The national rules must ensure that each category of data, including data relating to civil identity and IP addresses, "is kept completely separate from the other categories of data retained".[1775]
- Those rules must "ensure that, from a technical point of view, the separation of the various categories of retained data was genuinely watertight, by means of a secure and reliable computer system".[1776]

[1769] Judgment of 30 April 2024, *La Quadrature du Net and Others v Premier Ministre, Ministère de la Culture, French Data Network and Others,* C-470/21, EU:C:2024:370 (hereafter, "*French Data Network*").
[1770] ibid., at [75]–[76].
[1771] ibid., at [76].
[1772] Judgment of 6 October 2020, *La Quadrature du Net*, C-511/18, C-512/18 and C-520/18, EU:C:2020:791*,* at [153].
[1773] Judgment of 30 April 2024, *French Data Network,* C-470/21, EU:C:2024:370, at [119].
[1774] Judgment of 6 October 2020, *La Quadrature du Net*, C-511/18, C-512/18 and C-520/18, EU:C:2020:791, at [46].
[1775] Judgment of 30 April 2024, *French Data Network,* C-470/21, EU:C:2024:370, at [86].
[1776] ibid., at [87].

- As far as the rules provide for the possibility of linking the retained IP addresses with the civil identity of the person concerned, "the rules must do so through the use of an effective technical process which do not undermine the effectiveness of the watertight separation of those categories of data".[1777]
- The reliability of "that watertight separation must be subject to regular review by a public authority other than that which sought to obtain access to the data".[1778]

As the CJEU isolates one type of metadata from intrusion in the context of copyright infringement, almost invariably pursued as a civil wrong, but as a crime it is much less serious than the abuses inflicted on victims by sexual and other forms of violence and by major thefts. The position that the disclosure of identity of the user in the absence of profiling does not constitute a serious interference with Charter rights is difficult to reconcile with the CJEU's previous case law that explicitly states that disclosure of traffic and location data is a serious interference of Charter rights.

In *G.D. v Commissioner of An Garda Síochána and Others*[1779] – prosecuted in Ireland as *The People (D.P.P.) v Graham Dwyer*[1780] – the CJEU rejected the Commission's argument that particularly serious crime could be treated in the same way as threats to national security. The Court referred to its earlier case-law outlining a hierarchy of public interest objectives that may justify restrictions to rights protection according to their respective importance. Such a measure must be proportionate to the seriousness of the interference that it entails.[1781] By allowing broader exceptions to the principle of data minimisation, the CJEU seems to have undermined its own rationale for avoiding the dilution of the concept of "serious crime" posited in *G.D.* and *SpaceNet*. The result of the proportionality test in the context of copyright enforcement is the converse of what the CJEU had determined as unconstitutional;[1782] previously the Court held that data disclosure and retention requests by public authorities require prior review.

This decision seems to invite inconsistent degrees of protection from intrusion to privacy for criminals and mercenaries alike. According to one report, Member States' responses to the development of CJEU jurisprudence has been met with reluctance and a diversity of approaches by national governments.[1783] In the fog generated, a map is needed. The metadata regulatory framework across the EU for Member States can be summarised as follows:

- Member States in which the domestic legislation implementing the Data Retention Directive remains in force;
- Member States which amended their legislation or enacted new data retention laws in line with the CJEU case law. 12 counties made changes to their legislation in the period from 2018 to 2022, seven of which introduced targeted retention. For example, in Ireland, for national security purposes, the Communications (Retention of Data) (Amendment) Act 2022, requires all telecommunication service providers to retain metadata for a period of 12 months from the date on which the data were first processed by the service provider;
- Member States whose national laws transposing the Data Retention Directive were struck down and which now lack any metadata retention laws.

[1777] ibid., at [88]
[1778] ibid., at [89].
[1779] Judgment of 5 April 2022, *G.D. v Commissioner of An Garda Síochána and Others*, C-140/20, EU:C:2022:258 (hereafter, "*G.D.*").
[1780] *The People (D.P.P.) v Graham Dwyer* [2024] IESC 39, [2024] 7 J.I.C. 3116 (hereafter, "*Dwyer*").
[1781] Judgment of 5 April 2022, *G.D.,* C-140/20, EU:C:2022:258, at [56].
[1782] G. Westkamp, "Data Retention, Information Disclosure and Intellectual Property Enforcement: A Truly "High Standard" of Protection?" (2025) 1 Intellectual Property Quarterly 48.
[1783] European Commission, *Final Report*, 25.

III. CURRENT POSITION

On the protection of data, on its exceptions and on the judgments supporting the approach of the CJEU as justifying its rulings, there is a thicket of case decisions. From these, it is barely possible to discern the current position. While this may not be final, what follows may assist as a workable taxonomy:

1. EU law precludes general and indiscriminate retention of traffic and location data by providers of electronic communication services; *Digital Rights Ireland*.[1784] Hence, bulk data retention is incompatible with EU fundamental rights, even if it is accompanied by a strict access regime, mediated through a judge or other independent person; *Tele2* confirmed in *SpaceNet*.[1785]
2. To combat non-terrorist or non-State-threat crime, EU law precludes general and indiscriminate retention of traffic and location data. Targeted retention is permitted, only by predicted geographic area or expedited retention through the pre-identification of a person on the basis of objective evidence (quick freeze); *Tele2*.[1786] There may be different levels of interference that require additional or less justification; *Ministerio Fiscal*.[1787] These findings, uncertainly, are not perhaps applicable to subscriber data.[1788]
3. However, EU law allows general and indiscriminate retention of traffic and location data by providers of electronic communications services to safeguard national security. This can be intuited to cover, most obviously, terrorism or risk of invasion, surely including cyber-attacks. Here a set of, considerably more flexible, conditions are to be met. These do not require a prior reasonable suspicion focused on individuals or focused on geographic areas. The retention must be "time limited" and there must be "sufficiently solid grounds for considering that the Member State concerned is confronted with a serious threat …to national security which is shown to be genuine and present or foreseeable"; *La Quadrature du Net*.[1789] The data must be liable to provide information regarding the communications made by a user of a means of electronic communication or regarding the location of the terminal equipment used; *Prokuratur*.[1790]
4. However, as a further exception, EU law allows general and indiscriminate retention of IP addresses to match the civil identity data of its holder to detect copyright, or perhaps similar infringements of intellectual property on the internet, once certain requirements are met, without prior review by a judge or independent authority, save for "atypical situations" that are likely to reveal sensitive information; *French Data Network* case.[1791]

This line of cases, generated the ultimate decision on the legality of bulk data retention; *G.D. v Commissioner of An Garda Síochána and Others*.[1792] These facts are taken from the prosecution narrative.[1793] The victim met the accused and, over time, he increasingly expressed a desire to violently abuse women. He was a professional with no convictions. His wide professional travel exposes the invalidity of supposed geographic targeting. The police discovered a number of mobile

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[1784] Judgment of 8 April 2014, *Digital Rights Ireland*, C-293/12, EU:C:2014:238.
[1785] Judgment of 20 September 2022, *SpaceNet*, C-793/19 and C-794/19, EU:C:2022:702.
[1786] Judgment of 21 December 2016, *Tele2*, C-203/15 and C-698/15, EU:C:2016:970.
[1787] Judgment of 2 October 2018, *Ministerio Fiscal*, C-207/16, EU:C:2022:702 (hereafter, "*Ministerio Fiscal*").
[1788] European Council, "Document 14319/18", available at https://data.consilium.europa.eu/doc/document/ST-14319-2018-INIT/en/pdf (last accessed 27 July 2025). While Member States broadly agree on what constitutes metadata, some classify points such as IP addresses and device identifiers as subscriber data, others as traffic data.
[1789] Judgment of 6 October 2020, *La Quadrature du Net*, C-511/18, C-512/18 and C-520/18, EU:C:2020:791.
[1790] Judgment of 2 March 2021, *H.K. v Prokuratuur*, C-746/18, EU:C:2021:152. See also Judgment of 2 October 2018, *Ministerio Fiscal*, C-207/16, EU:C:2022:702.
[1791] Judgment of 6 October 2020, *La Quadrature du Net*, C-511/18, C-512/18 and C-520/18, EU:C:2020:791, at [134]–[135].
[1792] Judgment of 5 April 2022, *G.D.*, C-140/20, EU:C:2022:258.
[1793] Note, the authors express no view as to the validity of such assertion or as to any legal proposition debated.

phones, which they claimed to connect to the accused and others of which relatives linked to the victim. Analysis of messages on these revealed violent fantasies. As part of the investigation, the accused was known to have travelled to certain places on particular dates, and the mobile phones were ascribed to him by recovered metadata based on his proven presence in, or declared intention to be at, particular places. Hence, having first ascribed the phones to the victim and accused, a request was made to a police officer, not a judge, for relevant raw metadata to be accessed and analysed. This, it was claimed, established both a pattern which enabled identification of the accused, thus furthering the central tenet of acquaintance between the victim and accused, and motive and inclination. In a preliminary ruling as to admissibility, the Supreme Court of Ireland submitted questions to the CJEU as to whether the metadata of the accused had been illegally harvested by investigators.[1794] This would have a serious bearing on the admissibility of this key evidence. A central issue for the Irish Supreme Court was whether the trial judge was correct to admit the telecommunications data of the accused. The CJEU re-affirmed, in absolutist terms that "there can be no question of reinstating…the general and indiscriminate retention of traffic and location data"[1795] and "the fact that it may be difficult to provide a detailed definition of the circumstances and conditions under which targeted retention may be carried out is no reason for the Member States, by turning the exception into the rule, to provide for general retention of traffic and location data".[1796]

A. Sense and Sensibility?

Law should be based on good sense. Organised crime, as in the Veronica Guerin murder, can be as much an attack on society as such terrorist acts as the Omagh bombing. Both prosecutions relied on harvested telecommunications data as key evidence. Apart from that, the victims of serious crime should have an equal right to court processes which have access to a category of proof which experience has shown to be compelling. Two contrasting cases demonstrate the centrality of metadata in combatting all forms of crime. Hence, we briefly reference the murder of a journalist in Ireland by organised crime and the murder of those in Omagh, within the United Kingdom jurisdiction, by terrorists. The first victim died while investigating organised crime and the second set of victims perished due to warped ideology. All, however, are victims: in one category the CJEU's reasoning would now undermine a vital investigative instrument. In neither case was any private information about non-suspects ever revealed nor any complaint of intrusion ventilated.

In June 1996, Veronica Guerin, was shot, while stopped at traffic lights near Dublin city, by members of a gang she was investigating. She had been tracked by her killers travelling away from Dublin and then followed on her journey and murdered while returning. The perpetrators were a Dublin gang, importing drugs and automatic weapons. Of the seven main participants, one was ex-army with no convictions (no reason to predict criminality), another was running a shipping company in Cork (similarly), and another was unemployed and had no convictions (similarly). The other four had convictions for serious offences, but years previously, with no current police suspicions. The CJEU's position suggests that the prediction of crime, enabling the targeting of telecommunications data, can lawfully be retained and harvested only by augury. As to proof, at trial a pattern was established of the phones of gang members communicating with each other. Locations and interactions established involvement in the crimes.[1797] This was harvested from the incomprehensible data as to what phone communicated with what other phone, for how long, and off what mast did the caller and the receiver's phones connect. Since there was no surveillance of

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[1794] *Dwyer v The Commissioner of an Garda Síochána* [2020] IESC 4, [2020] J.I.C. 2401, at [7.2] (Clarke C.J.). In the final analysis, although this data was accessed illegally, the court applied a principle that where the law had changed, this could not be regarded as such an egregious breach of the rules of evidence to require exclusion. The problem, however, is with future cases.

[1795] Judgment of 5 April 2022, *G.D.*, C-140/20, EU:C:2022:258, at [83].

[1796] ibid., at [84].

[1797] See *The People (D.P.P.) v Meehan* [1999] 7 J.I.C. 2901 (S.C.C.), *The People (D.P.P.) v Gilligan* [2005] IESC 78, [2005] 11 J.I.C. 2301.

the words spoken but only by targeted deciphering of commercially retained information, it is difficult to see how privacy rights would be engaged. Even if engaged, the derogation for the investigation of murder both serves and is proportionate to a legitimate aim.

On 15 August 1998 in Omagh, Northern Ireland, a bomb was exploded killing dozens and injuring multiple other victims. The mobile phone of the person accused of conspiring to perpetrate the bombing was analysed and its metadata was recovered pursuant to the safeguards under Irish and British legislation. By a ruse, a second mobile phone, that of an uninvolved man, was borrowed. There was no reason to suspect the uninvolved man of being complicit. The metadata showed the two phones communicating in a pattern of staccato calls from Dundalk to Omagh, distance 110 kilometres, and returning on the same route. This established an advancing spotter car, using one phone, and the following explosives-packed car where another mobile received warnings on security checks. Analysis produced no convincing reason for this kind of pattern where the phones utilised masts internationally up and back in a northwest-southwest axis over a short timeframe. This had nothing to do with airports or train stations;[1798] geographical prediction being demonstrated to be unreal. The traffic was international. Hence, impossible for prior geographical targeting. The phone communicating from the spotter car travelled about 1.5 kilometres ahead of the car which had been turned into a bomb. The calls were routed through fixed masts, showing a pattern. The Special Criminal Court regarded this evidence as central to the conviction in the case of *The People (D.P.P.) v Colm Murphy*:

> The pattern of calls and sell-mast user by both phones on [the day of the Omagh bombing] indicate that each travelled from County Monaghan [in a Northerly direction] to Omagh shortly before the detonation of the car bomb there and also returned [in a southward direction to County Monaghan where the accused lived] thereafter. It is highly probable that the conveyance of the car-bomb to Omagh that day would have involved, not only the bomb carrying vehicle itself but also a scout car to travel ahead of it. Telephone contact between both vehicles in such circumstances is probable.[1799]

B. Evidence and Exclusion

The law of evidence evolved through experience but fundamental is that "the law is entitled to the evidence of every man".[1800] Common sense suggests the search for the truth is most likely to yield results when a court receives all available, relevant information. Jeremy Bentham wrote of the judicial system that it was one of "free proof";[1801] that in which evidence was admitted if logically relevant. Rules of exclusion, however, inform the archetype of every legal principle's inception. In Civil Law systems generally, the tribunal should "admit any evidence which it deems to have probative value", leaving the weight as a matter for analysis.[1802] Some sources of exclusion of evidence at Common Law originate in the fragility of jury analysis. But, in addition, social considerations require some sources of evidence to be exempt: hence, privilege. Outside of proof in court, the Common Law protects categories of evidence from harvesting, the classic example being that lawyers giving advice to clients are bound to confidentiality. Here there is sense. As analysed by Wigmore, privileged communications should be protected from admission in evidence where a relationship of confidence is inherent in the transmission of information, where society has an interest in protecting that form of relationship (e.g. lawyer and client), and where

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[1798] Judgment of 6 October 2020, *La Quadrature du Net*, C-511/18, C-512/18 and C-520/18, EU:C:2020:791, at [152].

[1799] *The People (D.P.P.) v Colm Murphy* [2002], judgment of 22 January 2002, not reported (S.C.C.). Note this decision was overturned on appeal due to a legal error made by the trial court, see *D.P.P. v Murphy* [2005] IECCA 52, [2005] 4 I.R. 504.

[1800] *The People (D.P.P.) v J.T.* (1998) 3 Frewen 141 (Circ. Ct. (Crim.)).

[1801] J. Bentham, *Rationale of Judicial Evidence, Specially Applied to English Practice*, vols. 1–5 (London 1827), 209.

[1802] G. Williams, *The Proof of Guilt: A Study of the English Criminal Trial*, 3rd ed. (London 1963), 208. Article 1358 of the French Civil Code "except where the law provides otherwise, proof may be provided by any means". Similarly, Article 286 of the German Civil Code allows a court to analyse any evidence, but it must give reasons as to why it finds evidence probative.

undermining the secrecy of that relationship would cause greater damage to social cohesion than removing the information in the communication from its reception as evidence.[1803]

Nullifying an entire category of proof undermines the judicial system. The human rights of victims are subject to privacy concerns; in contrast to the logic behind privilege, a much lesser concern. Further, there is no distinction to be found in classifying the form of proof that is possible, and the kinds of investigation into violations that may be pursued, between what is ordinary crime and a taxonomy of offences based on undermining the nation state. Intellectual property protections, while justified, are not superior to the right to life. The nation state exists to foster common values, one of which is the protection of those within the jurisdiction of its borders and laws.

In EU law, proportionality is central to every limitation on fundamental rights and is applied through the limbs of suitability or appropriateness and through the test of necessity.[1804] The prevailing case law of the CJEU has misstated the proportionality assessment to which interferences with the fundamental right to protection of personal data operate at a stratum where vital evidential proof is nullified.

Central to compliance with proportionality are the strict necessity test and the appropriateness test. The strict necessity threshold as applied to the overall proportionality test has been so strained as to become unpredictably applied. This flows from the Court's conflation of the necessity of a measure with the final element of the test; strict proportionality. This is "the part of the test where competing rights, or rights competing with objectives of general interest worthy of protection, are balanced against each other".[1805] The balancing test as applied to data preservation, production and disclosure orders lacks satisfactory resolving power to the competing interests at stake.

That emerged from one of the earliest interpretations of the application of proportionality to this issue in the opinion of Advocate General Saugmandsgaard Øe in *Tele2*. The Advocate General stated that "the requirement of proportionality within a democratic society prevents the combating of ordinary offences and the smooth conduct of proceedings other than criminal proceedings from constituting justifications for a general data retention obligation".[1806] Later case law, as analysed, divining exceptions to that principle, reveals a complex taxonomy of objectives allowing different degrees of metadata retention that do not equate to the degree of criminality at issue.

C. Privacy

If the European Union yields to a position where rights of general application enacted in aid of privacy are capable of thwarting criminal investigations, it requires an analysis of the origin of the weight the CJEU affords to privacy. *Scarlet Extended S.A. v Société Belge des Auteurs, Compositeurs et Editures*[1807] provided a hint that the CJEU might move in the direction of an almost absolute determination to establish and preserve anonymity for electronic data use. The decision arose from a 2004 request by the Belgian Association of Authors, Composers and Publishes for an order from the Belgian court requiring Scarlet, an internet service provider, to prevent copyright infringements committed through its service by blocking customers from sending or receiving files contained in protected works. The Belgian court found in favour of the authors' group, but the CJEU rejected that interpretation, stating that the installation of a filtering system may infringe the right to protection of the personal data of internet service provider's customers.[1808]

[1803] J.H. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3rd ed. (Boston 1940).
[1804] D. Nardi, "Proportionately and Strict Proportionality in the Case-law of the Court of Justice of the European Union on Data Retention" in Kosta and Kamara (eds.), *Data Retention*, ch. 5.
[1805] D. Nardi, "Proportionality" in Kosta and Karma (eds.), *Data Retention*, 64.
[1806] *Tele2 Sverige v Post-och Telestyrelsen* [2017] Q.B. 771, at [172] (Saugmandsgaard Øe A.G.)
[1807] Judgment of 24 November 2011, *Scarlet Extended S.A. v Société Belge des Auteurs, Compositeurs et Éditures S.C.R.L.*, C-70/10, EU:C:2011:771.
[1808] ibid., at [50]–[51].

Yet, privacy is a highly fact-dependent right. There may be situations of confidence, through commercial or personal relationship, were privacy rights demand protection. Conversely, a state of affairs commonly occurs where legislation-based rights may apply but where there can be no reasonable expectation of non-disclosure, for example arranging a serious crime. But, in any of these, statutory obligations may superimpose a blanket constriction. In the field of communications, the legislative model is that data may only be retrieved in accordance with law and when authorised. The very fact of restricting that kind of evidence, in distinction to documentary or eye-witness testimony, makes the interpretation of legislative norms one that demands shrewd and reality-based analysis by an apex court.[1809]

D. Human Rights

Critics may see human rights as asserting protections for those accused of crime. Those who have suffered a criminal violation also have rights. Without the secure retention of metadata and the potential to access and analyse it for strictly limited purposes related to criminal investigation, the most serious crime has a much greater chance of remaining undetected. Cutting out the truth in the form of key evidence distorts the legal process and severs it from good sense. Arguably, the European Court of Human Rights ("ECtHR") has struck this balance proportionately.[1810] In *KU v Finland*, the ECtHR explicitly held that:

> Although…users of telecommunications and Internet services must have a guarantee that their own privacy and freedom of expression will be respected, such guarantee[s] cannot be absolute and must yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others.[1811]

In the wake of these cases, just how much criminality society is willing to tolerate in pursuit of a particular conception of protection of proclaimed freedoms will have to be reckoned with. In consequence of the CJEU's decision in *Norra Stockholm Bygg*,[1812] the question over the use of metadata in civil proceedings is on an equal, but no less expansive, trajectory to that followed in the criminal law. Those proceedings confirm the application of the General Data Protection Regulation to civil court proceedings, including court orders to produce documents containing personal data as evidence. When assessing the production of a document containing personal data, the national court is required to have regard to the interests of the data subjects and balance these on a case-by-case basis, considering the type of proceeding at issue, and taking into account the principle of proportionality and data minimisation (the last resort principle whereby evidence by other means should be pursued rather than retained data). As real evidence, the law's treatment of banking data, provides an extreme point of comparison to the data nullification debate. At Common Law, what was known as the 'best evidence rule', possibly originated through judges noticing mistakes in hand-copying documents. The rule that proof must generally be offered by producing the original has weakened in favour of an analysis as to the weight to be afforded to a copy. But banking data, evidenced by the use of a credit card system that a customer spent a certain amount in a location on a particular date, proves both presence and potentially reveals more as to

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[1809] P. Charleton and S. Reilly, "Passing Off: An Uncertain Remedy" in European Union Intellectual Property Office (ed.), *20 years of the Boards of Appeal, Celebrating the Past, Looking Forward to the Future Liber Amicorum* (EUIPO 2017), 136.
[1810] O'Leary, "Balancing Rights".
[1811] *K.U. v Finland* (Application no. 287/02), Judgment of 2 March 2009, not yet reported, at [49].
[1812] Judgment of 2 March 2023, *Norra Stockholm Bygg A.B. v Per Nycander A.B.*, C-268/2, EU:C:2023:145 (hereafter, "*Norra Stockholm Bygg*").

proclivities. This data might more properly be protected by privacy rights. Yet, here, proof is thus far unimpeded.[1813]

IV. Conclusion

While there are dangers in placing privacy on the lowest rung of any taxonomy of rights, using digital privacy as a norm that nullifies crucial evidence overrides the entitlement of the victims of serious crime to a fair judicial process. The CJEU asserts that by retaining data there is a risk of abuse and unlawful use.[1814] Yet, the CJEU's blanket data retention ban in the fight against serious crime threatens social cohesion. Arguably, the global trade in information, facilitated by policies such as the EU's Digital Agenda, under which the European strategy for data has been central,[1815] may threaten privacy more than time-limited retention for law enforcement purposes.[1816] Under the placate surface of privacy rights lies the offering serious criminal offenders typically find most enticing; anonymity. Fundamentally, the admissibility of evidence in court is a matter for the judge presiding over litigation and while the various decisions of the CJEU do not change that principle, the case law divests judicial authority. The deficit in the apodixis of the various judgments might be seen as removed from reality of the paradigmatic cases of Omagh, *Dwyer* and Guerin. These are not untypical of what can happen anywhere.

The "golden thread" weaving through the criminal law is the duty of the prosecution to prove an accused person's guilt.[1817] For proof in civil and criminal litigation, metadata should be available. It is the stringent protection of privacy in the form of data, as a CJEU-declared supreme interest,[1818] that threatens the principle of finding the truth. This two-step of balancing rights yet also finding the truth, common to all court proceedings, requires flexibility. Yet, arguably, it has become unworkable where harvesting telecommunications data for evidence is concerned. The exclusion of evidence relating to harms attracting a high degree of culpability in furtherance of a particular conception of privacy protection lacks a foundation in reality. To this seemingly compromised system of justice, there are exceptions divorced from reason and logic. Thus, the victims of crime have been trumped by privacy. The trajectory of case law since *La Quadrature du Net* has been one of case-by-case exceptions to the CJEU's general retention prohibition. These do not follow from the principle, emerging as post-hoc rationalisations perhaps designed to avoid the logical consequences of *Tele2*.

As highlighted by the Supreme Court of Ireland, the implications of that dismissal of general data retention, "is far from obvious from the language of Article 15(1) of the ePrivacy Directive or of the Charter and appears to be highly contestable".[1819] Civil litigation might be regarded as less important: but not to those seeking justice. Furthermore, experience in Ireland and in the United Kingdom demonstrates, firstly, that terrorist activities often involve money laundering, bank robbery, fraud or other forms of theft, drug dealing and the illegal importation of weapons. These also are individual crimes. Secondly, unchecked organised crime can grow so menacing as to threaten state security; in which case, the CJEU's distinction becomes meaningless. While EU institutions have tended to define "national security" narrowly, this kind of uncertainty strikes at the constitutional heart of the rule of law.

[1813] Usually, retention periods for personal data are outlined by legislation, with the GDPR derogating the decision to data controllers.

[1814] Judgment of 5 April 2022, *G.D.*, C-140/20, EU:C:2022:258, at [45].

[1815] The European strategy for data explicitly states that it will "ensure that more data becomes available for use in the economy and society…", see "A European Strategy for Data", available at https://digital-strategy.ec.europa.eu/en/policies/strategy-data (last accessed 10 December 2024).

[1816] As may be the transfer of data under the Safe Harbour Agreement, see Judgment of 6 October 2015, *Maximilian Schrems v Data Protection Commissioner*, C-362/14, ECLI:EU:C:2015:650. If not available in Europe, perhaps the information being transferred minute by minute to the USA may be requested.

[1817] *Woolmington v Director of Public Prosecutions* [1935] A.C. 462, 481 (Viscount Sankey L.C.) (H.L.).

[1818] C. Kuner, "A 'Super-Right' to Data Protection? The Irish Facebook Case & the Future of EU Data Transfer Regulation", available at https://blogs.lse.ac.uk/medialse/2014/06/24/a-super-right-to-data-protection-the-irish-facebook-case-the-future-of-eu-data-transfer-regulation/ (last accessed 2 May 2025).

[1819] *The People v Caolan Smyth* [2024] IESC 22, at [95] (Collins J.).

As to the lawful interception of data in pursuit of serious crime, the alternative models of targeted data retention posited by the CJEU are not based on experience; but emerge as unworkable and impractical. Digital evidence can play a key role in 85% of major criminal investigations.[1820] Prior authorisation for inert data storage could not have solved the Guerin or Omagh murders, with several suspects beyond suspicion. As to geographical range, this would involve guesswork. Two jurisdictions and several towns were involved in the Omagh outrage, and Dublin, Kildare and Cork were the random locations that the relevant crime scenes threw up in the murder of the journalist. It was because of travel of the suspect that the data in *Dwyer* became significant. Criminals do not advertise themselves (prior suspicion), or house themselves in groups (geographical targeting). Nor are their activities limited to transport hubs like airports.

Quick freeze, the posited universal solution of the CJEU, is ill-suited to crimes committed via electronic means and to those which raise cross-border issues. One thinks of sexual exploitation or cyberattacks or complex organised criminality, often detected much later. Some 3,892 requests for communication data were made as part of Operation Notarise, an investigation carried out by the UK National Crimes Agency which resulted in the arrest of 660 suspected paedophiles who had been viewing perverted images of children. 3,982 requests for communications data were made as part of this operation, of which, 92% were able to be resolved to identify a suspect.[1821] A further deficit to quick freeze is that expedited retention can only be applied from the moment a crime is detected, or, more rarely, suspected, and it relies on the happenstance of data actually being stored by electronic service providers.[1822] The viability of the targeted retention model is less than certain given that some Member States do not have a legal obligation on electronic service providers to retain metadata. Some crimes committed online, therefore, may not be detected at all or until years later. Excluded, in terms of the availability of metadata for effective and thorough investigation, are the victims of unsolved crimes and of missing persons, the bodies of whom may turn up years afterwards. There is evidence that criminals are increasingly taking advantage of privacy protecting measures.[1823] Experts point out that accessing data may also be important to exonerate a suspect and to protect the rights of a defendant. Others have said that the Court's criteria are "problematic with respect to fundamental rights because of discrimination against categories of persons or location".[1824]

Practical problems associated with targeted retention proliferate. In some cases, companies do not provide information on the specific data they process and hold, rendering it difficult for competent authorities to submit targeted data access requests.[1825] Implementation problems are emerging because some of the CJEU's retention criteria were based on technologies that have evolved since the judgments were issued.[1826] Studies suggest metadata evidence can compensate the administration of justice for evidence lost due to encrypted communications.[1827] Hence, before making legal pronouncements of broad-sweep, courts of final authority should consider the

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[1820] European Commission, "Commission Impact Assessment on Proposals for a Regulation for Electronic Evidence in Criminal Matters and a Directive on the Appointment of Legal Representatives for the Purpose of Gathering Evidence in Criminal Proceedings" (Brussels 2018).

[1821] Anderson, *A Question of Trust*, at [7.51].

[1822] C. Dupont et al., "Study of the Retention of Electronic Communications Non-Content Data for Law Enforcement Purposes: Final Report", available at https://op.europa.eu/en/publication-detail/-/publication/081c7f15-39d3-11eb-b27b-01aa75ed71a1 (last accessed 29 July 2025).

[1823] "Concluding Report of the High-Level Group on Access to Data for Effective Law Enforcement", available at https://home-affairs.ec.europa.eu/document/download/4802e306-c364-4154-835b-e986a9a49281_en?filename=Concluding%20Report%20of%20the%20HLG%20on%20access%20to%20data%20for%20effective%20law%20enforcement_en.pdf (last accessed 4 December 2024).

[1824] "Recommendations of the High-Level Group on Access to Data for Effective Law Enforcement 2024", 8, available at https://home-affairs.ec.europa.eu/document/download/1105a0ef-535c-44a7-a6d4-a8478fce1d29_en (last accessed 4 December 2024).

[1825] ibid., 27.

[1826] E.g. Dynamic IP addresses and Carrier Grade Net Address Translation were not developed at the time of the CJEU judgments positing data retention based on geographic targeting, see "Recommendations of the High-Level Group", 7.

[1827] A.E. Boustead and M.B. Kugler, "Juror Interpretations of Metadata and Content Information: Implications for The Going Dark Debate" (2023) 9 Journal of Cybersecurity 1.

unintended consequences of what may then appear as attractive.[1828] This impacts on the ability of law enforcement authorities to uphold citizens' rights and is particularly alarming given the emphasis placed by the CJEU in *G.D.*[1829] and in *SpaceNet*[1830] on the availability of targeted retention as a way forward on data retention and in mitigating the negative effects of the unavailability of general retention, despite the evidence-based findings of the Irish Supreme Court in *Dwyer* that such measures would not be effective.[1831]

All-in-all, the obligation of the right to life, enshrined in Article 2 of the Charter, cannot propose that a life taken by reason of terrorism is worthy of a more cogent level of proof than a life taken as a result of criminal activity for personal gain or through acting out warped fantasies. This ever-quickening tangle potentially fuels a constitutional struggle between EU institutions and Member States; arguably laying down a crumbling basis, inimical to certainty in the law, for proof in civil and criminal litigation.

The flaw of the CJEU's analysis is to deem privacy as a goal worthy of limiting an investigative tool and vital evidential proof. Proportionality, in its most extreme application is degraded and promotes data minimisation at a high social cost. Privacy protections are a legitimate aim of democratic societies. But exceptions to the principle that cogent evidence is admissible evidence must be rational. Where evidence is put beyond use, practical reasons of social utility can justify exclusion from the judicial process. Good sense and long experience constitute a rational foundation, but that is absent here. Hence, our critique lies in the frailties of the CJEU's approach to the proportionality and necessity assessment vital to constraints on the vindication of fundamental rights and freedoms.

The strength of the legal system depends on public confidence in its ability to administer justice. If targeted retention fails, the stringent access requirements cemented by the jurisprudence of the CJEU means that, at worst, and not at all improbably, the availability of potent evidence in the detection of ordinary crime might be at the mercy of the internal policy of an e-communications service provider. A compromised system of justice in favour of an absolute principle above what is known as to human behaviour stifles truth and tends to draw the law away from its fundamental purpose in ordering society.

[1828] Service providers are alarmed by the costs of the technical implementation of targeted retention, and by frequently changing legislation, see "Concluding Report of the High-Level Group", 27.
[1829] Judgment of 5 April 2022, *G.D.*, C-140/20, EU:C:2022:258, at [78].
[1830] Judgment of 20 September 2022, *SpaceNet*, C-793/19 and C-794/19, EU:C:2022:702, at [112]–[113].
[1831] *Dwyer v The Commissioner of An Garda Síochána* [2020] IESC 4, at [4.5] (Clarke C.J.).