

Post-Acquittal Retrials for Serious Offences in the Irish Criminal Justice Process: Lessons from England and Wales

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The common law principle against retrials for the same criminal offence is a fundamental principle of criminal justice and procedure common to legal systems concerned with securing protection of fundamental rights in the criminal justice process. The principle of double jeopardy developed at common law as a special plea in bar against retrials for the same offence following an acquittal or conviction by a court of competent criminal jurisdiction. This was in response to criminal procedure during the medieval period, which did not always provide for a criminal trial on the merits of the case but rather according to the power and resources available to the prosecution authorities as opposed to the adverse position of the accused. Statutory modification of the principle against double jeopardy in England and Wales has been the model for reform in other common law jurisdictions, including Ireland. This reform did not abolish the principle but rather provided for post-acquittal retrials in limited circumstances where fresh and compelling evidence of the accused's guilt is discovered following an acquittal, or where the acquittal was tainted by an administration of justice offence. This article critically evaluates double jeopardy law reform in England and Wales, and Ireland, with possible implications for the criminal justice process operative in Ireland.

I – Introduction

The ancient common law prohibition on multiple trials,¹ known as the double jeopardy principle or *nemo debet bis vexari*, is a procedural defence that prohibits the prosecution of an accused for a criminal offence for which he has already been acquitted or convicted following a trial on the merits by a court of competent criminal jurisdiction.² A peremptory plea of *autrefois acquit*³ or *autrefois convict*⁴ may be entered meaning the defendant was formerly acquitted or convicted of the same (or substantially the same) offence.⁵ When the pleas in bar are raised, the relevant court will normally rule as a preliminary matter whether the plea is substantiated. If the court is satisfied the projected trial will be estopped. Double jeopardy can only arise when there has been a previous

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¹ Double jeopardy is a long-standing legal principle existing in many countries, and is one of the oldest rules of English law dating back to the 12th century: J. Hunter, "The Development of the Rule against Double Jeopardy" (1984) 5 J. Leg. Hist. 3; J.A. Sigler, "A History of Double Jeopardy" (1963) 7 Am. J. Legal Hist. 283.

² The general position is set out in T. O'Malley, *The Criminal Process* (Dublin: Round Hall, 2009) at 128 [hereinafter O'Malley].

³ *People (D.P.P.) v. O'Shea* [1982] I.R. 241; *A.G. (O'Maonaigh) v. Fitzgerald* [1964] I.R. 458.

⁴ *State (Tynan) v. Keane* [1968] I.R. 348 [hereinafter *Tynan*]; *State (A.G.) v. Judge Deale* [1973] I.R. 180.

⁵ The three essential protections are from being retried for an acquittal; from retrial after a conviction; and multiple punishments for the same offence. G. Coffey, "Raising the Pleas in Bar against a Retrial for the Same Criminal Offence" (2005) 5(2) J.S.I.J. 124.

criminal trial.⁶ In many countries the protection against double jeopardy is a constitutional right while in others it is afforded by statute law.⁷

Statutory modification of the principle in England and Wales has been the model for reform in several common law jurisdictions which allow post-acquittal retrials in limited circumstances, typically where new and compelling evidence emerges or where the acquittal is tainted.⁸ s. The article will examine policy issues for and against double jeopardy law reform, statutory modification of the principle in England and Wales, and Ireland, and procedural safeguards for post-acquittal retrials. The issues that arise in the Irish criminal justice process are not unique to this jurisdiction and it is always useful to contrast and compare developments in cognate jurisdictions. While the analysis provided and the solutions suggested by parliament and superior courts in England and Wales hold their own intrinsic interest they may often shed light on similar matters that will need to be resolved in the Irish criminal justice process.

II – Policy Considerations Underlying the Principle against Double Jeopardy

Opponents of double jeopardy law reform suggest that retrials would constitute a significant encroachment on the fundamental due process rights of the accused.⁹ Friedland¹⁰ describes the inequity of permitting retrials in the following terms:

[i]n many cases an innocent person will not have the stamina or resources effectively to fight a second charge. And, knowing that a second proceeding is possible an innocent person may plead guilty at the first trial. But even if the accused vigorously fights the second charge he may be at a greater disadvantage than he was at the first trial because he will normally have disclosed his complete defence at the former trial. Moreover, he may have entered the witness-box himself. The

⁶ *D.S. v. Judges of Cork Circuit Court and DPP* [2008] 4 I.R. 3 [hereinafter *D.S.*]. It is important to note the difference between a retrial following a mistrial or *nolle prosequi* and the prohibition on double-jeopardy. It is not uncommon for jurisdictions to allow for trials to be stopped and heard afresh should there be some technical error or misconduct that prevents the original trial from continuing in a fair and just manner. Double jeopardy applies only after a trial has been successfully completed. The crucial difference between the two circumstances is that in the latter there exists a verdict of acquittal or conviction that would technically be considered conclusive on the matter.

⁷ G. Coffey, “The Constitutional Status of the Double Jeopardy Principle” (2008) 30 D.U.L.J. 138.

⁸ See e.g. N. Taylor, “England and Australia Relax the Double Jeopardy Privilege for Those Convicted of Serious Crimes” (2005) 19 Temp. Int’l & Comp. L.J. 189.

⁹ Cf. P. Roberts, “Justice for All? Two Bad Arguments (and Several Good Suggestions) for Resisting Double Jeopardy Law Reform” (2002) 6 Int’l J. Evidence & Proof 197.

¹⁰ M.L. Friedland, *Double Jeopardy* (Oxford: Clarendon Press, 1969) [hereinafter Friedland].

prosecutor can study the transcript and may thereby find apparent defects and inconsistencies in the defence evidence to use at the second trial.¹¹

Likewise, in *Green v. United States*,¹² Black J. opined:

[t]he underlying idea, one that is deeply ingrained in at least the Anglo-American systems of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.¹³

The key principles and rationales proffered for the maintenance of a strict approach to the double jeopardy principle will now be discussed. In particular, (A) the increased risk of wrongful conviction, (B) the issue of finality in criminal litigation, (C) the need to have efficient investigations, (D) power imbalances and tactical advantages to the prosecution and (E) the hardship associated with repeated prosecutions.

A. Increased Risk of Wrongful Conviction

Post-acquittal retrials increase the risk of a wrongful conviction and miscarriages of justice, particularly where the prosecution case is weak.¹⁴ Many defendants, having already endured a lengthy and costly trial, may not have the stamina or indeed the resources to effectively defend a retrial. The prosecution would have a tactical advantage at retrial because the defence case is known and prosecution strategies can more easily be modified at retrial. The probability that a jury will unjustifiably convict would increase. These advantages will clearly make it easier for the prosecution to discharge the burden of proof and highlights the need for judicial vigilance when considering applications based on statutory exceptions to the principle. Post-acquittal retrials should not be allowed unless there is fresh and compelling evidence or the acquittal is tainted. These are essential constraints to applications for retrials as they reduce the risk of wrongful convictions when the matter is reheard.

Adverse pre-trial publicity undermines the impartiality of the criminal trial process whereby the jury may be influenced by adverse pre-trial publicity against the accused, via

¹¹ *Ibid.* at 4.

¹² (1957) 355 U.S. 184.

¹³ *Ibid.* at 187-188.

¹⁴ C. Parkinson, "Double Jeopardy Reform: The New Evidence Exception for Acquittals" (2003) 26 U.N.S.W.L.J. 603.

print and electronic media, including the internet.¹⁵ The potential for adverse pre-trial publicity associated with a retrial based on fresh and compelling evidence of guilt or tainted acquittal exceptions might be prejudicial to a fair retrial in due course of law. The defendant's fundamental right to the presumption of innocence may also be in jeopardy at retrial.¹⁶ The Court should consider the effect of adverse pre-trial publicity and whether it is necessary to stay a criminal trial until such time as the effects have faded from the memories of prospective jurors. The necessity for reporting restrictions is greatly enhanced in the case of retrials following the quashing of an acquittal in accordance with statutory exceptions to the prohibition on double jeopardy. Courts of justice retain an inherent power and duty to prevent abuse of its process and maintain its character as a court of justice.¹⁷ Judges have a duty to prevent an abuse of process and exercise of this duty can result in a judicial stay of criminal proceedings.¹⁸ This might be considered by the Court when determining an application to quash an acquittal with an order for retrial in the light of extensive adverse pre-trial publicity pertaining to the quashing of an acquittal. This could relate to events occurring between the quashing of an acquittal and the retrial. Alternatively, the *sub judice* rule could be invoked.¹⁹ The perception of jury bias in consequence of adverse pre-trial publicity would be increased if the jury had prior knowledge of the fact that the retrial had the Court's *imprimatur*, or that the Court had determined new evidence to be compelling, or that the accused had been earlier acquitted because of an administration of justice offence.²⁰ The risk that the jury will unjustifiably convict may increase if an accused has been returned for retrial which might be enough to convince the jury that the accused is in fact guilty.

¹⁵ G. Duffy, "Pre-trial Publicity, Prejudice, and the Right to a Fair Trial" (1994) 4 I.C.L.J. 113; cf. C. Lysaght, "Publicity of Court Proceedings" (2003) 38 Ir. Jur. 34.

¹⁶ See remarks by Carroll J. in *D.P.P. v. Haugh (No. 2)* [2001] 1 I.R. 162 at 168-169; J.L. O'Donnell, "The Jury on Trial: Reflections on *D.P.P. v. Haugh*" (2000) 5 B.R. 470. See also remarks by Phillips J. in *R. v. Maxwell* (6 March 1995, unreported), cited in *R. v. Dunlop* [2007] 1 W.L.R. 1657 at 1663, *per* Lord Phillips [hereinafter *Dunlop*].

¹⁷ Judicial authority to prevent an abuse of process is essential to the proper functioning of the courts. In *R. v. Horseferry Road Magistrates' Court, Ex parte Bennett* [1994] 1 A.C. 42 at 76, Lord Lowry referred to the need for the court "in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the court's conscience as being contrary to the rule of law."

¹⁸ D. Young, M. Summers and D. Corker, *Abuse of Process in Criminal Proceedings*, 3rd ed. (Haywards Heath: Bloomsbury Professional, 2009); A. L.-T. Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings*, 2nd ed. Oxford: Oxford University Press, 2008).

¹⁹ See chapter 6 "The *Sub Judice* Rule" of Law Reform Commission of Ireland, LRC 46-1994, *Report on Contempt of Court* (Dublin: Law Reform Commission, 1994).

²⁰ An administration of justice offence includes any of the following: bribery of, or interference with, a juror, witness or judicial officer; perversion of (or conspiracy to pervert) the course of justice; and perjury.

B. Finality in Criminal Litigation

This is an important aspect of the criminal justice process, which helps all interested parties to move on, to resume socio-economic activity and to create new legal relationships, and ensures that the authority of the Court is not undermined by inconsistent verdicts. Finality for acquittals has traditionally been viewed with great importance and those acquitted are usually given the opportunity to move forward with certainty that there will be no further prosecutions for the same offence. Individuals should not be compelled to live in a state of continued uncertainty and anxiety with the possibility of a retrial for the same offence at some future unspecified date. However, the victim and the community have a competing interest to ensure that the final outcome of the criminal process is the correct one.

Finality is not compelling in the case of convictions which may remain open to challenge notwithstanding the lapse of time where there is strong evidence that a miscarriage of justice has occurred. In order to overturn a conviction there must be very strong new evidence that the conviction was wrong in law and constituted a miscarriage of justice. In cases where the challenge to a conviction is well-founded the individual's fundamental right to personal liberty could take priority over the importance attached to the stability of verdicts in criminal trials. Logic dictates that if convicted criminals can seek justice at any time after conviction then acquitted criminals should expect the prospect of a post-acquittal retrial if new and compelling evidence comes to light.

C. Efficient Investigations

In circumstances where police and prosecution authorities comprehend that they have only one opportunity of securing a conviction, double jeopardy encourages and promotes efficient investigations and thorough trial preparation. Consequently, police are more likely to investigate all aspects of the commission of the offence and put forward the strongest case possible. It is unlikely that police would carry out investigations in a sloppy manner with the foresight that a retrial is their safeguard. Even if the work ethic of police and prosecutors is driven by case outcomes then, as a matter of logic, their diligence would be unaltered by statutory modification. The incentive for the police and prosecution authorities to efficiently prosecute the case against the accused at the first trial should not be lost. During the original investigation and prosecution it could not be known in advance

whether a retrial would be permitted because of the procedural safeguards in the reforming legislation. The exceptions to the double jeopardy principle are, for the most part, premised in the discovery of new and compelling evidence that could not have been discovered with the exercise of due diligence.

Would the new and compelling evidence exception provide the opportunity for the police to fabricate evidence where it is their genuinely held belief that the accused was in fact guilty of the serious offences for which he had been acquitted? If the police are prepared to fabricate evidence, would this not have occurred before the first trial? The rules of criminal procedure and evidence provide for evidentiary challenges to be made against evidence tendered by the prosecution and this is no less applicable at retrial. If a retrial is granted, a high threshold should continue to be placed on police to demonstrate that such new and compelling evidence was not reasonably available at the time of the original investigation. Intense judicial scrutiny should always apply to new evidence produced by the police, especially in light of concerns that police may fabricate evidence against an acquitted person in the belief that the person acquitted is in fact guilty.

D. Power Imbalance and Tactical Advantages to the Prosecution

The power imbalance between the prosecution authorities and the accused at retrial is particularly important in an adversarial criminal justice system. In criminal trials the presumption of innocence is paramount and the prosecution bears the onus of proof. However, when an individual is prosecuted by the State, with all its resources and powers, the individual defendant is at a distinct disadvantage. Without sufficient procedural safeguards, post-acquittal retrials could readily be used by the executive as an instrument of oppression.

In the appropriate circumstances, police may obtain a warrant to seize documents and other evidence, take an accused person's fingerprints or other bodily samples, and may compel an accused to participate in a line-up procedure. The prosecution authorities have financial and other resources not available to the accused. For example, with D.N.A. evidence defendants typically lack the resources to match the police technology and they also do not have access to the crime scene, effectively disabling them from testing the evidence. The extensive powers of the State are directly relevant to the issue of whether the

prosecution authorities should be given the opportunity to re-try a person formerly acquitted.

The Forensic Science Laboratory, which forms part of the Department of Justice, Equality and Law Reform, offers a full scientific service to various state agencies from crime scene to court, principally An Garda Síochána.²¹ The objective is to assist in the investigation of crime and to serve the administration of justice.

The accused has few key tactical advantages including the right to silence and the right not to disclose their case except for some exceptions such as an alibi or an expert's report. The element of surprise, which comes with the defence ability to conceal their case, should not be undermined. It is important to restrict the imbalance that remains between a State and the accused. Allowing post-acquittal retrial might be akin to compelling an accused to answer questions in breach of the privilege against self-incrimination, which protects against compulsion to give evidence or to supply documents that would tend to prove the accused's guilt. At the original trial, the defence may have been compelled to concede particular facts which can be subsequently used by the prosecution to strengthen their case at retrial. At retrial the defence case is already known through the accused giving evidence at the first trial or through the cross examination of witnesses by defence counsel. Consequently, the prosecution are more easily able to adapt their case and increase the prospect of a conviction.

Most accused persons would not have the stamina or resources to defend a second indictment for the same offence. The limited financial resources available to the accused could adversely impact on the preparation of a proper defence, which is exacerbated in the case of a post-acquittal retrial. There is an inequality of arms between the resources available to the accused, financial and otherwise, with those of the prosecution authorities. This results in the power (im)balance at retrial favouring the prosecution even more heavily.

²¹ Eolaíocht Fhóirínseach Éireann, Home Page <<http://www.forensicscience.ie/>> (date accessed: 3 May, 2013).

E. Hardship associated with repeated prosecutions

The criminal justice process is an enormously stressful event in the life of the accused whose fundamental right to personal liberty is in jeopardy. If convicted his life will be changed forever and his social and familial relationships will be intensely challenged. While these outcomes are contingent on conviction the intense anxiety commences from the earlier stages in the criminal process and will overwhelm innocent and guilty persons correspondingly.²² Even before the verdict is known, the process is not merely inconvenient since criminal charges can potentially disrupt careers and relationships. Furthermore, the highly public nature of the criminal process makes the process inevitably embarrassing and possibly even permanently stigmatising for the accused.²³

Retrials for the same offence are extremely burdensome. Lord Loreburn L.C. informed the British Parliament that putting someone through the perils of the criminal justice process twice “approaches the confines of torture”²⁴ It is arguable that the psychological distress of an accused outweighs post-acquittal retrials in some cases.²⁵ On the other hand, there will be little to no public sympathy for the distress of a guilty person who has to face two trials before finally being convicted.²⁶ However, it is dangerous to assume the guilt of the accused as an easy way to dismiss this argument and the presumption of innocence must guide considerations of hardship associated with post-acquittal retrials. It is noteworthy that it is not only the accused who suffers hardship in the case of post-acquittal retrials. The accused’s family and friends, witnesses and, most importantly, victims may all be subject to hardship when the prohibition on double jeopardy is relaxed. Dennis associates this argument with the State’s duty of human dignity to its citizens.²⁷ The State is constitutionally bound to treat its citizens with dignity and due respect,²⁸ which arguably includes the duty to seek out justice for victims and their family where new and compelling evidence comes to light. On the other hand, post-acquittal retrials could be perceived as an instrument of oppression in consideration of the distress

²² P. Roberts, “Double Jeopardy Law Reform: A Criminal Justice Commentary” (2002) 65 M.L.R. 393 at 405.

²³ G. Dingwall, “Prosecutorial Policy, Double Jeopardy and the Public Interest” (2000) 63 M.L.R. 268 at 269.

²⁴ Lord Loreburn, L.C., 179 Parl. Deb, H.L. 1473 (1997).

²⁵ C. Corns, “Retrial of Acquitted Persons: Time for Reform of the Double Jeopardy Rule?” (2003) 27 Crim. L.J. 80 at 86.

²⁶ Cf. D.A. Green, “Public Opinion versus Public Judgment about Crime” (2006) 46 Br. J. Criminol. 131.

²⁷ I. Dennis, “Rethinking Double Jeopardy: Justice and Finality in Criminal Process” (2000) Crim. L. Rev. 933 at 940.

²⁸ Preamble to the Constitution of Ireland.

and anxiety already endured by the accused.²⁹ This value reflects the infallibility of the criminal justice process and is also the subject of the maxim frequently cited in double jeopardy cases originating in *Sparry's Case*,³⁰ *nemo debet bis vexari pro una et eadem causa* (no one shall be twice vexed for the same cause).

The cost of defending a prosecution will be substantial and in many instances unrecoverable, even if the accused is acquitted. Exposing persons to this legitimate but arduous criminal process is consequential in liberal democratic states with a rigorous system for identifying and punishing serious criminal offenders. However, when that process has reached legitimate conclusion, repeating it might be vexatious. Finality in the criminal process is a legitimate demand so that individuals can rebuild their lives without living in a constant state of insecurity with the prospect of retrial. It may be suggested that only the guilty need fear a retrial; however all persons acquitted within the scope of the statutory exception may, to some extent, fall prey to the fear that the ordeal might be repeated at some future unspecified date.

III – Removing the Immunity against Post-Acquittal Retrials

With regard to rationalising the exceptions to the prohibition on double jeopardy, the Law Commission for England and Wales³¹ identified the question for consideration: “[i]s it possible to identify a category of cases in respect of which the objective of achieving accurate outcomes clearly outweighs the justifications underlying the rule against double jeopardy?”³²

In some cases, the strict application of the rule against double jeopardy stands in the way of justice for victims of serious crime and the interests of justice in convicting and punishing offenders.³³ Statutory modification of the double jeopardy principle is not a first step on a road to loss of individual freedom, and the prohibition can be an anachronistic obstacle to justice. The safeguards provided for in reforming legislation will make retrial orders exceptional in rare cases in which there is new and compelling evidence of guilt.

²⁹ See remarks by Friedland, *supra* note 10 at 4.

³⁰ (1589) 5 Co Rep 61a.

³¹ Law Commission, *Report on Double Jeopardy and Prosecution Appeals*, Cmd. 5048, L.C.267 (London: The Stationery Office, 2001).

³² *Ibid.* at para. 4.22.

³³ Cf. Chapter 8, L. Laudan, *Truth, Error, and Criminal Law: An Essay in Legal Epistemology* (Cambridge: Cambridge University Press, 2006); A.L. Goodhart, “Acquitting the Guilty” (1954) 70 L.Q.R. 514.

The ultimate aim of the law of evidence, and the criminal justice process generally, is to secure legitimacy of verdicts, which must be factually correct and morally authoritative. While respect for fundamental principles of criminal justice and the rights of the accused represent an important aspect of moral authority, the court must strike a fair and proportionate balance between the necessity to secure a factually correct verdict at trial and to respect the accused's procedural and human rights.

In an adversarial system the purpose of a criminal trial is to determine whether the prosecution can establish the accused's guilt beyond reasonable doubt; less weight is attached to the just result or the pursuit for the objective truth. Consequently, reliance on an adversarial system to excuse wrongful acquittals is objectionable.

The prohibition on double jeopardy is a fundamental constitutional and human right, therefore any abrogation should be justified by the State. The State should discharge the onus in demonstrating that any incursion on the accused's fundamental rights is warranted and supported by evidence based research demonstrating the effectiveness of allowing exceptions to the principle of double jeopardy. Given the adolescent nature of double jeopardy law reform in England and Wales, the number of successful retrials under the new provisions is limited. The D.P.P. informed the Home Affairs Committee that in a twelve month period there would be no more than a handful of cases subject to review. These figures limit the ability of the State or its agencies from carrying out any meaningful evidence based research. Qualitative assessments, academic review and careful scrutiny by the legal profession are more appropriate to critically assess practical implications of double jeopardy law reform.

It is important to acknowledge the relative positions of the victim and the accused at different stages in the criminal process in areas such as the admissibility of evidence, cross-examination of the victim and sentencing. In this regard, priority will typically be accorded to the accused³⁴ and the same considerations apply to any conflict of interest between the rights of the accused and those of the victim.³⁵ This is because the accused enjoys the presumption of innocence which is one of the most fundamental rights a person enjoys in the common law system. Furthermore, Article 38.1 of the Constitution and Article 6.1 of

³⁴ *Rattigan v. D.P.P.* [2008] I.E.S.C. 34.

³⁵ O'Malley, *supra* note 2 at 17.

the European Convention of Human Rights (E.C.H.R.) confers the right to trial in due course of law upon the accused, not the victim, who in the context of the trial is not in jeopardy. An injustice has already been suffered by the victim and it is for the State to ensure that a further injustice, such as a wrongful conviction, is not suffered by the accused. While the primary consideration during the trial should be the fundamental rights of the accused, certain restrictions on these rights are constitutionally permissible. In this context, it is noteworthy that Article 40.3 of the Constitution requires the State to defend and vindicate the personal rights of citizens, which applies equally to victims and accused persons. Such encroachments on the traditional rights of the accused in the criminal process include allowing the victim to address the Court and certain modifications on the rules of cross-examinations in sexual offence cases. This is indicative of the emerging victims' rights model of criminal justice.³⁶ Many jurisdictions, including Ireland, are actively pursuing a policy of giving victims a central place in the criminal justice process, and the position of victims is currently under review at E.U. level.

A. Fresh Evidence

New evidence is defined as that which was not adduced in the original proceedings and could not have been adduced in those proceedings with the exercise of reasonable diligence. A retrial will not be allowed if the evidence was overlooked at the first trial.³⁷ The requirement for 'reasonable diligence' should be applied to a high standard, which is an imperative so as to discourage sloppy investigations and prosecutions, particularly given the amount of resources and powers available to the State.

Evidence could be discovered with new forensic techniques previously unavailable to law enforcement authorities, and prospective changes in the law on admissibility and exclusionary rules could result in evidence deemed inadmissible at the first trial being tendered if a post-acquittal retrial were ordered. New forensic techniques for gathering evidence typically include voluntary post-acquittal confessions, D.N.A. evidence,³⁸ voice

³⁶ Cf. H. Fenwick, "Rights of Victims in the Criminal Justice System: Rhetoric or Reality" (1995) *Crim. L. Rev.* 843; J. Doak, "Victims' Rights in Criminal Trials: Prospects for Participation" (2005) 32 *J. Law & Soc.* 294.

³⁷ K. Burton, "Reform of the Double Jeopardy Rule on the Basis of Fresh and Compelling New DNA Evidence in New South Wales and Queensland" (2005) 11 *J.C.U.L.R.* 84 at 94.

³⁸ Law Reform Commission, LRC 78-2005, *Report on the Establishment of a DNA Database* (Dublin: Law Reform Commission, 2005); L. Heffernan, "A D.N.A. Database" (2008) 18 *I.C.L.J.* 105; L. Heffernan, "The Law Reform Commission's Proposed DNA Database: Issues of Scope" (2006) 12 *M.L.J.I.* 56; J.W. Bond and C. Hammond, "The Value of DNA Material Recovered from Crime Scenes" (2008) 53 *J. Forensic Sci.* 797. Cf. A. Ligertwood,

recognition and facial mapping technology, and fingerprint evidence,³⁹ which could assist the police in solving older cases resulting in some acquittals being revisited. This raises the policy issue as to whether the test for determining the cogency of new evidence should depend on the safety of a former acquittal rather than on the strength of a second prosecution. This would place the emphasis on the legitimacy of the former acquittal as opposed to prejudging a retrial.

Policymakers and drafters of the reforming legislation in England and Wales, and Ireland, were clearly mindful of advancements in D.N.A. technology, which has resulted in new evidence coming to light which was not available under older testing procedures. It is now possible for a very small quantity of bodily fluid, located at a crime scene, to be analysed and matched to a suspect. The U.K. Home Affairs Committee also identified scientific advances in corneal mapping, improved fingerprint technology and enhancement of C.C.T.V. pictures and footage.⁴⁰

B. Compelling Evidence

For evidence to be compelling it must be reliable, substantial and highly probative, strong and likely to affect the outcome of a jury's deliberations. The Law Commission of England and Wales recommended a test of whether the new evidence would strengthen the prosecution case to the point where it is highly probable that a reasonable jury, properly directed, would convict.⁴¹ Such a strict standard is preferable as it would best ensure that projected retrials would only be allowed in the interests of justice.

C. Interests of Justice

The requirement for post-acquittal retrials to be in the interests of justice encompasses a non exhaustive list of factors, including whether the circumstances suggest a fair trial is likely, the length of time since the original acquittal and whether the police and prosecution have acted promptly in seeking a retrial.⁴² This prerequisite ensures the Court

"Can D.N.A. Evidence Alone Convict an Accused?"(2011) 33 Syd. Law Rev. 487; S.J. Young, "D.N.A. Evidence: Beyond Reasonable Doubt?" (1991) Crim. L. Rev. 264.

³⁹ Cf. D. Newman, "The Limitations of Fingerprint Identifications" (2007) 22 Crim. Just. 36.

⁴⁰ Law Commission, *Double Jeopardy*, Consultation Paper 156 (London: The Stationery Office, 1999).

⁴¹ *Ibid.* at para. 323.

⁴² A fair trial is essential, not only for protecting the human rights of the accused and those of victims but also to ensure proper administration of justice, which is a key component of the rule of law in liberal democratic

is receptive to unforeseen circumstances and submissions which may arise in future applications. In determining whether it is in the interests of justice for an order for a (fair) retrial to be made, the Court must have particular regard to: the length of time since the acquitted person allegedly committed the offence and whether any police officer or prosecutor has failed to act with reasonable diligence or expedition in connection with the application for a retrial of the acquitted person.

IV – Cold Case Review

Analysing evidence from unsolved cases with new technologies may help in solving decades-old crimes and new forensic techniques will aid in this evaluation. Forensic samples from major unsolved crimes could be retested to potentially identify suspects and forensic techniques that will revolutionise crime investigation.⁴³ In March 2009, a new technique which can decipher previously unintelligible D.N.A. samples was made available to all police forces in England and Wales.⁴⁴ It is essential that investigators working on these cold cases can quickly become familiar with investigative work already undertaken. A major drawback in many instances is the very laborious task of reading documentation and this can take several investigators many months to complete.

In May 2011, following a cold case review, two of the original suspects in the Stephen Lawrence murder,⁴⁵ Gary Dobson and David Norris, were retried for the murder in the light of new and compelling evidence. Dobson's original acquittal had been quashed by the Court of Appeal, allowing a retrial to take place.⁴⁶ In January 2012, Dobson and Norris were convicted of the racially-motivated murder and were sentenced to detention at Her Majesty's Pleasure, equivalent to a life sentence for an adult, with minimum terms of 15 years 2 months and 14 years 3 months respectively for what the trial judge described as a

states. It is axiomatic that the accused is entitled to a trial before an independent, impartial and competent tribunal established by law: Constitution of Ireland, Art. 38.1; E.C.H.R., Art. 6.1; International Covenant on Civil and Political Rights, Art. 14.1; Universal Declaration of Human Rights, Art. 10.

⁴³ Consider the following scenario: a criminal touches a sleeve in the act of committing a crime however, there is no fingerprint, no hair or fluid sample. That does not mean there is no evidence. A skin sample on a sleeve, invisible to the naked eye, can be enough crucial evidence in the hands of forensic experts.

⁴⁴ The U.K. National Crime Faculty estimates that approximately 35 individuals formerly acquitted of murders might be retried: Home Affairs Committee, Third Report (Session 1999-2000), H.C. 190, *The Double Jeopardy Rule* (London, The Stationery Office, 2000), at para. 20. <<http://www.publications.parliament.uk/pa/cm199900/cmselect/cmhaff/190/19002.htm>> (date accessed: 10th July 2013)

⁴⁵ See *infra* Part V and for details on the case see *infra* note 52.

⁴⁶ *R. v. Dobson* [2011] E.W.C.A. Crim. 1255.

“terrible and evil crime”.⁴⁷ The sentences would have been longer but the offence had been committed many years previously and before adulthood, requiring the Court to sentence them as juveniles according to the law as it stood at the time of the murder.⁴⁸

In Ireland, the Serious Crime Review Team (‘cold-case squad’) was established in March 2007 as a specialist unit within An Garda Síochána based at the National Bureau of Criminal Investigation (N.B.C.I.). It investigates and reviews unsolved homicides dating back to 1980, although its remit may be extended where evidence or materials from cases pre-1980 is made available.⁴⁹ The Team has a dedicated forensic scientist from the Forensic Science Laboratory attached to it, together with the services of the State Pathologist’s Office, a clinical anthropologist and a forensic psychologist.

V – Reform in England and Wales

Double jeopardy law reform in England and Wales was in some measure precipitated by the acquittal of five youths suspected of the racially motivated murder of Stephen Lawrence and the subsequent reports into this. The Macpherson Inquiry⁵⁰ into the botched investigation of the defendants recommended that there should be an exception to the double jeopardy principle in circumstances where new and compelling evidence of guilt is discovered following an acquittal.⁵¹ The Report of the Inquiry considered that continued absolute protection against retrials could in some instances lead to an injustice to victims and the community, and recommended that the scope and application of the principle should be reconsidered either by the Law Commission or Parliament.⁵² The Home Affairs Select

⁴⁷ *R. v. Dobson and Norris* (4 January 2012, unreported), Central Criminal Court (Treacy J.) at para. 1 <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-dobson-norris-120104.pdf>> (date accessed: 1 March 2012) [hereinafter *R. v. Dobson and Norris* (4 January 2012)].

⁴⁸ *R. v. Dobson and Norris* (15 February 2012, unreported), Central Criminal Court (Treacy, J.) <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/mention-hearing-ruling-dobson-norris.pdf>> (date accessed: 10 July 2013).

⁴⁹ See *Annual Report of An Garda Síochána 2007* at 4 <<http://www.garda.ie/Documents/User/annualreport07.pdf>> (date accessed: 20 February 2012).

⁵⁰ W. Macpherson, *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny* (Cm. 4262, 1999) [hereinafter Macpherson Inquiry] concluded that the police investigation failed to examine eyewitness accounts of the murder for several days, and had failed to secure forensic evidence. The police investigation failed to take action into lines of inquiry that were clearly available following the murder. K. Storry, “The Implications of the Macpherson Report Into the Death of Stephen Lawrence” (2000) 12 *Current Issues Crim. Just.* 106; L. Bridges, “The Lawrence Inquiry: Incompetence, Corruption, and Institutional Racism” (1999) 26 *J. Law & Soc.* 298.

⁵¹ Macpherson Inquiry, *ibid.* recommendation 38.

⁵² In April 1993, Stephen Lawrence was murdered by a gang of white youths chanting racist slogans in a brutal racist attack. Five suspects were arrested but not convicted. A public inquiry was held in 1998, headed

Committee reviewed the law on double jeopardy and considered arguments for and against statutory modification of the principle.⁵³ It concluded that there was a strong case for reform that would make provision for a retrial where there is new evidence rendering the acquittal unsafe and the offence is very serious carrying a life sentence on conviction.

The Law Commission's Consultation Paper⁵⁴ provisionally recommended that the prohibition on double jeopardy should be abrogated where new evidence is discovered following an acquittal. The Commission's subsequent joint report on prosecution appeals and the double jeopardy principle⁵⁵ effectively followed the Consultation Paper's recommendation for a statutory exception. The Report was more restrictive in that it limited the offences to which the proposed abrogation would apply, principally the offence of murder which it considered to be qualitatively different from other serious offences. In light of this restriction, the Law Commission suggested that the proposed statutory exception should apply retrospectively. The Consultation Paper gave examples of what were seen as the strongest possible cases for reopening an acquittal: scientific breakthroughs might generate new evidence, notably with D.N.A., and a hit-woman who comes forward after the acquittal of those who hired her.⁵⁶ The Report referred to cases "where new evidence of the defendant's guilt has become available",⁵⁷ and gave as examples a full and incontestable confession, evidence of a scientific nature, the weapon with the defendant's fingerprints being found in his home or garden, and C.C.T.V. footage.⁵⁸ It is noteworthy that the Law Commission argued that the preoccupation with the defendant stems from an asymmetrical analysis of the criminal justice system.

The Auld Report considered the Law Commission's recommendation to have been unduly conservative and recommended that the proposed exception to the double jeopardy principle should not be limited to murder but applicable also to other very serious offences

by Sir William Macpherson that examined the original Metropolitan Police Service investigation and concluded that the force was

"institutionally racist." It also recommended that the double jeopardy rule should be abrogated in murder cases to allow a retrial upon new and compelling evidence. The resulting Macpherson Inquiry is one of the most important moments in the modern history of British criminal justice. *Ibid.*

⁵³ Home Affairs Committee, *The Double Jeopardy Rule*, *supra* note 44.

⁵⁴ Law Commission, Consultation Paper No. 156, *Double Jeopardy: A Consultation Paper* (London: The Stationary Office, 1999); I. Dennis, "Double Jeopardy: A Second Bite at the Cherry" (1999) *Crim. L. Rev.* 927.

⁵⁵ Law Commission, *Report on Double Jeopardy and Prosecution Appeals*, *supra* note 31; I. Dennis, "Prosecution Appeals and Retrial for Serious Offences" (2004) *Crim. L. Rev.* 619.

⁵⁶ *Ibid.* at para. 26.

⁵⁷ *Ibid.* at para. 4.1.

⁵⁸ *Ibid.* at paras 4.63-4.64.

punishable either by life or other long terms of imprisonment.⁵⁹ The White Paper, *Justice for All*, concurred with the Auld Report's proposals for reform based on a modified version of the Law Commission's recommendations whereby reforming legislation should include other serious criminal offences including rape, manslaughter and armed robbery.⁶⁰ The White Paper clearly articulated "rebalancing the criminal justice system in favour of the victim",⁶¹ given that victims of serious crime are drawn into the system by the wantonness of others and deserve "effective justice."⁶² The criminal justice system must "convict the guilty, acquit the innocent, and in the penalties it imposes, punish offenders and reduce reoffending"⁶³ in order to satisfy its obligations to both the victims and society. This reorientation inevitably entails abandonment of a more rights-based, defendant-centric view of the justice system in favour of a crime control, or possible victim-oriented system of criminal justice. The importance of the victim as an integral part of the criminal justice process makes intuitive sense. Victims are not mere third parties; they were the targets of illegal, often violent, activity and their desires deserve respect befitting the importance of the victim in the criminal justice process which should not *per se* justify a reorientation of that process. The victim represents only one important component of the system and their needs must be balanced against those of the State and of the accused. Centering the criminal justice process upon the expectations of the victim unjustifiably tilts the scales against the accused and runs counter to the traditions of Anglo-American criminal justice.

Part 10 (sections 75 to 97) of the *Criminal Justice Act 2003 (2003 Act)* defines the statutory framework for post-acquittal retrials applicable to serious 'qualifying offences' which in the main carry a possible sentence of life imprisonment.⁶⁴ This statutory

⁵⁹ In chapter 2, Summary and Recommendations, it was stated "... the general thrust of the Law Commission's recommendations for the introduction of statutory exceptions to the double jeopardy rule, save that a prosecutor's right of appeal against acquittal should not be limited to cases of murder and allied offences, but should extend to other grave offences punishable with life or long terms of imprisonment" The Right Honourable Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (London: The Stationary Office, 2001) at 30.

⁶⁰ Government White Paper, *Justice for All*, Cmd. 5563, (London: The Stationary Office, 2002) at para. 4.64. The White Paper also focuses upon punishing criminals however this focus seems to stem from a desire to ensure proper retribution on behalf of wronged victims.

⁶¹ *Ibid.* at 26.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ Qualifying offences are provided for in Schedule 5 of the *2003 Act*, which include: offences against the person; sexual offences; drugs offences; criminal damage offences; war crimes and terrorism; and conspiracy. An exception had previously been introduced by the *Criminal Procedure and Investigations Act 1996*, ss. 54-56 in the case of tainted acquittals such as jury or witness bribing or intimidation. However, this does not operate retrospectively.

modification “contains a formidable set of hurdles that have to be cleared before the Court of Appeal is able to quash an acquittal.”⁶⁵ The accused must have been formerly acquitted of the offence on indictment or on appeal,⁶⁶ and is deemed to have been acquitted of a qualifying offence for which he could have been convicted at trial, that is, a lesser-included alternative offence. Moreover, the accused cannot be retried of an offence for which he has previously been convicted.⁶⁷

The D.P.P. is empowered to make an application to the Court of Appeal for orders quashing an acquittal and retrial.⁶⁸ Written consent of the D.P.P. must first be obtained by the prosecuting authorities who must be satisfied that there is new and compelling evidence and that it would be in the public interest for a retrial to proceed.⁶⁹ Only one application is permitted.⁷⁰ The Court may quash an acquittal with an order for retrial in the interests of justice where there is new and compelling evidence of the accused’s guilt.⁷¹ The provisions of the *2003 Act* pertaining to the modification of the double jeopardy principle have retrospective effect.⁷² Exceptions apply in cases where the accused has been found not guilty by reason of insanity.⁷³

The Court may impose reporting restrictions in the interests of justice to prevent the risk of adverse pre-trial publicity which could prejudice a fair retrial where an application is made by the prosecution to quash an acquittal.⁷⁴ It is an offence to breach a restriction on publication order.⁷⁵ Provision is also made for reporting restrictions in the case of a retrial if the Court is of the opinion that publication would be prejudicial to the

⁶⁵ Editorial, “The Criminal Justice Act 2003” (2004) *Crim. L. Rev.* 251 at 251.

⁶⁶ *2003 Act*, s. 75(1).

⁶⁷ In Northern Ireland the relevant provisions of the *2003 Act*, effective from 18 April 2005, makes certain qualifying offence (including murder, rape, kidnapping, specified sexual acts with young children, specified drug offences, defined acts of terrorism, as well as in certain cases attempts or conspiracies to commit the foregoing) subject to retrial after acquittal with retrospective effect if there is a finding by the Court that there is new and compelling evidence. The double jeopardy rule no longer applies absolutely in Scotland since the *Double Jeopardy (Scotland) Act 2011* came into force on 28 November 2011. The legislation introduced three broad exceptions to the rule: where the acquittal had been tainted by an attempt to pervert the course of justice; where the accused admitted his guilt after acquittal; and where there was new evidence.

⁶⁸ *2003 Act*, s. 76.

⁶⁹ *Ibid.*, s. 76(3).

⁷⁰ *Ibid.*, s. 76(5).

⁷¹ *Ibid.*, ss. 77-79.

⁷² *Ibid.*, s. 75(6).

⁷³ *Ibid.*, s. 75(2)(b).

⁷⁴ *Ibid.*, s. 82(1), (3).

⁷⁵ *Ibid.*, s. 83.

administration of justice.⁷⁶ However, this is not an absolute protection against adverse pre-trial publicity but is rather granted at the discretion of the Court.

The *2003 Act* also makes provision for arrest, detention and bail.⁷⁷ Procedural issues are dealt with in relation to police investigations of individuals formerly acquitted who might be subject to a retrial. The procedure for a retrial includes notice, time limits, and the right of the accused to be present at any hearing pertaining to a retrial application and have representation.⁷⁸ As a general rule, the police may not arrest, question, conduct searches, seize certain items or take fingerprints a suspect subject to a retrial investigation, unless the D.P.P. has consented or alternatively has certified that an acquittal would not be a legal impediment to a retrial.⁷⁹ However, there is no requirement under the *2003 Act* that the police obtain the consent of the D.P.P. to conduct investigations, which are not stipulated for in section 85(3), such as interviewing witnesses.

The accused must be served with notice that the D.P.P. is making an application within two days and is entitled to be present and represented at the oral hearing. The D.P.P. may also make an application to reopen an acquittal following a private prosecution.⁸⁰ The accused must be arraigned on indictment within two months of the order for retrial and cannot be arraigned after this period unless with leave of the Court.⁸¹ An accused shall be indicted within two months after an order for retrial; however the Court may give leave for an indictment to be proceeded with beyond this period.⁸²

The Court must also consider whether it would be in the interests of justice to permit a retrial in all the circumstances of the case, such as the length of time, and whether the police had exercised due diligence in locating evidence for the original trial.⁸³ The Court may quash an acquittal on the application of the prosecution authorities,⁸⁴ with a right of appeal to the House of Lords available to both the acquitted person and the prosecutor.⁸⁵

⁷⁶ *Ibid.*, s. 82.

⁷⁷ *Ibid.*, ss. 87-91.

⁷⁸ *Ibid.*, s. 80.

⁷⁹ *Ibid.*, s. 85(6).

⁸⁰ *Ibid.*, s. 79(4). See too *R. v. Dobson and Norris* (4 January 2012), *supra* note 47.

⁸¹ *Ibid.*, s. 83(3).

⁸² *Ibid.*, s. 84(2).

⁸³ *Ibid.*, s. 79(2).

⁸⁴ *Ibid.*, s. 77(1).

⁸⁵ *Ibid.*, s. 81.

Section 76 requires a prosecutor to apply to the Court for the relevant orders: quashing an acquittal and retrial. The application requires the written consent of the D.P.P., which is a non-delegable responsibility, and before giving consent the D.P.P. must be satisfied that the new and compelling evidence appears to meet the requirements of section 78 and a retrial is in the public interest. In relation to public interest the D.P.P. will grant his consent providing the other conditions are satisfied, unless there are public interests considerations against making an application that prevail over those factors in favour. The prosecuting authorities act on behalf of society, not just in the interests of a particular individual. However, when determining whether or not to make an application the D.P.P. will take into consideration the consequences for the victim.

As a general rule, applications for retrials would only proceed in cases where, as a result of new and compelling evidence, a conviction is highly probable and any acquittal by a jury at a subsequent trial would appear to be perverse. This is consistent with the legislative framework and reflects a proper appreciation of the continuing (but no longer absolute) importance of finality in the criminal justice process. The D.P.P.'s opinion that it is in the public interest for the application to proceed, although a prerequisite to the application, is not conclusive of it. In *R. v. Miell*,⁸⁶ the issue pertained to whether the accused's subsequent plea of guilty to perjury at his criminal trial constituted compelling evidence that he had in fact committed the offence for which he had been acquitted. Lord Philips C.J. found that this new evidence was not compelling, reliable nor highly probative of the case against the acquitted person, and refused an order for retrial. The Court must form its own view whether the statutory requirements are met independently of the D.P.P.

Section 77(1) of the 2003 Act provides: "[o]n an application under section 76(1), the Court of Appeal- (a) if satisfied that the requirements of section 78 and 79 are met, *must make the order* applied for; (b) otherwise, must dismiss the application."⁸⁷ This is remarkable language in that once the substantial statutory requirements are established no broad or overarching judicial discretion remains in the Court to refuse the application. Section 78 identifies the first statutory requirement:

- (1) The requirements of this section are met if there is new and compelling evidence against the acquitted person in relation to the qualifying offence.

⁸⁶ [2008] 1 W.L.R. 627 [hereinafter *Miell*].

⁸⁷ Emphasis added.

(2) Evidence is new if it was not adduced in the proceedings in which the person was acquitted (nor, if those were appeal proceedings, in earlier proceedings to which the appeal related).

(3) Evidence is compelling if - (a) it is reliable, (b) it is substantial, and (c) in the context of the outstanding issues, it appears highly probative of the case against the acquitted person.

(4) The outstanding issues are the issues in dispute in the proceedings in which the person was acquitted and, if those were appeal proceedings, any other issues remaining in dispute from earlier proceedings to which the appeal related.

(5) For the purposes of this section, it is irrelevant whether any evidence would have been admissible in earlier proceedings against the acquitted person.

Evidence is considered “new” if it was not adduced at the original trial, including an appeal.⁸⁸ This may constitute a new discovery in relation to a piece of old evidence, which typically includes new forensic techniques typically D.N.A. evidence. Thus if a sample had been in police custody for many years it may now constitute new evidence, as occurred in the Stephen Lawrence case.⁸⁹ Evidence that was not tendered at the original trial for tactical reasons will not be treated as new evidence. The Court will investigate not only whether the new evidence was adduced at trial, but also whether it could have been, and why it was not. Evidence may have been inadmissible, or admissible but not admitted as a result of a ruling by the judge at the original trial, but admissible at any retrial because of a change in the rules on admissibility since the original proceedings – this is new evidence in the context of section 78(2). The consent of the D.P.P. may only be given where the new evidence is compelling, which means reliable, substantial, and in the context of the outstanding issues, it appears highly probative of the case against the acquitted person.⁹⁰ The question arises as to the appropriate approach in relation to evidence which could, with reasonable diligence, have been discovered at the time of the original proceedings. It is appropriate when assessing whether section 76(4) is satisfied to also consider whether the Court of Appeal is likely to make the order sought. The Court of Appeal will take any failure into account under section 79(2)(c) and (d). The D.P.P. has agreed that any failure to act with due diligence will be part of the public interest test which he has to apply, in accordance with section 76(4)(b). Evidence which was not available or which was available but without probative value is the kind of evidence for which the legislation was designed and there is no policy justification that it should not be considered in accordance with sections 76 and 78. Examples include a highly cogent witness statement, credible

⁸⁸ 2003 Act, s. 78.

⁸⁹ See *R. v. Dobson* [2011] E.W.C.A. Crim. 1255.

⁹⁰ *Ibid.*, s. 78(3).

confession, or evidence which was available at the time but of which the relevance has only come to light, as a result of developments in forensic science.

“Compelling” means evidence which is reliable, substantial and highly probative of the case against the acquitted person.⁹¹ In accordance with section 78(5) the admissibility of evidence in any retrial consequent on a successful application by the prosecuting authorities will be decided in accordance with the rules of evidence which apply at the date of the hearing of the application rather than the rules in force at the date of the original trial.

The prosecuting authorities must consider the public interest in deciding whether or not to make an application. An application will usually proceed unless there are public interest considerations against making it which clearly outweigh those factors in favour. Although the D.P.P. acts on behalf of society and not just in the interests of a particular individual,⁹² the consequences for the victim and any views expressed by the victim or the victim’s family should be taken into consideration when deciding whether or not to make an application.

The first acquittal to be successfully challenged was *Dunlop*.⁹³ The defendant had been twice tried in 1991 for murder committed in 1989. The first trial resulted in the jury being unable to agree on a verdict. He was acquitted following the retrial. In 2000, having confessed in prison that he had murdered the victim he was convicted for perjury and sentenced to six years imprisonment.⁹⁴ In September 2006 he pleaded guilty and in October 2006 he was sentenced to life imprisonment.⁹⁵ In December 2010, Mark Weston became the

⁹¹ *Ibid.*, s. 78(3).

⁹² Constitution of Ireland, Article 30.3.

⁹³ *Dunlop*, *supra* note 16.

⁹⁴ Dunlop confessed to the murder and mutilation of the victim to a prison officer in a taped conversation, while serving a seven-year term of imprisonment in Moreland Prison for a serious assault on another victim.

⁹⁵ Dunlop became the first person to be convicted of murder following a prior acquittal for the same crime, in his case his 1991 acquittal of the victim’s murder. Some years later he had confessed to the crime, and was convicted of perjury, but was unable to be retried for the killing itself. The case was re-investigated in early 2005, when the 2003 Act came into effect, and his case was referred to the Court of Appeal in November 2005 for permission to instigate a new trial, which was granted. Dunlop pleaded guilty to murder and having sex with her dead body repeatedly, and was sentenced to life imprisonment, with a recommendation he serve no less than 17 years. In December 2010, Mark Weston became the first person to be retried and found guilty of murder by a jury (Dunlop having confessed). In 1996 Weston had been acquitted of the murder of Vikki Thompson at Ascott-under-Wychwood on 12 August 1995, but following the discovery of compelling new evidence in 2009 - specks of the victims’ blood were found on his boots - he was arrested and tried for a second time. He was sentenced to life imprisonment, to serve a minimum of 13 years: S. Bates, “Loner convicted of murder in double jeopardy retrial” *The Guardian* (13 December 2010).

first person to be retried and found guilty of murder by a jury (Dunlop having confessed).⁹⁶ In 1996 Weston had been acquitted of the murder, but following the discovery of compelling new evidence in 2009 - specks of the victims' blood were found on his boots - he was arrested and tried for a second time. He was sentenced to life imprisonment, to serve a minimum of 13 years.

In *R. v. Andrews*,⁹⁷ the defendant was acquitted in 2004 of indecent assault and rape which had allegedly taken place in 1991 when the victim was 15 years old. At the trial the defendant had put himself forward as a man of positive good character who had worked with thousands of young people without any complaints of impropriety. However, after the trial and following further police investigations an indictment containing 17 counts of indecent assault against several other persons was proffered against the defendant. The evidence in support of the indictment demonstrated that the victim's allegations formed part of a series of complaints which, in her case, had occurred approximately half way through the period to which the 17 counts related. The prosecution made an application under section 76(1) of the 2003 Act to quash the accused's acquittal for rape and order his retrial, contending that the evidence in relation to the 17 counts of indecent assault, although not directly related to the complaint of rape, would be admissible to support that complaint. This was to counter the accused's assertions of good character and to establish a propensity to commit sexual offences, and that it therefore constituted "new and compelling evidence ... in relation to the qualifying offence", namely the rape, within the meaning of section 78(1) of the 2003 Act. The defendant contended that the evidence was not direct evidence "in relation to" the rape, and so fell outside the ambit of section 78(1). The Court, allowing the application, held that section 78 of the 2003 Act did not require new evidence relied on by the prosecution for quashing the acquittal and ordering the retrial of a defendant to be direct evidence. Admissible evidence in relation to the qualifying offence should be treated as relating to it for the purposes of section 78(1). Although the new evidence was not direct it provided strong supporting evidence and was therefore new and compelling evidence against the defendant in relation to the offence of rape. In the circumstances, a conviction was highly probable and the interests of justice would best be served by quashing the defendant's acquittal and ordering his retrial on the rape allegation. The Court noted that in considering whether it is in the interests of justice to quash an acquittal and order a retrial

⁹⁶ *R. v. Weston* (13 December 2010, unreported), Reading Crown Court (Bean J.).

⁹⁷ [2009] 1 W.L.R. 1947.

the principle of finality in litigation does not by itself provide a relevant consideration. In the circumstances of the case the Court did not agree that the interests of justice if otherwise served by an order for a new trial would be undermined because of the potential forensic difficulties arising from the admission in evidence of the complainant's evidence of grooming activities by the defendant.

It is noteworthy that the number of retrial orders has been relatively high in comparison to the number of applications:

- *Maxwell and Mansell v. R.*⁹⁸ – new evidence, acquittal quashed, retrial ordered
- *R. v. A.*⁹⁹ – new evidence from other victims, acquittal quashed, retrial ordered
- *Dunlop*¹⁰⁰ – new confession evidence, acquittal quashed, retrial ordered
- *R. v. Dobson*¹⁰¹ – new scientific evidence, acquittal quashed, retrial ordered
- *R. v. Weston*¹⁰² – new forensic evidence, acquittal quashed, retrial ordered
- *R. v. G.(G.) and B.(S.)*¹⁰³ – new evidence from accomplice, unreliable, application dismissed
- *Miell*¹⁰⁴ – new confession unreliable, application dismissed
- *R. v. B.(J.)*¹⁰⁵ – new evidence from accomplice, unreliable, application dismissed.

The Crown Prosecution Service (C.P.S.) has issued policy guidelines regarding retrial of serious offences under Part 10 of the *2003 Act*.¹⁰⁶ Close liaison is necessary between the prosecution authorities and senior police officers as they need to devise a plan for each case. This will help the C.P.S. to respond to urgent requests if they may arise, and to make timely applications to the Court, which should in turn benefit the progress of the investigation and the case as a whole. The question of communication with the victim, and/or the victim's family, or with the wider community will arise at each stage of the case, from the time of the re-investigation through to the conclusion of the retrial. If the police decide to take investigative steps, they may consider liaising with the victim's family. However, if the C.P.S. is not inclined to consent to fresh investigative steps, this may require explanation to those affected. It may also be necessary to inform victims, witnesses and communities of a decision to consent, or not to consent as the case may be, to an application being made to the Court for a retrial order. The C.P.S. and the police will

⁹⁸ [2009] E.W.C.A. Crim. 2552.

⁹⁹ [2008] E.W.C.A. Crim. 2908.

¹⁰⁰ *Dunlop*, supra note 16.

¹⁰¹ *Dobson*, supra note 46.

¹⁰² [2010] E.W.C.A. Crim. 1576.

¹⁰³ [2009] E.W.C.A. Crim. 1077.

¹⁰⁴ *Meill*, supra note 86.

¹⁰⁵ [2009] E.W.C.A. Crim. 1036.

¹⁰⁶ Crown Prosecution Service prosecution policy and guidance on Retrials for Serious Offences <http://www.cps.gov.uk/legal/p_to_r/retrial_of_serious_offences/> (date accessed: 10 July 2013).

determine how and when to communicate with the victim and the victim's family as appropriate in each case.

In England and Wales, the "tainted acquittal" exception to the double jeopardy principle is provided for in sections 54 - 57 of the *Criminal Procedure and Investigations Act 1996*. These provisions enable the High Court to make an order quashing an acquittal in circumstances where the acquittal is deemed to have resulted from interference with, or intimidation of, a juror or witness (or potential witness). The C.P.S. has issued the following general guidance to prosecutors regarding the circumstances in which the Courts are likely to make a retrial order following a tainted acquittal:

- it appears likely that the acquitted person would not have been acquitted were it not for the interference or intimidation
- it would not be contrary to the interests of justice to take proceedings against the acquitted person
- the acquitted person has been given a reasonable opportunity to make written representations to the Court
- it appears likely that the conviction for the administration of justice offence will stand

In such circumstances, an acquitted person may be re-tried for the original offence.

VI – Statutory Modification in Ireland

The legal effect of the double jeopardy principle does not mean that a person cannot be prosecuted more than once for the same criminal offence.¹⁰⁷ The principle had previously been subject to significant statutory amendment, most notably appeals to the Court of Criminal Appeal pursuant to section 4 of the *Criminal Justice Act 1993* where a retrial can be ordered notwithstanding the fact of the previous trial and conviction.¹⁰⁸

¹⁰⁷ In *Tynan*, Walsh J. observed "as a general proposition it is not correct to state without qualification that under our law no person can be prosecuted twice for the same offence"; *Tynan*, *supra* note 4 at 355. The judgment of Kearns J. in *D.S.*, *supra* note 6, establishes that Irish law recognises that a person may be properly retried after a jury disagreement. Similarly, absent some unfairness or misconduct such as that contemplated in *State (O'Callaghan) v. O'hUadhaigh* [1977] 1 I.R. 42, the entry of a *nolle prosequi*, even during the course of a trial, will not *per se* bar to further prosecution (see *e.g. Richards v. R.* [1993] A.C. 217).

¹⁰⁸ Some other statutory exceptions are of considerable antiquity such as section 2 of the *Summary Jurisdiction Act 1857* as extended by section 51 of the *Courts (Supplemental Provisions) Act 1961* (see *Fitzgerald v. D.P.P.* [2003] 3 I.R. 247). More recent and perhaps dramatic examples are provided for by the provisions of Part 1(A) of the *Criminal Procedure Act 1967*, as inserted by section 9 of the *Criminal Justice Act 1999* and Part 3 of the *Criminal Procedure Act 2010*.

Statutory modification of the double jeopardy principle was largely influenced by the Law Reform Commission's *Report on Prosecution Appeals and Pre-Trial Hearings*¹⁰⁹ which in fact refrained from recommending the introduction of "with prejudice" prosecution appeals. The *Balance in Criminal Law Review Group Final Report*¹¹⁰ did not advocate the introduction of retrials after a jury finding, but considered that:

... no significant argument has been advanced against the principle of the 'with prejudice' appeal and that by contrast a very strong public interest exists in ensuring that a defendant who does, in fact, have a case to answer, should not benefit from a miscarriage of justice by reason of an erroneous ruling on a point of law by the trial judge.¹¹¹

Part 3 of the *Criminal Procedure Act 2010 (2010 Act)* modified the double jeopardy principle to allow post-acquittal retrial for 'relevant offences' where new and compelling evidence is discovered or subsequently emerges, or in the case of a tainted acquittal (*i.e.* where there is evidence that a former acquittal occurred in circumstances of interference with the criminal justice process such as jury or witness tampering).¹¹² A retrial in the case of tainted acquittals may be ordered in respect of any offence tried on indictment where the first trial was tainted by an offence against the administration of justice such as bribery, intimidation or any other activity designed to pervert the course of justice including perjury. There must be reasonable grounds to believe that the offence affected the outcome of the trial and the D.P.P. must be satisfied that the acquittal was not merited. With regard to the new evidence exception, the D.P.P. will generally have a Garda report on its investigation of the new evidence. Applications for retrial based on the "tainted acquittal" exception has a broader scope given that it applies in the case of all acquittals for serious offence following a trial on indictment.

It is noteworthy that the growing importance of victim's rights and the victim's movement, particularly from the 1990s onwards, was significant to double jeopardy reform

¹⁰⁹ Law Reform Commission, L.R.C. 81-2006, *Report on Prosecution Appeals and Pre-Trial Hearings* (Dublin: Law Reform Commission, 2006).

¹¹⁰ Hogan *et al.*, *Balance in Criminal Law Review Group Final Report* (March 2007) <<http://www.inis.gov.ie/en/JELR/BalanceRpt.pdf/Files/BalanceRpt.pdf>> (date accessed: 15 December 2011). The Review Group's recommendations inform many of the *2010 Act* provisions.

¹¹¹ *Ibid.* at 195. However, the *2010 Act* does not limit itself to such "with prejudice" appeals.

¹¹² Relevant offences are those that for the most part carry a mandatory or discretionary life sentence. The offences under the *International Criminal Court Act 2006* which carry a maximum of 30 years in some circumstances are the exception. The Schedule to the *2010 Act* provides that relevant offences include serious crimes including murder, manslaughter, rape, genocide, trafficking, offences against the State, organised crime, assault causing harm, aggravated burglary and robbery, arson and damaging property.

in the Irish context.¹¹³ While the *2010 Act* was in the main announced by the then Minister for Justice as victim-oriented when the statutory reforms were introduced he purported to speak for “most members of the public” whom he believed would welcome this law reform, “particularly victims, who are deeply upset by the knowledge that guilty persons were not being convicted for their crimes.”¹¹⁴ While this sentiment is understandable, the human rights concerns raised by the prospect of post-acquittal retrials are not assuaged by the provisions of the *2010 Act*. Indeed, the Irish Council for Civil Liberties suggested that many of the measures contained within the legislation “chip away at fair trial rights”, and noted that “retrial proposals set out in the [*2010 Act*] will do little or nothing to improve the position of victims or their families.”¹¹⁵

The *2010 Act* also empowers the D.P.P. with a right of appeal to the Supreme Court on a ‘with prejudice’ basis against an acquittal. Such an appeal can take place where the acquittal is deemed to have arisen from an erroneous ruling by the trial Court on a point of law arising during the trial or from a decision by the Court of Criminal Appeal not to order a retrial following the quashing of a conviction. Part 3 of the *2010 Act* effectively follows Part 10 of the U.K. *2003 Act* allowing post-acquittal retrials as a consequence of new and compelling evidence. However, the list of ‘qualifying offences’ in the *2003 Act* is more restricted than in the *2010 Act*: while it includes murder, manslaughter, sexual offences, genocide and trafficking, it limits crime against property to those which endanger life.

Sections 7 to 10 define the rigorous procedures before a retrial may proceed, and ultimately it is for the Court of Criminal Appeal to decide whether a retrial should take place. New evidence must be compelling and must not have been available with the exercise of due diligence by the police at the time of the first trial. New and compelling evidence must be of a standard that implicates the accused with a high degree of probability in the commission of the relevant offence. This is a very high standard short of declaring the new evidence must amount to proof that is beyond reasonable doubt. The Court should be

¹¹³ Part 2 of the *2010 Act* reformed the law relating to victim impact evidence and, in particular, to extend the entitlement to make a victim impact statement at a sentencing hearing to the family members of homicide victims.

¹¹⁴ Minister for Justice, Dermot Ahern, “Ahern Go-Ahead for New Murder Retrial Law” <<http://www.justice.ie/en/JELR/Pages/Ahern%20Go-Ahead%20for%20New%20Murder%20Retrial%20Law>> (date accessed: 17 June 2012).

¹¹⁵ Irish Council for Civil Liberties, “Ahern’s Crime Bill Sells Victims Short, says ICCL” <<http://www.iccl.ie/news/2009/05/25/ahern's-crime-bill-sells-victims-short-says-iccl.html>> (date accessed: 17 June 2012).

vigilant in determining applicants for retrial that the evidence should not predetermine the outcome of a retrial, which is the function of the jury to discharge impartially.¹¹⁶

The Review Group considered that statutory power to provide for an appeal in respect of an acquittal following new and compelling evidence or tainted acquittal would be rarely used, as has been the experience in other countries thus far, and that the statutory exceptions should only be used rarely.¹¹⁷ The Review Group recommended that there should be an exacting threshold where the D.P.P. makes an application for a retrial order. Whether the threshold stipulated in section 8 of the *2003 Act* is exacting enough remains to be seen.

Section 12 outlines important safeguards, including the power of the Court to order restrictions on attendance at the application in addition to restrictions on the reporting of details of the case. These restrictions can be maintained until the retrial has concluded, and are designed to avoid prejudicing the retrial, especially by avoiding adverse pre-trial publicity that might unduly influence prospective jurors.¹¹⁸ The retrial will entail a full rehearing of the case, and if convicted, the defendant is liable to the prescribed penalty for the offence in question. Section 14 provides that the decision of the Court of Criminal Appeal is subject to appeal to the Supreme Court on a point of law.

Sections 15 to 18 define the powers available to the police who may not pursue the investigation against an acquitted person except where it has judicial authorisation to use the powers in the *2010 Act*. In the case of the tainted acquittal exception, there must be a conviction for the offence against the administration of justice. Once satisfied that the acquittal is without merit, the D.P.P. may apply to the Court of Criminal Appeal for orders quashing the acquittal and retrial. The acquitted person is put on notice of the application and may attend and participate in the hearing.¹¹⁹ The Court may quash the acquittal and order a new trial if it is satisfied that the D.P.P. has complied with the requirements as to the standard of the new and compelling evidence or, where appropriate, that an offence

¹¹⁶ Impartiality in the trial process is an imperative as otherwise the due process rights of the accused would have been violated and the verdict may be quashed on appeal or by way of judicial review proceedings. K. Costello, "Certiorari Followed by Remittal" (1993) 3 I.C.L.J. 145; *People (A.G.) v. Paul Singer* [1975] I.R. 408; *People (D.P.P.) v. Tobin* [2001] 3 I.R. 469; Cf. *Sander v. United Kingdom* [2000] Crim. L.R. 767.

¹¹⁷ D. Hamer, "The Expectation of Incorrect Acquittals and the 'New and Compelling Evidence' Exception to Double Jeopardy" (2009) 2 Crim. L. Rev. 63 at 63.

¹¹⁸ Section 13 specifies details of the offences committed by publishers who breach an order.

¹¹⁹ Legal aid will be available to the accused.

against the administration of justice had occurred and that it would be in the interests of justice. The D.P.P. may only bring an application once and it must be in the public interest. The D.P.P. may also make an application for retrial where the previous acquittal was tainted by the commission of an offence against the administration of justice.¹²⁰ The D.P.P. or A.G. may appeal to the Supreme Court on a point of law regarding a direction of the Court of Criminal Appeal or the exclusion of evidence. If an acquitted person fails to attend and the Court decides to proceed with the application, it may, in the event of it ordering a retrial, issue a warrant for the arrest of the accused.

The D.P.P.'s application to the Court can be in the absence of an acquitted person, about which due process concerns will arise. The application must be made on notice but it can be done in a person's absence. Unlike its English counterpart, there is no time limit within which the D.P.P. may make such an application. The Court to which the application is to be made is the Court of Criminal Appeal.

There is a general presumption in substantive criminal law against retrospection which is reflected in Article 15.5.1° of the Constitution and Article 7.1 E.C.H.R. While statutory modification of the prohibition on double jeopardy is concerned with criminal procedure, the procedure for quashing an acquittal with an order for retrial does not have retrospective effect. This is because the Minister for Justice was advised that there would be a strong risk that the superior courts would regard it as interference by the Oireachtas in the administration of justice if the Oireachtas allowed cases that were determined by the Courts of criminal justice to be reopened.¹²¹ The Minister also indicated that retrospective effect of double jeopardy law reform would represent a transgression of the constitutional doctrine on the separation of powers.

VII – Importance of Strict Control Mechanisms

In jurisdictions that have modified the prohibition on double jeopardy, reliance on the Court of Appeal to act as the “gatekeeper” to applications for a retrial is key to ensuring procedural safeguards are respected. The Court is best placed to ensure that only a limited

¹²⁰ The provisions of the 2010 Act are not applicable to cases where special verdicts were recorded under the *Criminal Law (Insanity) Act 2006*.

¹²¹ The Minister for Justice clarified that any such changes to the double jeopardy rule would not operate retrospectively; Editorial, “No retrospective double jeopardy” *Irish Times* (9 September 2009).

exception to double jeopardy is allowed to operate in practice. While the subjective judgments required to be made by the Court in determining whether evidence is new and compelling might be justifiably criticised, the dilemma is to identify an alternative body to oversee applications to quash an acquittal with an order for retrial. It might be inappropriate to allow the D.P.P. to make such assessments as the prosecuting authorities might be unduly influenced by pressure from the police or the victim's family.

The standard of proof for a retrial order must be very high, which is important to prevent the groundless erosion of fundamental rights in the criminal process. However, the standard should not be so high that the Court is perceived to be influencing the final decision on conviction or acquittal, which could impinge upon the right to a trial by an impartial jury. This would have a compounding effect on the rights of the accused and the Court must exercise the power to stay proceedings if such prejudice exists and is, in their view, likely to render any retrial unfair. Key safeguards will now be discussed, in particular, (A) the seriousness of the criminal offence, (B) tainted acquittals, and (C) the prohibition on more than one retrial.

A. Serious Criminal Offences

Statutory exceptions for all types of offences would have adverse consequences to accused persons, investigative agencies and the criminal justice process. Legislation in England and Wales, and Ireland, stipulate a minimum level of seriousness for the statutory exception to apply. It is only the most serious cases where the safety of the community is strongly engaged that are subject to the exceptions. It is also the most serious offences where victims may justifiably demand justice and such demands may outweigh the finality of an acquittal.

B. Tainted Acquittals

It is understandable that prosecuting authorities would pursue a defendant who interfered with the administration of justice by intimidating or influencing witnesses or the jury as such interference renders the original trial tainted. Consequently, a defendant who engages in such practices cannot rely on the unnecessary hardship argument as the retrial is the product of their criminal act in perverting the course of justice.

C. Only one retrial

Allowing more than one post-acquittal retrial is prohibited by the reforming legislation and the accused who has been acquitted twice can strongly argue that the verdict is legitimate and final. This is particularly the case where the prosecution case at the second trial includes apparent fresh and compelling evidence. If the prosecuting authorities were permitted to pursue an accused after two acquittals, this would undermine the criminal trial process and the jury system. Their continued pursuit, at this point in time, may constitute an abuse of State power and resources. Indeed, an issue of concern is that legislation might be amended and therefore it may be possible that more than one application for retrial could be provided for in due course.

VIII – Conclusion

One of the principal objectives of the criminal justice process is that a true verdict should be recorded following a trial on the merits by a court of competent criminal jurisdiction. In the interests of justice there should be no wrongful convictions, and where they occur, or if new evidence emerges which undermines the safety of a conviction, the conviction will be quashed. However, a retrial may be ordered for the same offence. The long established common law principle against double jeopardy precluded retrials following an acquittal regardless of cogency of evidence emerging after the original trial. Post-acquittal retrials for serious offences will henceforth be allowed where new and compelling evidence comes to light, or the acquittal is tainted. The role of the Court of Criminal Appeal is paramount in applying this test rigidly.

Statutory modification of the double jeopardy principle is concerned with the most serious offences, which represents a trade-off between the interests of finality in the criminal justice process and the interests of justice in determining whether an acquittal should be reopened. This relates to the most innovative recent changes in criminal law and the conduct of criminal trials, admissibility of evidence and procedure. It is imperative that applications for post-acquittal retrial are limited by procedural safeguards and that the Court's decision in any case strikes a fair and proportionate balance between the fundamental rights of the accused, the victim and the public interest. This balance exists where there is a limited and controlled exception to the prohibition on double jeopardy.

Statutory exceptions are relatively new and the experience in England and Wales thus far has been that over half of the applications for retrial orders were successful, which might be indicative of how applications for post-acquittal retrials will be resolved in the Irish criminal justice process. Media publicity where a retrial is ordered is likely to be high therefore, in cases where the Court does order a retrial, it is imperative that the superior courts exercise their powers to stay proceedings where adverse pre-trial publicity would jeopardise the presumption of innocence at retrial. This is particularly important in respect of publicity in the period between the Court of Criminal Appeal hearing and retrial. The importance of reporting restrictions and judicial stay of proceedings by the Court in this regard cannot be underestimated.

Important concerns remain in relation to the lack of finality for the accused with concomitant anxiety, the increased risk of wrongful conviction if a retrial is ordered, the potential for increased harassment and the possibility of lax investigative practices on the part of police in the knowledge that a second opportunity to convict the accused may be allowed. In addition to these concerns pertaining to the fundamental legitimacy of the legal changes effected by statutory modification in Ireland, the range of offences included in the Schedule to the *2010 Act* is disproportionately wider than reforming legislation in England and Wales.

A significant weakness in the Irish legislation is the absence of retrospective application to cases which have received adjudication. Exceptions to the double jeopardy principle do not create any new substantive criminal offences but rather modifies an element of criminal procedure in the prosecution of serious offences and therefore would not present any legal or constitutional impediment against retrospective effect of the statutory exceptions to the common law prohibition on double jeopardy. It is futile that any new and compelling evidence discovered by the Serious Crime Review Team will not found an application to quash an acquittal and order for retrial in the interests of justice owing to the lack of retrospective effect. This anomaly will need to be addressed by the legislature so as to ensure justice for victims and their families. In the meantime, it remains to be seen whether the superior courts will take a liberal expansive approach to the statutory exceptions or alternatively whether applications for post-acquittal retrial orders will be rare.