

EVALUATING THE COMMON LAW PRINCIPLE AGAINST RETRIALS

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And after the acquitted person steps out of the courtroom and breathes afresh the air of freedom, even if it should emerge afterwards that there is fresh evidence of his guilt, even evidence provided by his own admission of guilt, he cannot be put on trial again for the offence of which he has been found not guilty by the jury.¹

INTRODUCTION

The common law principle against retrials, generally referred to as “the rule against double jeopardy,” proscribes retrials for the same criminal offence following a trial on the merits by a court of competent criminal jurisdiction concluding with an acquittal or conviction.² This principle of the common law has recently been reformed in the United Kingdom,³ and New South Wales,⁴ and similar reforms have been proposed in a number of common law

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1. *The People v O’ Shea* [1982] IR 384 (SC), at 432 *per* Henchy J.
2. Double jeopardy is more aptly described as a principle or maxim of the common law (as opposed to a rule of law *per se*) thus incorporating a multitude of substantive and procedural rules pertaining to the investigation, indictment and trial of criminal offences; see M S Kirk, “‘Jeopardy’ During the Period of the Year Books” (1934) 82 *University of Pennsylvania Law Review* 602, at 604.
3. Criminal Justice Act 2003, Part 10 (UK). The provisions of the 2003 Act pertaining to the reform of double jeopardy are applicable in England and Wales, and Northern Ireland.
4. On 17 October 2006, the Parliament of New South Wales passed the Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006 No 69. This legislation provides for an exception to the common law principle against double jeopardy in circumstances where fresh and compelling evidence of the accused’s guilt is subsequently discovered, and also in the case of a “tainted” acquittal.

jurisdictions, namely Ireland,⁵ Australia⁶ and New Zealand.⁷ If these proposed reforms are implemented in Ireland, provision would be made for an exception to the principle against double jeopardy where fresh and compelling evidence of the accused's guilt is discovered following an acquittal.⁸

This article presents an evaluation of the policy considerations for the retention of the common law principle against double jeopardy as a complete bar against retrials, and alternatively whether the principle should be reformed.⁹

JUSTIFICATION FOR THE PRINCIPLE AGAINST RETRIALS

The rationale¹⁰ for the development of the principle against double jeopardy at common law was based on the deficiencies in medieval criminal procedure, to

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5. See the remarks by the Minister for Justice, Equality and Law Reform pertaining to the proposed reforms of the common law principle against double jeopardy in Ireland (Rebalancing Criminal Justice: Remarks by Tánaiste in Limerick, 20 October 2006 available at: <http://www.justice.ie/80256E01003A02CF/vWeb/pcJUSQ6UTMDB-en>).
 6. The federal government of Australia has proposed similar reforms (as those in New South Wales) of double jeopardy: Discussion Paper, Model Criminal Code, Chapter 2, *Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals* (Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, November, 2003); N Taylor, "England and Australia Relax the Double Jeopardy Privilege for Those Convicted of Serious Crimes" (2005) 19 *Temple International and Comparative Law Journal* 189.
 7. New Zealand Law Commission, Report: *Acquittal Following Perversion of the Course of Justice* (NZLC, R70, 2001); New Zealand Law Commission, Discussion Paper: *Acquittal Following Perversion of the Course of Justice: A Response to R v Moore* (NZLC, PP42, 2000).
 8. New evidence is compelling if: it presents a substantially stronger case; the evidence was not available at the original criminal trial; a conviction is almost certain; it necessitates a retrial in the interests of justice.
 9. See further: C Corns, "Retrial of Acquitted Persons: Time for Reform of the Double Jeopardy Rule?" (2003) 27 *Criminal Law Journal* 80; I Dennis, "Prosecution Appeals and Retrial for Serious Offences" [2004] *Criminal Law Review* 619; P Roberts, "Double Jeopardy Law Reform: A Criminal Justice Commentary" (2002) 65 *Modern Law Review* 393; G Dingwall, "Prosecutorial Policy, Double Jeopardy and the Public Interest" (2000) 63 *Modern Law Review* 268; C Parkinson, "Double Jeopardy Reform: The New Evidence Exception for Acquittals" (2003) 26 *University of New South Wales Law Journal* 603; B Fitzpatrick, "Double Jeopardy: One Idea and Two Myths from the Criminal Justice Bill 2002" (2003) 67 *Journal of Criminal Law* 149; P Roberts, "Justice for All? Two Bad Arguments (and Several Good Suggestions) for Resisting Double Jeopardy Reform" (2002) 6 *International Journal of Evidence and Proof* 197.
 10. In *Green v United States* (1957) 355 US 184, at 187-188 Black J explained:

the advantage of the prosecution, and the draconian punishments imposed on defendants.¹¹ Consequently, the common law principle against retrials gradually evolved for the protection of the accused in the interests of justice because of the adverse standing of an accused and the imposition of draconian punishments including the death penalty on conviction for most criminal offences.

The potential for convicting the innocent through repeated criminal trials encapsulates the rationale for the development of the common law pleas in bar against retrials, *autrefois acquit* and *autrefois convict*.¹² The power and resources available to the prosecution, weighed against those of the accused, necessitates that the State be denied the opportunity to subject accused persons to the ordeal of repeated trials for the same criminal offence subsequent to an acquittal or conviction. This justifies the imposition of legal impediments to prevent the prosecution from abusing its authority through repeated attempts to convict and punish an accused for the same criminal offence.¹³ Retaining the principle against retrials also protects against the use of the criminal trial process as an instrument of oppression.

The 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.

11. See TFT Plucknett, *A Concise History of the Common Law* (5th ed, Butterworths, 1956), at 424-441. For a historical analysis of the common law development of double jeopardy see: J H Hunter, "The Development of the Rule against Double Jeopardy" (1984) 5 *Journal of Legal History* 3; J A Sigler, "A History of Double Jeopardy" (1963) 7 *American Journal of Legal History* 283.
12. The common law pleas in bar are applicable where the first criminal trial proceeded on the merits of the case within the jurisdiction of the trial court. Consequently, there is no legal impediment *per se* against a retrial where the initial criminal trial did not proceed on the merits, such as where a mistrial was declared as a result of witness tampering or other procedural irregularities. A final verdict of acquittal or conviction is essential to pleading double jeopardy; see further G Coffey, "Raising the Pleas in Bar against a Retrial for the Same Criminal Offence" (2005) 5(2) *Judicial Studies Institute Journal* 124.
13. Four essential criteria against placing an accused twice in jeopardy for the same offence were put forward by the English Law Reform Commission: the risk of wrongful conviction; the distress of the trial process; the need for finality of litigation; the need to encourage efficient investigation: see Law Commission for England and Wales, Consultation Paper No 156, *Double Jeopardy* (1999), at [4.5]-[4.11]; see further M Knight, "Convicting the Guilty" [1966] *Criminal Law Review* 24, at 27-35.

Permitting retrials for the same criminal offence may lead to systematic abuse in the prosecution of offenders, as there may be occasions where the prosecution would regard the first trial as a “rehearsal” for a second attempt to convict the accused. There is also the possibility that the prosecution could engage in “jury-shopping” so as to enhance the probability of securing a conviction.¹⁴ This potential abuse of prosecutorial discretion directly relates to the rationale for the development of the common law principle against double jeopardy.¹⁵

The accused would almost certainly lack the resources and stamina to endure the repeated stress and anxiety in the case of a retrial following an acquittal.¹⁶ The accused would be at a clear disadvantage for he may have disclosed his defence strategies during the initial criminal trial and the prosecution would have the opportunity to examine the transcript for any deficiencies so as to enhance the prospects of a securing a conviction following a retrial.¹⁷ Moreover, if the accused had testified on his own behalf, the prosecution would, so as to expose apparent inconsistencies in the accused’s version of events surrounding his alleged transgressions, scrutinize this evidence. The prosecution would have a clear advantage in exposing deficiencies in the accused’s defence in addition to any anomalies in the prosecution’s case that could be rectified before a retrial. It should also be considered that the prosecution have the necessary capacity and resources at their disposal in the discovery and presentation of evidence in comparison to the resources available to the accused in the criminal justice process.

14. See W T Fisher, “Double Jeopardy, two Sovereignties and the Intruding Constitution” (1961) 28 *University of Chicago Law Review* 591, at 592 stating: “...on the fanciful hypothesis of an unlimited number of prosecutions the ultimate conviction of an innocent man approaches a mathematical certainty.”

15. See further: A L-T Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (Clarendon Press, 1993); A L-T Choo, “Halting Criminal Prosecutions: the Abuse of Process Doctrine Revisited” [1995] *Criminal Law Review* 864; J A Lundquist, “Prosecutorial Discretion: A Re-evaluation of the Prosecutor’s Unbridled Discretion and its Potential for Abuse” (1971) 21 *DePaul Law Review* 485.

16. Truly innocent individuals will undoubtedly suffer undue anxiety at the prospect of being retried for the same criminal offence, therefore it is essential to have safeguards in place by way of a reviewing court to consider the veracity of the fresh and compelling evidence so that individuals who have been justly acquitted will not have to endure the stress and anxiety of a second trial for the same criminal offence. Without sufficient safeguards in place, the authority vested in the State to prosecute or indeed to re-prosecute could potentially be used as an instrument of oppression against the accused in certain circumstances.

17. See P Roberts, “Double Jeopardy Law Reform: A Criminal Justice Commentary” (2002) 65 *Modern Law Review* 393, at 398.

The opportunity to re-prosecute the accused on more than one occasion for the same criminal offence following an acquittal may also give the prosecution the opportunity to strengthen their case by coaching witnesses to alter their testimony. What must also be considered is that if a witness gave false testimony against the accused this would constitute the offence of perjury which could form the basis of an appeal against a conviction or indeed if discovered during the course of the criminal trial would most likely result in a request for a mistrial.

A certain disadvantage to the accused in the case of a retrial would be the risk that the prosecution, with its superior resources, could enervate the accused's resilience and secure a conviction solely through persistence rather than on the merits of the case against the accused.¹⁸ Moreover, re-prosecuting those acquitted by the trial court increases the likelihood of convicting the innocent particularly due to adverse pre-trial publicity with regard to the subsequent discovery of fresh and compelling evidence of the accused's guilt. This procedure, whereby the power and resources available to the prosecution outweigh those of the accused, would almost certainly result in an asymmetry in the criminal justice process since the accused may not have the necessary resources to locate the relevant evidence of his innocence of the criminal offences charged.

The terminology used to describe new evidence of the accused's guilt is "fresh and compelling." To assert that new evidence is "conclusive" of the accused's guilt would infringe the right to the presumption of innocence, which is a fundamental right of the accused undergoing a criminal trial, or retrial. What must also be considered is adverse pre-trial publicity that could result in a biased jury during the course of the retrial whereby extraneous information, *eg* print and electronic media,¹⁹ may unduly influence the evidence presented by the prosecution and the defence during the course of the criminal trial.²⁰ It is a fundamental requirement that "persons selected to serve as jury members

18. See further Note, "Trial by Persistence" (1952) 4 *Stanford Law Review* 537.

19. See further: B Emmerson and A Ashworth, *Human Rights and Criminal Justice* (Sweet & Maxwell, 2001), at 357-367; C Walker, "Fundamental Rights, Fair Trials and the New Audio-Visual Sector" (1996) 59(4) *Modern Law Review* 517; P Duparc-Portier, "Media Reporting of Trials in France and Ireland" (2006) 6(1) *Judicial Studies Institute Journal* 197.

20. In jurisdictions where the law on double jeopardy has recently been reformed, provision has been made for reporting restrictions pertaining to an application by the prosecution authorities for a retrial, and also during the course of the retrial: Criminal Justice Act 2003, sections 82 and 83 (UK); Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006, section 111 (NSW).

in criminal trials are required to reach their verdicts solely in accordance with the evidence adduced during the course of the criminal trial.”²¹

The impact of adverse pre-trial publicity on the trial process arose for consideration in *DPP v His Honour Judge Kevin Haugh and Charles J Haughey*,²² where the applicant sought a judicial review of the decision by the Central Criminal Court to postpone the criminal trial against the accused asserting that this was final and effectively terminated the criminal proceedings against the accused.²³ Carroll J ruled that the order was not final in the nature of an order of prohibition or indeed a permanent stay on the criminal proceedings against the accused and furthermore that it was for the trial judge to decide the issue as to whether there was an unavoidable injustice in prosecuting the accused at this point in time.²⁴ The jury is duty-bound to determine the guilt or innocence of the accused based on the evidence tendered during the course of the criminal trial; otherwise the constitutional right to a fair trial is infringed.

It is for the trial judge to determine the potential effects of adverse pre-trial publicity and consequently whether or not a criminal trial should proceed at that point in time or, alternatively, whether the trial should be postponed until such time as the adverse effects of such pre-trial publicity are deemed to have faded from the memories of prospective jurors. The significance of this is that a conviction following a retrial in circumstances where the jury members were biased by the influence of adverse pre-trial publicity would be open to challenge on appeal or an application for judicial review as the accused would not have had a fair retrial. Accordingly, the reviewing court when assessing the veracity of the subsequent emergence of fresh and compelling evidence of the accused’s guilt must also consider whether there is adverse pre-trial publicity which could result in an unfair retrial of the accused.

If the law on double jeopardy is reformed in this jurisdiction, a consequence of this procedure may be inefficient police investigations in addition to the potential for impulsive prosecutions in the knowledge that if a conviction is not secured following the initial criminal trial, there may be further opportunities to “convict” the accused.²⁵ However, this potential for abuse of prosecutorial discretion may be circumvented by the stipulation that a retrial may only proceed in light of the subsequent discovery of fresh and compelling evidence of the

21. *Director of Public Prosecutions v Haugh, Haughey and the Attorney General* [2000] 1 IR 184 (HC), at 209 *per O’ Donovan J.*

22. [2001] 1 IR 162. See further: J L O’ Donnell, “The Jury on Trial: Reflections on *DPP-v-Haugh*” (2000, July) *Bar Review* 470; M Levi, “Pre-trial Publicity and its Treatment in the English Courts” [1996] *Criminal Law Review* 622.

23. *Cf C Corns*, “Judicial Termination of Defective Criminal Prosecutions: Stay Applications” (1997) 16(1) *University of Tasmania Law Review* 75.

24. See the judgment by Carroll J [2001] 1 IR 162 (HC), at 168-170.

25. See the remarks by Lord Devlin *Connelly v DPP* [1964] 2 All ER 401, at 441-442.

accused's guilt if this evidence could not have been discovered by the police through the exercise of reasonable diligence prior to the initial criminal trial. In the United Kingdom, a consent procedure is essential to any application by the prosecution to the reviewing court to quash an acquittal based on the discovery of fresh and compelling evidence of the accused's guilt which in conjunction with the evidence adduced during the course of the former criminal trial renders the prosecution's case against the accused substantially stronger.²⁶

The presumption of innocence²⁷ is fundamental to a fair and equitable criminal trial, and has been recognised as an unspecified constitutional right in Ireland²⁸ in addition to being a specified right under the European Convention on Human Rights.²⁹ The significance of the presumption of innocence for the purposes of double jeopardy law reform is that, in an application to quash an acquittal, the reviewing court must be convinced that there is a compelling case against the accused.³⁰ The emphasis of fresh and compelling evidence of guilt should be on an application to quash the acquittal rather than prejudging the proposed retrial for the same criminal offence.³¹ What is significant in this respect is that the term used is "fresh and compelling evidence" necessitating a retrial, not "conclusive evidence" of the accused's guilt, which could prejudice the outcome of a retrial and accordingly the accused's constitutional rights to natural justice. What is equally important is the issue of adverse pre-trial publicity,³² which may suggest that the accused is being retried in the light of fresh and compelling evidence of his guilt, which could prejudice the retrial. A court or tribunal must be impartial in the adjudication process and apply the

26. Criminal Justice Act 2003, section 76(3) (UK).

27. See further A Ashworth, "Four Threats to the Presumption of Innocence" (2006) 10(4) *International Journal of Evidence and Proof* 241.

28. Constitution of Ireland, Article 38.1; see *O' Leary v Attorney General* [1995] 1 IR 254 (SC).

29. ECHR, Article 6(2).

30. The logical choice for a reviewing court in Ireland is the Court of Criminal Appeal with an appeal to the Supreme Court. However, section 4 of the Court and Court Officers Act 1995 evidently provides for the eventual abolition of this Court with "powers, jurisdiction and functions" being transferred to the Supreme Court.

31. The procedure in the United Kingdom is for the Court of Appeal (Criminal Division) to quash a former acquittal, thus removing any legal impediment against a retrial for the same criminal offence: Criminal Justice Act 2003, sections 76 and 77 (UK).

32. Sections 82 and 83 of the Criminal Justice Act 2003 (UK) provide for reporting restrictions and the imposition of criminal sanctions where the media are deemed to have engaged in adverse pre-trial publicity which would render a retrial unfair and subject to challenge on appeal (if the accused was convicted). See further: B Emmerson and A Ashworth, *Human Rights and Criminal Justice*, note 19, at 357-367; G Duffy, "Pre-trial Publicity, Prejudice, and the Right to a Fair Trial" (1994) 4 *Irish Criminal Law Journal* 113.

principles of natural justice so as to ensure that proper procedures are followed. It is imperative that the terminology used by the courts pertaining to the subsequent emergence of fresh evidence of the accused's guilt does not have the effect of reversing the presumption of innocence.³³

Would proposed reforms of the common law principle against double jeopardy constitute substantial inroads into the presumption of innocence, which is fundamental to a fair trial in due course of law? Would the jury empanelled for the retrial be impartial with the knowledge that the reviewing court has determined that there is fresh and compelling evidence of the accused's guilt? Once the reviewing court has determined that the accused should be retried a certain consequence for the accused would be the unavoidable suspicion of guilt in the minds of the jury.³⁴ Consequently, it is imperative for the reviewing court to use the correct terminology when quashing an acquittal and ordering a retrial *ie* that there is fresh and compelling evidence when taken in conjunction with the evidence tendered during the course of the initial criminal trial makes the prosecution's case against the accused substantially stronger.

A potential consequence of permitting a retrial is the elongation of the criminal proceedings against the accused. Would this violate the accused's constitutional right to an expeditious criminal trial which stipulates that the accused is put on trial within a reasonable period of time following his indictment for the criminal offence(s) charged?³⁵ However, this should not prevent the prosecution from presenting fresh and compelling evidence of the accused's guilt even if a significant period of time has elapsed since the accused's acquittal, provided that once this fresh evidence has been discovered, the accused is charged and tried expeditiously. In other words, the accused must be tried within

33. Fresh evidence of the accused's guilt must be reliable in the sense that it is credible and is more likely to be believed, and relevant in that when conjoined with the evidence tendered at the first criminal trial, this fresh evidence makes the prosecution's case substantially stronger. Of course, there would be a stipulation that this fresh evidence could not, with the exercise of due diligence, have been discovered prior to the first criminal trial. Evidence of the accused's guilt that was not admissible at the initial criminal trial, but is now admissible because of changes in the law of evidence, could constitute fresh evidence.

34. In criminal proceedings, the possibility of empanelling a biased jury and the potential influence of adverse pre-trial publicity on prospective jurors, should be addressed at *voire dire*.

35. See: *In Re Singer* (1963) 97 ILTR 130 (SC), at 136 *per* Maguire CJ; *The State (O'Connell) v Fawsitt* [1986] IR 363 (SC), at 379 *per* Finlay CJ. In *Hogan v The President of the Circuit Court* [1994] 2 IR 513 (SC), at 521 Finlay CJ explained that it was an established rule of law that an accused is entitled to "an expeditious trial as a positive constitutional right" to a trial in due course of law in accordance with Article 38.1 of the Constitution.

a reasonable period of time from the date he is arrested and charged for the commission of a criminal offence. If the accused had contributed to the delay, judicial review proceedings may not be permitted.³⁶ The periods of undue delay must be satisfactorily explained. The applicant must discharge the onus of establishing the delay to have been unreasonable in the circumstances and as a result he could not obtain a fair trial.³⁷

Evidence may no longer be available where offences are alleged to have occurred perhaps decades earlier, but this is an issue that the trial judge can bring to the attention of the jury. It may be more difficult to defend rather than prosecute crimes alleged to have been committed several decades previously, in consequence of the vague memories of witnesses and admissibility of evidence. The jury should be circumspect in relation to an event phrased in vague and general terms as opposed to a recent event with details and particulars. The trial judge should exercise the discretion of the court to issue an appropriate direction to the jury, in order to ensure that the accused receives a fair (re)trial.³⁸

The continued unqualified application of the common law principle against double jeopardy serves to ensure that police investigations and the prosecution of criminal offences will maintain professional standards and efficiency. If the police are aware that a subsequent criminal trial against the accused may proceed in the event that the first criminal trial does not result in a conviction, then they may not be prepared to make further investigations, such as the consideration of other credible suspects, prior to the initial criminal trial. Indeed, the quality of police investigations and the effectiveness of prosecutions by the DPP may deteriorate over time and there is a real possibility that innocent persons could be wrongfully convicted. Of course, this has to be reconciled with the collective right of society to the proper investigation, prosecution and punishment of serious criminal offenders.

A perceived danger in permitting retrials for the same alleged criminal conduct is where the accused, although not essentially being retried for the same criminal offence *per se*, would be tried under a separate statutory provisions which as a matter of law criminalizes the same conduct although the separate statutory provision “defines the conduct in a different language.”³⁹ However, this issue has been stipulated for in Ireland by legislation preventing more than one trial for acts or omissions which are deemed criminal under statute and common law, or under more than one statute.⁴⁰ In other words, only one criminal

36. *W(T) v DPP* 28 July 2004 (SC).

37. *Doyle v DPP* 6 July 2006 (HC).

38. See the judgment of McGuinness J in *W v DPP* 31 October 2003 (SC).

39. W T Fisher, “Double Jeopardy, Two Sovereignties and the Intruding Constitution” (1961) 28(4) *University of Chicago Law Review* 591, at 597.

40. Interpretation Act 1937, section 14.

trial may proceed either at common law or under statutory provision for this alleged criminal activity.

Maintaining public confidence in the effective administration of the criminal justice process is essential to any debate on the proposed reforms of the law on double jeopardy.⁴¹ In *Connelly v DPP*,⁴² Lord Devlin having outlined the injustices associated with multiple trials for the same criminal offence stated: “[t]here is another factor to be considered, and that is the courts’ duty to conduct their proceedings so as to command the respect and confidence of the public.”⁴³ Retaining the principle against double jeopardy serves to enhance public confidence in the effective administration of the criminal justice system. Re-prosecutions for the same criminal offence following a botched attempt at the first trial may undermine public confidence in the competence of the police in the investigation of criminal transgressions and the gathering of all relevant evidence prior to the criminal trial, in addition to the competence of the prosecution to present this evidence efficiently during the course of the trial. Thus, any debate regarding the potential reform of double jeopardy jurisprudence must take into consideration broader criminal justice issues most notably the interests of society in convicting and punishing those who are guilty of the commission of serious criminal offences.⁴⁴ Nevertheless, an objective debate of the policy issues to be considered in any reform of the principle against double jeopardy is essential for the effective administration of the criminal justice system. Broader public policy issues will need to be addressed so as to achieve a fair and just balance between the substantive and procedural rights of the accused, and the collective interests of society in prosecuting, convicting and punishing individuals for the commission of heinous criminal offences.⁴⁵

41. See further: C M Bradley, and J L Hoffmann, “Public Perception, Justice, and the ‘Search for Truth’ in Criminal Cases” (1996) 69 *California Law Review* 1267; J V Roberts, “Public Opinion, Crime, and Criminal Justice” (1992) 16 *Crime and Justice* 99; D McKillop, and E Helmes, “Public Opinion and Criminal Justice: Emotion, Morality and Consensus” (2003) 10(1) *Psychiatry, Psychology and Law* 210.

42. [1964] AC 1254 (HL & PC).

43. [1964] AC 1254 at 1353 (HL & PC).

44. See P Devlin, *The Enforcement of Morals* (Oxford University Press, 1965), at 22 stating:

the criminal law exists for the protection of individuals.... But the true principle is that the law exists for the protection of society. It does not discharge its function by protecting the individual from injury, annoyance, corruption, and exploitation; the law must protect also the institutions and the community of ideas, political and moral, without which people cannot live together.

45. Criminal law is a division of public law and accordingly is concerned with the detection and prosecution of those individuals who have committed criminal offences against society; see *Deaton v Attorney General* [1963] IR 170 (SC).

While the accused is endowed with many substantive and procedural rights, whether statutory, constitutional or at common law, in stark contrast to the adverse standing of the accused subject to the criminal justice system during the medieval period, the existence of so many rights for the protection of the accused in the contemporary criminal justice system should not *per se* justify the complete abolition or indeed an exception to the common law principle against double jeopardy.⁴⁶ Finality of judgments is an important issue to be considered against proposed reforms of double jeopardy jurisprudence. If a truly innocent individual has been charged, prosecuted and acquitted he cannot proceed with the remainder of his life with a significant degree of certainty, due to the possibility of a subsequent retrial for the same criminal offence.⁴⁷

The policies against proposed reforms of the common law principle against retrials with the objective of re-prosecuting the accused for the same criminal offence may be summarised by the assertion that the proscription demands greater efficiency and effectiveness from both the police and prosecution in the investigation and prosecution of criminal offenders. This directly relates to the requirement of “reasonable diligence” being exercised by the police in the investigation of the criminal offences charged prior to the first criminal trial with the result that one must question whether a criminal trial which initially began with ineffective police investigatory procedures could result in a safe conviction in the case of a retrial. This is essential to avoid certain injustices to accused persons through repeated prosecutions for the same criminal offence following a trial on the merits.

PERMITTING RETRIALS IN LIMITED CIRCUMSTANCES

Double jeopardy prevents a retrial following a trial on the merits concluding with an acquittal or conviction, notwithstanding the subsequent emergence of fresh and compelling evidence of the accused’s guilt.⁴⁸ However, this procedure must be reconciled with the contemporary criminal justice process and the multifarious substantive and procedural rights vested in the accused during the course of a criminal trial. Moreover, in consideration of the advancements made in forensic science, particularly the techniques for analysing of DNA evidence,

46. See J Hall, “Objectives of Federal Criminal Procedural Revision” (1942) 51 *Yale Law Journal* 723, at 729 stating: “there is the fallacy of arguing that because the accused had so few rights in the 16th and 17th centuries, therefore he has too many rights now.”

47. See further I Dennis, “Rethinking Double Jeopardy: Justice and Finality in Criminal Process” [2000] *Criminal Law Review* 933.

48. See the remarks by Lord Devlin in *Connolly v DPP* [1964] AC 1254 (HL), at 1353, and Hawkins J in *R v Miles* (1890) 17 Cox’s CC 9 (CCR), at 20.

voice recognition and facial mapping technology, the unconditional application of the common law proscription against retrials should be relaxed where fresh and compelling evidence of the accused's guilt is subsequently discovered. Furthermore, the procedures for gathering such evidence may not have been available to the police and the Forensic Science Laboratory at the time when the criminal offence was committed, perhaps many decades previously.⁴⁹

While the accused is entitled to a fair trial of the criminal charges on the merits of the case, society's collective interest in the prosecution and punishment of offenders must also be given due consideration. There are several important reasons for permitting retrials for the same offence following an acquittal, for instance: public confidence in the effective administration of the criminal justice system could be undermined; the guilty should not be allowed escape conviction and punishment because of a defect in the criminal justice process; and a general power to order a retrial in appropriate, albeit strictly limited circumstances, should exist.⁵⁰ Consequently, there is the necessity for a procedure whereby a retrial for the same criminal offence could proceed in circumstances where fresh and compelling evidence of the accused's guilt is discovered following an acquittal.

In consideration of the power and resources available to the prosecution in contrast to the standing of the accused, the proposed reforms of double jeopardy jurisprudence must take into account the harassment factor of repeated attempts to convict an accused through successive criminal trials for the same criminal offence. It is imperative that prospective legislation reforming the law on double jeopardy stipulates that only one retrial may proceed against the accused following the initial criminal trial.⁵¹ Moreover, the criteria for quashing an acquittal must be clearly stipulated in reforming legislation so that it is only in limited circumstances that a retrial would proceed in the light of the subsequent emergence of fresh and compelling evidence of the accused's guilt.⁵²

The common law principle against double jeopardy stipulates that an accused

49. See further: Law Reform Commission, Consultation Paper, *The Establishment of a DNA Database* (LRC CP 29-2004); A Clare, "Retention of Fingerprints and DNA Samples: Compatibility with the European Convention on Human Rights" (2003) 67 *Journal of Criminal Law* 23.

50. See M Knight, "Convicting the Guilty" (1966) *Criminal Law Review* 24, at 27-35.

51. In the United Kingdom, only one application for a retrial may be made by the prosecution to the Court of Appeal (Criminal Division): Criminal Justice Act 2003, section 76(5).

52. The procedure in the United Kingdom, as provided for by the Criminal Justice Act 2003, section 76, is for an application to the Court of Appeal (Criminal Division) to quash an acquittal in the light of fresh and compelling evidence of the accused's guilt of the offence for which he has been formerly acquitted. This procedure would remove any legal impediment (*autrefois acquit* or *autrefois convict*) against a retrial for the same criminal offence in these limited circumstances.

cannot be retried for the same criminal offence following an acquittal or conviction for that same offence, notwithstanding the subsequent emergence of fresh and compelling evidence of the accused's guilt following a trial on the merits by a court of competent criminal jurisdiction.⁵³ It may often be the case that an accused escaped conviction or had his conviction quashed because of some procedural irregularity during the course of the former criminal trial. In the interests of the preservation of a just and ordered society, the accused in these circumstances should not be allowed to evade a retrial for the same offence where fresh and compelling evidence of guilt is subsequently discovered. Justice will not have been served where an accused is acquitted because of a technical error. It is not so much the swiftness of justice but rather the certainty of justice that is most effective against crime.

The law on double jeopardy has recently been reformed by statute in the United Kingdom⁵⁴ with a comprehensive eradication of this principle of criminal procedure and provides for a retrial for approximately 30 "qualifying" criminal offences.⁵⁵ Exceptions to the principle against double jeopardy under the provisions of the Criminal Justice Act 2003 are confined to more serious criminal offences. The procedure for making an application for retrial for a "qualifying criminal offence" is comprehensively set out in Part 10 of the 2003 Act.⁵⁶

53. In *The People (AG) v Kelly (No 2)* [1938] IR 109 (CCA) it was stated that successive retrials may proceed against the accused if deemed necessary in the particular circumstances. Contemporary methods for gathering evidence, previously unavailable, could justify a retrial where fresh and compelling evidence of the accused's guilt may now be presented to the trial court. However, in *The People (AG) v Griffin* [1974] IR 416 (SC) it was held that the Court of Criminal Appeal is not authorised to order a retrial in circumstances where the prosecution had previously failed to present sufficient proof of the accused's guilt during the course of the former criminal trial.

54. Criminal Justice Act 2003, Part 10, sections 75-97. See also: Law Commission for England and Wales, Report No 267, *Double Jeopardy and Prosecution Appeals* (Cm 5048, 2001); Law Commission for England and Wales, Consultation Paper No 156, *Double Jeopardy* (1999); House of Commons, *The Criminal Justice Bill: Double Jeopardy and Prosecution Appeals* (Research Paper 02/74, 2002).

55. These "qualifying offences" are provided for in Part 1 of Schedule 5 to the Criminal Justice Act 2003 (UK) and generally comprise the following: offences against the person; sexual offences; drugs offences; criminal damage offences; war crimes and terrorism; and conspiracy.

56. The 2003 Act gives the prosecution the right of appeal against an acquittal where "new and compelling evidence" is discovered following an acquittal. The National Crime Faculty in the UK considers that there are approximately 35 "acquittees" who may eventually be retried for the same criminal offence if fresh and compelling evidence of their guilt is discovered: *The Guardian*, 11 November 2005 (online version available at: <http://www.guardian.co.uk/print/0,3858,5330933-104770,00.html>).

The spur to reform in the United Kingdom was the bungled attempt to prosecute the five white youths for the murder of black teenager Stephen Lawrence in 1993.⁵⁷ The five accused in this case were acquitted principally as a result of the incompetence and institutional racism by the police in the investigation of the murder in addition to the ineffectiveness of the prosecution during the course of the criminal trial.⁵⁸ The Home Secretary, Mr Jack Straw MP, instigated an official inquiry in 1997 into the botched attempt to effectively prosecute the five accused. The *Macpherson Inquiry*⁵⁹ into the death of Stephen Lawrence made a number of recommendations the most significant of which is that the common law principle against double jeopardy should be relaxed where fresh and compelling evidence of the accused's guilt is discovered following an acquittal which in conjunction with the evidence adduced during the course of the former criminal trial makes the prosecution's case against the accused substantially stronger.⁶⁰

A retrial may be ordered after a conviction has been set aside due to a misdirection by the trial judge or where the jury failed to reach a verdict. Furthermore, the trial judge may order a rehearing when an error of law occurs during the course of the criminal trial; an accused may also be retried if the indictment is quashed by the trial judge whether before or after a verdict has been given, or if the first trial took place before a court not having jurisdiction to try the case, *ie ultra vires*, or where the trial court was subsequently deemed

57. Three of the five youths were prosecuted in 1996 by private prosecution which resulted with an acquittal due to the absence of conclusive evidence. The judge entered verdicts of not guilty (directed acquittal) due to insufficient and unsatisfactory evidence. The remaining two youths were discharged at the committal stage of the prosecution. The Stephen Lawrence case was the seminal case for reforming the law on double jeopardy in the United Kingdom.

58. The *Macpherson Inquiry* into the racist murder of Stephen Lawrence concluded that the police investigation failed to investigate eyewitness accounts of the murder for several days, and had failed to secure forensic evidence. Moreover, the police investigation failed to take action into lines of inquiry that were clearly available following the murder. Indeed, it is widely believed that there was institutionalised racism among the investigating members of the police force.

59. Macpherson Inquiry, *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny* (Cm 4262, 1999). See further: J Foster, T Newburn, and A Souhami, *Assessing the Impact of the Stephen Lawrence Inquiry* (Home Office Research Study No 294, 2005); J Lea, "The Macpherson Report and the Question of Institutional Racism" (2000) 39(3) *Howard Journal of Criminal Justice* 219; L Bridges, "The Lawrence Inquiry: Incompetence, Corruption, and Institutional Racism" (1999) 26(3) *Journal of Law and Society* 298; K Storry, "The Implications of the Macpherson Report Into the Death of Stephen Lawrence" (2000) 12(1) *Current Issues in Criminal Justice* 106.

60. MacPherson Inquiry, note 59, recommendation 38.

a *coram non judge*. Thus, where a conviction has been set aside because of procedural irregularities, following an appeal by the defendant, the Court of Criminal Appeal has an inherent power to order a retrial.⁶¹ It follows that the former trial had not been conducted on the merits of the case and therefore there was no former verdict of either acquittal or conviction upon which the accused could base the pleas in bar, *autrefois acquit* or *autrefois convict*, against a retrial for the same criminal offence.

An order for a retrial following a “tainted acquittal”⁶² would not *per se* infringe the principle against double jeopardy which requires a final verdict of acquittal or conviction on the merits before the pleas in bar may be raised. Moreover, it is not necessary to establish that the accused was involved in the interference with the administration of justice, which resulted in the “tainted acquittal,” once it has been established that there has not been a trial on the merits by a court of competent criminal jurisdiction.⁶³

With the increased number of criminal trials before the criminal courts it is possible that a case may be dismissed due to some procedural technicality such as the absence of a crucial prosecution witness, courts being eager to proceed with the next case on the list. Conversely, it could be argued that increased crime rates⁶⁴ could increase the need for finality in criminal litigation with the

61. Criminal Procedure Act 1993, sections 3(1)(c) and 4. These provisions empower the Court of Criminal Appeal, on appeal by a defendant, to overturn a conviction and to order a retrial for the same offence.

62. A “tainted acquittal” is deemed to have occurred where the accused has been acquitted, but had knowingly procured his “acquittal” by bribing or indeed intimidating jurors or witnesses. Reforms of the common law principle against double jeopardy are under way in New Zealand following the “acquittal” of gang member, Kevin Moore. He could not be retried for the same criminal offence, on the basis that he had been “formerly” acquitted at the initial criminal trial. However, his acquittal was tainted as it was based on witnesses he had organised to “testify” on his behalf. See further: Law Commission of New Zealand, *Acquittal Following Perversion of the Course of Justice* (NZLC Report 70, 2001); New Zealand Law Commission, Discussion Paper: *Acquittal Following Perversion of the Course of Justice: A Response to R v Moore* (NZLC, PP42, 2000); *R v Moore* [1999] 3 NZLR 385; D S Rudstein, “Double Jeopardy and the Fraudulently-Obtained Acquittal” (1995) 60 *Missouri Law Review* 607; T M DiBiagio, “Judicial Equity: An Argument for Post-Acquittal Retrial When the Judicial Process is Fundamentally Defective” (1996) 47 *Catholic University Law Review* 77; C Tapper, “Clouded Acquittal” (2001) 117 *Law Quarterly Review* 1.

63. This is stipulated for by statute in the United Kingdom by sections 54-57 of the Criminal Procedure and Investigations Act 1996 which makes provision for re-opening an acquittal that appears to have been tainted by intimidation of witnesses or jurors.

64. See Central Statistics Office, *Statistical Yearbook of Ireland 2006* (Stationery Office, 2006), at 131, Table 6.1, and generally chapter 6.

result that the accused could not again be tried for the same criminal offence for which had formerly been “acquitted.” However, this is a tenuous argument as to allow individuals who might be guilty of committing serious criminal offences go free would not be conducive to the preservation of a just and ordered society. Indeed, this may result in members of society seeking private vengeance, assuming the role of “judge, jury and executioner” imposing swift justice on the “acquittee” where the criminal justice system has failed to convict and punish an offender.⁶⁵ It is a truism that many criminal justice systems have at some point in time infringed the fundamental rights of an accused in the criminal justice process, most notably through wrongful convictions,⁶⁶ but this should not derogate from society’s collective interest in the detection and prosecution of those who are most likely guilty of the commission of heinous criminal offences, particularly where fresh and compelling evidence of the accused’s guilt is discovered following an acquittal.

There is a constitutional mandate that a jury tries most indictable offences.⁶⁷ Article 4 of the Constitution provides that “Ireland is a sovereign, independent, democratic state.” Accordingly the State derives its authority from the consent of the governed and maintains its legitimacy through the participation by the People in a representative democracy.⁶⁸ Although the People delegate authority and confer legitimacy they retain sovereignty and as such possess the final check on governmental authority. Dawson⁶⁹ suggests that popular sovereignty must be final and unappealable whereby a jury verdict must not be undermined by the prosecution authorities ignoring this verdict, thus purporting to prosecute the accused on a second occasion for the same criminal offence. Consequently, when the jury reaches its verdict it is arguable that by virtue of the common law principle against double jeopardy the prosecution should be prevented from reviewing an acquittal with the objective of re-trying the accused for the same

65. See O W Holmes Jr, *The Common Law* (Dover Publications, 1991), Lecture I, “Early Forms of Liability”, at 2-3 stating: “It is commonly known that the early forms of legal procedure were grounded in vengeance. Modern writers have thought that Roman law started from the blood feud, and all the authorities agree that the German law began in that way.”

66. See for example C R Huff, “Wrongful Convictions: The American Experience” (2004) 46(2) *Canadian Journal of Criminology and Criminal Justice* 107.

67. Constitution of Ireland, Article 38.5. In *The People (DPP) v O’Shea* [1982] IR 384 (SC), at 432 Henchy J stated: “I am satisfied that the indissoluble attachment to trial by jury of the right after acquittal to raise the plea of *autrefois acquit* was one of the prime reasons why the Constitution of 1937 (like that of 1922) mandated trial with a jury as the normal mode of trying major offences.”

68. *Byrne v Ireland* [1972] IR 241 (SC), at 264 *per* Walsh J.

69. M A Dawson, “Popular Sovereignty, Double Jeopardy and the Dual Sovereignty Doctrine” (1992) 102 *Yale Law Journal* 281, at 282-283.

criminal offence. However, the sanctity of the jury cannot be reconciled with human infallibility, therefore the verdict of the jury should not necessarily be unalterable.

The pleas in bar, *autrefois acquit* and *autrefois convict*, stipulate that the initial criminal trial must have concluded on the merits of the case in the absence of procedural irregularities. If the initial criminal trial was conducted other than on the merits, the accused would not be deemed to have been in former jeopardy of the same criminal offence charged in a subsequent indictment. Thus, if the accused had been “acquitted” for an offence charged in a subsequent indictment but the former criminal trial had concluded on the basis of procedural irregularities, there should be no legal impediment if the “acquittal” is quashed and a retrial ordered for the same criminal offence. In these circumstances a retrial may be allowed without infringing the common law principle against double jeopardy. Nonetheless, the concern here is where there has been a lawful “acquittal” on the merits of the case and subsequently fresh and compelling evidence of the accused’s guilt emerges necessitating a relaxation of double jeopardy jurisprudence, albeit in strictly limited circumstances.

The Supreme Court of Nigeria decision in *Okoduwa v The State*,⁷⁰ provides a useful analysis of the core issues to be considered before a retrial for the same criminal offence should be ordered:

- There has been an error in law or an irregularity in procedure that neither renders the trial a nullity nor makes it possible for the appeal court to say that there has been no miscarriage of justice;
- Apart from the error of law or irregularity in procedure the evidence before the court discloses a substantial case against the accused;
- There are no special circumstances which would make it unjust to put the accused on trial a second time;
- The offence for which the accused is charged and their consequences are serious in nature;
- To refuse an order of retrial would occasion a greater injustice than to grant it.

These criteria are not exhaustive and may be modified depending on the particular circumstances of the case under consideration. The following issues should also be considered before a retrial is ordered in any particular case:

- The seriousness and prevalence of the offence;
- The probable duration and expense of a new trial;
- The ordeal to be undergone for a second time by the accused;

70. [1990] LRC (Const) 337 (SC), at 346 *per* Nnanami JS C, following *Abondundu v The Queen* (1959) 4 FSC 70 (Fed SC).

- The lapse of time since the alleged commission of the offence and its effect on the quality of the evidence;
- The nature of the case of the prosecution against the accused as disclosed in the evidence at the first trial, whether substantial or not.⁷¹

Proposed reforms of double jeopardy law should equally consider society's interest in the prosecution and punishment of offenders and also the individual rights of the accused in the criminal justice process.

The fundamental issue to be resolved in this jurisdiction is whether the Irish courts should be given the authority to order a retrial following an "acquittal" where fresh and compelling of the accused's guilt is subsequently discovered. The law on double jeopardy has recently been reformed in the United Kingdom and New South Wales, and several other common law jurisdictions, Australian federal jurisdiction, New Zealand and Ireland, are considering proposals for reform. Judicial authority in Ireland on the problematic issue of retrials has been inconsistent. In a landmark decision, *The People v Conney*,⁷² the majority of the Supreme Court ruled that an appeal from the Central Criminal Court could be made to the Supreme Court against an acquittal or conviction.⁷³ The Supreme Court, in *The People v O'Shea*,⁷⁴ subsequently confirmed this ruling where the majority opinion of the court was that an acquittal could be appealed to the Supreme Court and a retrial ordered for the same criminal offence. However, in *The People (DPP) v Quilligan (No2)*,⁷⁵ the Supreme Court effectively reversed these previous rulings on appeals against acquittals. In *Quilligan*, the Supreme Court quashed a directed acquittal by the trial judge on the basis that the acquittal was invalid. However, the Supreme Court refused to order a retrial of the accused for the same criminal offence. An interesting feature of the ruling in *Quilligan* is that the court was equally divided as to whether a retrial should be ordered with Hederman J reserving his opinion, instead ruling that he would not order a retrial in this particular case. This is indicative of the uncertainty expressed by the superior courts regarding the issue of retrials for the same offence.⁷⁶ Where a verdict of acquittal

71. [1990] LRC (Const) 337 (SC), at 346.

72. [1975] IR 314 (SC).

73. This ruling was based on a literal interpretation of Article 34.4.3° of the Constitution of Ireland which *inter alia* provides that "The Supreme Court shall ... have appellate jurisdiction from *all* decisions of the High Court" (emphasis added).

74. [1982] IR 384 (SC).

75. [1989] IR 46 (SC).

76. See further: J P Casey, "Confusion in Criminal Appeals: The Legacy of *Conney*" (1975) 10 *Irish Jurist* 300, and by the same author, "Criminal Appeals: The Confusion Persists" (1981) 16 *Irish Jurist* 271; G W Hogan, "Criminal Appeals: A New Departure" (1983) 5 *Dublin University Law Journal* 254.

or conviction has been quashed due to some procedural irregularity, then there is no formal verdict of the trial court upon which to base the pleas in bar, *autrefois acquit* and *autrefois convict*, and accordingly there is no legal impediment *per se* against retrials for the same criminal offence in these circumstances.

The legal uncertainty raised by the trilogy of cases beginning with *Conney*, followed by *O'Shea* and *Quilligan*, was responded to by the legislature with section 11 of the Criminal Procedure Act 1993 which effectively overruled the rulings in *Conney* and *O'Shea*.⁷⁷ This provision, as amended, clearly indicates a form of statutory protection against being placed twice in jeopardy for the same offence by no longer permitting an appeal against an acquittal in the Central Criminal Court.⁷⁸

The core issue for reform is where fresh and compelling evidence of the accused's guilt is discovered following an acquittal, which in conjunction with the evidence tendered during the course of the former criminal trial, renders the prosecution's case against the accused substantially stronger. In the interests of justice and the preservation of the effective administration and public confidence in the criminal justice system, the fundamental issue for the purposes of reforming the principle against double jeopardy is whether an accused in these circumstances should be retried for the same criminal offence. Individuals who, as a matter of fact, are guilty of committing serious criminal offences will not be brought to justice and punished accordingly. An "acquittee" might well boast⁷⁹ of his guilt following an acquittal or may even credibly confess to his crimes perhaps due to genuine remorse, however, because of the unconditional application of the common law principle against double jeopardy such an individual cannot be retried for the same criminal offence. If, however, the

77. Henceforth, the authority of the Supreme Court to consider appeals from acquittals in the Central Criminal Court is abolished, save for an appeal on a point of law without prejudice to a verdict in favour of the accused.

78. This provision has subsequently been replaced by section 44 of the Courts and Court Officers Act, 1995 which provides: "An appeal shall not lie to the Supreme Court from a decision of the Central Criminal Court to acquit a person, other than an appeal under section 34 of the Criminal Procedure Act, 1967." It was necessary to enact this provision of the 1995 Act because section 11 of the 1993 Act was deemed to have been too restrictive. An appeal may still proceed on a point of law under section 34 of the Criminal Procedure Act 1967. In these circumstances the State is permitted to appeal on a point of law so as to secure a determination by the Supreme Court of the issues of law raised during the course of the criminal trial, although the position of the accused will not be affected by the decision of the Supreme Court.

79. M L Friedland, *Double Jeopardy* (Clarendon Press, 1969), at 5, n 1 cites the following examples: the British Columbia case of *Heathman*, *Toronto Globe and Mail*, 28 and 29 January 1964; *Leffer* (1936) 67 CCC 330 (Ont SC).

accused had given evidence on oath at his trial and now confesses to the crimes previously charged in the indictment he may, of course, be charged with perjury,⁸⁰ unless of course he had exercised his right to silence.⁸¹ It has been held that where the accused is charged with perjury following his acquittal (or conviction) on a charge of a substantive criminal offence, the doctrine of issue estoppel may not be raised by the accused as plea in bar to a further prosecution because of the inherent differences between the offences.⁸² Moreover, to allow the accused to escape conviction and punishment for the commission of perjury based on his testimony given during the course of the former criminal trial as to his innocence and which resulted in his acquittal would constitute an affront to the criminal justice system.⁸³

Any meaningful debate on the reform of double jeopardy law must be composed and a consideration of all relevant issues from the viewpoint of the prosecution and the accused must be evenly weighed before amendments to the law are made. Indeed, cases attracting publicity on this issue may result in a call for swift changes in the law.⁸⁴ However, this should be avoided in favour

80. Interestingly, in a recent high profile Australian case, *The Queen v Carroll* [2002] HCA 55, where the accused was charged and convicted of murder in 1985, this conviction was overturned on appeal. Subsequently, further evidence was discovered; however the accused could not be charged with the same criminal offence, murder, but instead was charged with perjury on the basis that he had lied during the former criminal trial. This perjury conviction was quashed on appeal as it was deemed by the High Court of Australia to have violated the double jeopardy proscription. See further M Kirby, "Carroll, Double Jeopardy and International Human Rights Law" (2003) 27 *Criminal Law Journal* 231.

81. The accused is entitled to exercise the unspecified constitutional right to silence, this being a corollary of the specified constitutional right of freedom of expression as provided for by Article 40.6.1°(i) of the Constitution; see: *Rock v Ireland* [1997] 3 IR 484 (SC); *Heaney v Ireland* [1996] 1 IR 580 (SC); G W Hogan, "The Right to Silence after *National Banks* and *Finnerty*" (1999) 21 *Dublin University Law Journal* 176; J H Langbein, "The Historical Origins of the Privilege Against Self-Incrimination at Common Law" (1993-1994) 92 *Michigan Law Review* 1047.

82. *DPP v Humphreys* [1977] AC 1 (HL); *DPP v O' Connor* 13 July 1994 (HC); *R v El-Zarw* [1994] 2 Qd R 67 (CCA); *R v Smith* (1998) 119 CCC (3d) 547 (CCA).

83. Neither the principle against double jeopardy nor the doctrine of *res judicata* (to maintain the legal system) would prevent the prosecution from proceeding with a charge of perjury following the accused's acquittal for the substantive criminal offence.

84. Recent high profile examples include: *The Queen v Carroll* [2002] HCA 55 (HCA), and *Pearce v The Queen* [1998] HCA 57 (HCA) in Australia; *R v Moore* [1999] 3 NZLR 385 (HC) in New Zealand; and the recent conviction (following an admission of guilt) in the case of *R v Dunlop* (2007) 1 Cr App R 8 (CCA) in the United Kingdom, the first conviction under the provisions of the double jeopardy exception provided for by the Criminal Justice Act 2003.

of a rational debate of contemporary procedures so as to strike a fair balance between those who are innocent of crimes and the collective interest of society in the investigation of crime and the trial and punishment of offenders.⁸⁵

However, there should be safeguards in place for the protection of those individuals accused of committing serious criminal offences such as the requirement of a hearing to determine whether a second trial for the same offence is to be permitted based on the cogency of the fresh and compelling evidence of the accused's guilt. It is essential that any proposed legislative amendment take account of these issues so as to ensure fairness of procedures. A consent procedure should be established whereby the prosecution will be required to make an application to the reviewing court to quash an acquittal on the basis of fresh and compelling evidence of the accused's guilt which in conjunction with the evidence against the accused adduced during the course of the former criminal trial renders the prosecution's case against the accused substantially stronger thereby meriting a retrial. This consent procedure would obviate the danger of prosecutorial abuse through the unwarranted harassment of the accused by unwarranted successive criminal prosecutions assuming of course that double jeopardy law is ultimately reformed in Ireland.⁸⁶

The common law principle against double jeopardy proscribes a retrial for the same criminal offence following a trial by a court of competent criminal jurisdiction notwithstanding the discovery of fresh and compelling evidence of the accused's guilt. Conversely, if fresh and compelling evidence subsequently emerges establishing the accused's innocence following his conviction this will be admitted in the interests of justice, as the conviction is no longer considered legitimate. Is it in the interests of the preservation of a just and ordered society that individuals should continue to be at liberty where there is fresh and compelling evidence of their guilt, albeit following a trial on the merits resulting in an "acquittal"? Does the subsequent emergence of fresh and compelling evidence of the accused's guilt following his "acquittal" undermine the legitimacy of such an acquittal with the result that an exception should be made to the common law principle against double jeopardy? Of course what must also be considered is that the subsequent emergence of fresh and compelling

85. See P Roberts, "Double Jeopardy Law Reform: A Criminal Justice Commentary" (2002) 65 *Modern Law Review* 393, at 396 stating: "As the debate is taken forward into the policy arena, clear thinking and principled argument will be at a premium, the more so because double jeopardy reform has become entangled in the public mind with highly-charged issues of racist violence and police effectiveness in the aftermath of Macpherson. Every lawyer knows that hard cases make bad law." Cf R Dworkin, "Hard Cases" (1975) 88 *Harvard Law Review* 1057.

86. In the United Kingdom, the consent of DPP is required by the prosecutor before an application to the Court of Appeal (Criminal Division) for an order quashing an acquittal so that a retrial may proceed: Criminal Justice Act 2003, section 76(3).

evidence such as DNA, voice identification technology, facial mapping recognition technology, fingerprints, blood samples, reliable witnesses *etc.*, is not *per se* conclusive evidence of guilt.⁸⁷

A procedural issue to be addressed with regard to the proposed relaxation of the principle against double jeopardy, which could give the police and prosecution a second opportunity at prosecuting and convicting the accused for the same criminal offence, is the possibility of an abuse of the courts' process being perpetrated.⁸⁸ In other words, could the prosecution instigate speculative charges against the accused with the expectation of a conviction? If, however, the accused is acquitted, a retrial for the same criminal offence may be permitted in the light of fresh and compelling evidence of his guilt which in conjunction with the evidence tendered during the course of the former criminal trial substantially strengthens the prosecution's case against the accused.⁸⁹ What must also be considered is that if the prosecution decides to initially proceed with only a portion of the evidence it has mustered against the accused, perhaps because to proffer all of the relevant evidence would require further investigation, this would result in the unwarranted harassment of the accused through successive prosecutions for the same criminal offence. The prosecution would thus proceed with the knowledge that if a conviction is unsuccessful a subsequent prosecution for the same criminal offence based on fresh and compelling evidence could proceed. This issue may be disposed of by the proper implementation of the criteria for determining if evidence is to be considered fresh and compelling, *ie* reasonable diligence must have been exercised in the discovery process prior to the former criminal trial and the fresh evidence must be credible in the sense that it makes the prosecutions' case against the accused in conjunction with the evidence tendered during the course of the former criminal trial substantially stronger. If the prosecution makes an application to retry the accused for the same criminal offence, the reviewing court must be satisfied that the subsequent emergence of fresh and compelling evidence necessitates the retrial of the accused in the interests of justice.

The rationale for the development of the principle against double jeopardy at common law no longer exists with the result that an unconditional application

87. There is judicial authority in Australia that a retrial in appropriate circumstances, such as the subsequent emergence of fresh and compelling evidence, will not amount to a violation of the common law principle against double jeopardy: *Davern v Messel* (1984) 155 Crim LR 21, at [60] (HCA).

88. See further: R G Fox, "Criminal Delay as Abuse of Process" (1990) 16 *Monash University Law Review* 64; J Hunter, "Abuse of Process Savages Criminal Issue Estoppel" (1995) 18(1) *University of New South Wales Law Journal* 151; R Pattenden, "Abuse of Process in Criminal Litigation" (1989) 53 *Journal of Criminal Law* 341.

89. Cf L Sunderland, "Trial by Persistence" (1952) 4 *Stanford Law Review* 537.

of the prohibition against retrials should be reformed where in the interests of justice a second trial for the same criminal offence could proceed.⁹⁰ However, assuming that double jeopardy jurisprudence is ultimately relaxed thereby permitting retrials albeit in strictly limited circumstances, it is essential to provide a *caveat* whereby only one retrial should be permitted against the accused.⁹¹ Indeed, if the law on double jeopardy is completely abolished then an accused could potentially be retried for the same criminal offence *ad infinitum*. Hence, what is proposed is a relaxation of the common law principle against retrials where fresh and compelling evidence of the accused's guilt subsequently emerges which in conjunction with the evidence tendered at the former criminal trial makes the prosecution's case substantially stronger. Permitting one retrial would also serve to ensure efficiency by the police in the investigation of crime and also by the prosecution in the presentation of the evidence against the accused during the course of the criminal trial. Indeed, the proposed relaxation of the principle against double jeopardy would also serve to enhance public confidence in the criminal justice system where those who as a matter of fact are guilty of the commission of serious criminal offences are tried and punished accordingly, thereby avoiding the potential for "private vengeance."

Although the criminal justice system is efficient in the prosecution of criminal offenders, there is undoubtedly a *lacuna* in the criminal justice process since an accused cannot be retried in circumstance where fresh and compelling evidence of his guilt is discovered following an acquittal, especially in consideration of new procedures for gathering forensic evidence.

RETROSPECTIVE EFFECT OF DOUBLE JEOPARDY LAW REFORM

An important issue concerning the prospective reform of double jeopardy law in Ireland is whether an order for a retrial would, or should, have retrospective effect. The principle against retroactive criminal laws stipulates that parliament shall not declare acts (or omissions) to be criminal offences that were not so at the time of their commission.⁹² This is essential in accordance with the "rule of law" so that individuals may engage in activities with the knowledge that this

90. An order for a retrial should only be made in the interests of justice, taking into consideration the adverse effects of pre-trial publicity surrounding the case.

91. Double jeopardy law reform in the United Kingdom stipulates that only one retrial may proceed: Criminal Justice Act 2003, section 76(5).

92. See further: S R Munzer, "A Theory of Retroactive Legislation" (1982) 61 *Texas Law Review* 425; C B Hochman, "The Supreme Court and the Constitutionality of Retroactive Legislation" (1960) 73 *Harvard Law Review* 692; E E Smead, "The Rule against Retroactive Legislation as a Principle of Jurisprudence" (1936) 20 *Minnesota Law Review* 775.

would not constitute a criminal offence.⁹³ Retrospective effect of the proposed reforms of double jeopardy law is concerned with amending a rule of criminal procedure. Therefore it would not *per se* constitute an infringement of the principle against non-retroactive criminal offences, but rather the removal of a legal impediment against retrials.⁹⁴ Moreover, individuals knew they were engaged in criminal activity at the pertinent time and were “acquitted” despite evidence of their guilt, assuming of course they are guilty of the criminal offences charged.

The principle against non-retroactive criminal laws is provided for by the Constitution of Ireland,⁹⁵ and the European Convention on Human Rights.⁹⁶ However, neither of these provisions places any legal impediment against retroactive criminal procedure, which is significant for the proposed reforms of double jeopardy. Consequently, if the activity were a criminal offence at the time of its alleged commission or omission, an application by the prosecution for a retrial of an offence committed before the proposed reforms take effect, this would not infringe the principle against non-retroactive criminal laws.

If the law on double jeopardy is reformed in Ireland thereby permitting retrials where the accused had been acquitted perhaps several decades previously, this will not infringe the principle of non-retroactivity of criminal laws. In other words, proposed reforms of double jeopardy would not create any new substantive criminal offence but rather amend a rule of criminal procedure. The essential point being that the principle of non-retroactivity does not raise any legal impediment to the proposed reforms of the common law principle against double jeopardy, assuming of course that the offence charged in the current indictment was a criminal offence known to the criminal law at the date of its commission.⁹⁷ If the law on double jeopardy is ultimately reformed this may resolve many unsolved older cases where contemporary procedures for gathering evidence, such as DNA, voice recognition and facial mapping technology, were not established at the time of the initial investigation by the police prior to the initial criminal trial, perhaps several decades previously.

It is essential that proposed reforms of double jeopardy law have retrospective effect. Indeed, it is cases where the criminal offences were

93. See further J W Bridge, “Retrospective Legislation and the Rule of Law in Britain” (1967) 35 *University of Missouri at Kansas City Law Review* 132.

94. Retrospective effect of double jeopardy law reform is provided for by the Criminal Justice Act 2003, section 75(6) (UK).

95. Constitution of Ireland, Article 15.5.1°.

96. ECHR, Article 7.1; see further: *Achour v France* [2006] ECHR 67335/01; *Ozturk v Turkey* [2005] ECHR 29365/95.

97. This is encapsulated in the maxim *nullum crimen sine lege*; see: *King v Attorney General* [1981] IR 223 (SC); *The People (Attorney General) v Edge* [1943] IR 115 (SC).

committed perhaps decades previously that would be the spur to reforming the law on double jeopardy. Therefore, without retrospective effect of the proposed relaxation of the common law principle against double jeopardy, unsolved older cases would be immune from further prosecution.⁹⁸ Those individuals who are blatantly aware that their “acquittal” was in fact tainted and therefore not on the merits will be concerned with the proposed relaxation of the double jeopardy prohibition. However, what must also be considered are those individuals who are innocent of the criminal offences and have been formerly acquitted.

INTERNATIONAL LAW PROVISIONS

Provision against retrials for the same offence following an acquittal is also provided for by international human rights instruments and also in civil law jurisdictions where it is known as *non (ne) bis in idem*.⁹⁹ There are legislative provisions in Ireland preventing retrials in this jurisdiction where the accused has been acquitted or convicted of the comparative offence in another jurisdiction to which the provision relates.¹⁰⁰ International law provisions¹⁰¹ against retrials will undoubtedly gain significance with the increase in cross-border international crime in addition to jurisdictional problems rendering the effective prosecution

98. See the *Third Report of the Home Affairs Select Committee*, “The Double Jeopardy Rule” (1999-2000) HC Paper No 190, at [54] stating:

Retrospection will be a controversial area if legislation is brought forward to amend the double jeopardy law. Without retrospection, the change would take years to have any impact and would leave a sense of frustration about past cases. Time limits would further restrict the benefits of such a change and there is a risk that the strongest cases for a retrial would happen to fall just outside the limits chosen.

99. See further: M Fletcher, “Some Developments to the *Ne Bis In Idem* Principle in the European Union: Criminal Proceedings Against *Huseyn Gözütok* and *Klaus Brügge*” (2003) 66 *Modern Law Review* 769; van den Wyngaert and G Stessens, “The International *Non Bis In Idem* Principle: Resolving Some of the Unanswered Questions” (1999) 48 *International and Comparative Law Quarterly* 779; J E Costa, “Double Jeopardy and *Non Bis In Idem*: Principles of Fairness” (1998) 4 *University of California Davis Journal of International Law and Policy* 181.

100. Criminal Justice (Terrorist Offences) Act 2005, section 46; Criminal Justice (Safety of United Nations Workers) Act 2000, section 10; Sexual Offences (Jurisdiction) Act 1996, section 9; Criminal Law (Jurisdiction) Act 1976, section 15; Extradition Act 1965, section 17. These provisions afford statutory protection against retrials in accordance with the principle of *ne bis in idem* in international law.

101. See for example: Rome Statute of the International Criminal Court 1998, Article 20 (*Ne bis in idem*); Charter of Fundamental Rights of the European Union 2000, Article 50; Convention Implementing the Schengen Agreement 1985, Article 54.

of offences more difficult to achieve. International law provisions on the principle against retrials whereby the accused may be subject to multiple criminal law prosecutorial jurisdictions further exacerbates the difficulties associated with double jeopardy jurisprudence.

Article 6(1) of the European Convention on Human Rights¹⁰² provides that everyone charged with a criminal offence should have the charges against him determined within a reasonable period of time before an independent and impartial court.¹⁰³ The ECtHR has inferred certain rights under this provision.¹⁰⁴ It was originally understood that Article 6(1) by definition included the right not to be tried twice for the same criminal offence,¹⁰⁵ although this contention has since been rejected.¹⁰⁶ Nevertheless, the significance of this provision of the ECHR is that if the reviewing court makes an order for a retrial, this must proceed within a reasonable period of time from arrest and detention.

The most pertinent provision of the ECHR is Article 4(1) of Protocol 7,¹⁰⁷ which stipulates:

No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same state for an offence for which he has already been *finally* acquitted or convicted in accordance with the *law and penal procedure* of that state.

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102. The ECHR became part of domestic law through the European Convention on Human Rights Act 2003. See the remarks by Kearns J *Dublin City Council v Fennell* [2005] 1 IR 604, at 608 (SC) noting that the Act of 2003 does not purport to incorporate the Convention directly into domestic law.
103. The issues of concern with the elongation of the trial process has been examined by the ECtHR: *Corigliano v Italy* (1983) 5 EHRR 334 (breach of Article 6.1); The Court will consider the complexities of the case but the workload of the courts or insufficient state resources will not *per se* justify a delay: *Zimmerman and Steiner v Switzerland* (1984) 6 EHRR 17.
104. For example, in *Golder v United Kingdom* (1975) 1 EHRR 524, the ECtHR inferred a fundamental right of access to the courts in accordance with the provisions of Article 6(1).
105. *X v Austria*, Application No 4212/69, 35 CD 151 (13 July 1970); *X v Netherlands*, Application No 9433/81, 27 DR 233 (11 December 1981).
106. In *S v Federal Republic of Germany* (1983) 39 DR 43 at 47 it was stated that Article 6 assures “neither expressly nor by way of implication the principle of *ne bis in idem*.”
107. Emphasis added. “Protocol 7 was adopted so as to bring the Convention into line with the broader range of rights protected under the International Covenant on Civil and Political Rights (ICCPR)”: B Emmerson, and A Ashworth, *Human Rights and Criminal Justice* (Sweet & Maxwell, 2001), at 303.

The prosecution right of appeal would be considered part of the “law and penal procedure” and therefore would not constitute an infringement *per se* of Protocol 7, Article 4(1), as this is part of the normal progress of a case in criminal justice process as opposed to new proceedings constituting a second prosecution for the same offence. This provision may only be invoked once the accused has been “finally” acquitted or convicted, *ie* the appeal process has been exhausted. It has been held that the purpose of Article 4(1) of Protocol 7, ECHR is to prevent the repetition of criminal trials that have been formerly concluded by a final decision.¹⁰⁸ A significant feature of this provision is that the accused must have been “acquitted or convicted in accordance with the law and penal procedure of that state,” in other words, it is not applicable between states *inter se*, but only against multiple prosecutions within the same jurisdiction.¹⁰⁹ Consequently, this provision does not prevent an accused from being prosecuted and convicted for the same offence in another jurisdiction, unlike domestic legislation in Ireland.¹¹⁰

What is significant for the purposes of the proposed reforms of double jeopardy law in this jurisdiction is the stipulation in Article 4(2) of Protocol 7, which provides that a retrial may proceed where new evidence is discovered:

The provision of the preceding paragraph [Article 4(1)] shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is *new or newly discovered facts*, or there has been a fundamental defect in the proceedings, which could affect the outcome of the case (emphasis added).

Consequently, there would be an exception where there had been procedural irregularities during the course of the initial criminal trial, in addition to the new evidence exception. More to the point, this provision allows for the admissibility of “newly discovered facts” in order to “reopen a case,” *ie* a retrial for the alleged commission of the same criminal offence.¹¹¹ This is significant

108. *Gradinger v Austria* [1995] ECHR 15963/90.

109. *S v Federal Republic of Germany* (1983) 39 DR 43.

110. See note 100.

111. This issue arose for consideration in *Nikitin v Russia* [2004] ECHR 50178/99, at [45] where the ECtHR stated:

art 4 of Protocol No 7 draws a clear distinction between a second prosecution or trial which is prohibited by the first paragraph of this Article, and the resumption of a trial in exceptional circumstances, which is provided for in its second paragraph. Article 4(2) of Protocol No 7 expressly envisages the possibility that an individual may have to accept, *in accordance with domestic law*, prosecution on the same counts where a case is re-opened following the emergence of new evidence or the discovery of a fundamental defect in the previous proceedings (emphasis added).

with regard to the proposed reforms of double jeopardy law in Ireland, Australia and New Zealand, and the recent reforms in the United Kingdom and New South Wales, whereby a retrial for the same criminal offence could be initiated by the subsequent discovery of fresh and compelling evidence of the accused's guilt.

The application of the principle against double jeopardy in common law jurisdictions stipulates that there must have a final verdict of acquittal or conviction before the pleas in bar against a second trial for the same criminal offence may be raised. This requirement is also specified by the ECHR as is evidenced by the Explanatory Report to Protocol 7, which provides that a decision will be regarded as final:

if ... it has acquired the force of *res judicata*. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them.¹¹²

Protocol 7 while prohibiting fresh proceedings does allow for the continuation of proceedings. Article 4(2) of Protocol 7 provides for a retrial where there has been "a fundamental defect in the previous proceedings, which could affect the outcome of the case." What constitutes a "fundamental defect" will be determined in accordance with the particular circumstances of a criminal trial. Nevertheless, Article 4(2) of Protocol 7 provides for an exception to the principle of *non bis in idem* in circumstances where fresh evidence of the accused's guilt of the criminal offences charged is subsequently discovered. Indeed, there is no legal impediment under the provisions of Article 4 to two criminal trials for separate offences arising out of the same criminal transgression.¹¹³

The ECHR is now directly applicable in Irish law; consequently the exception to the principle against double jeopardy as provided for by Article 4(2) of Protocol 7 may enhance current proposals for a relaxation of the principle against retrials where fresh and compelling evidence is discovered following an acquittal.

Provision against retrials is also provided for by Article 14(7) of the International Covenant on Civil and Political Rights,¹¹⁴ which stipulates:

112. Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Explanatory Memorandum [22].

113. *Oliveira v Switzerland* [1998] ECHR 25711/94; *Gradinger v Austria* [1995] ECHR 15963/90; *Fischer v Austria* [2001] ECHR 37950/97.

114. The rights protected by the ICCPR, and the first Optional Protocol (the first Optional Protocol was ratified by Ireland on 8 December 1989) are broadly similar to those of the ECHR. Cases brought within the jurisdiction of the ICCPR are dealt with by the Human Rights Committee (this is the body endowed with the responsibility

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the *law and penal procedure* of each country (emphasis added).

The prosecution right of appeal would be considered part of the “law and penal procedure” and therefore would not constitute an infringement *per se* of Article 14(7). Moreover, as with Article 4(1) of Protocol 7 to the ECHR, this provision is only applicable “in accordance with the law and penal procedure of each country” and therefore is not applicable between states *inter se*.¹¹⁵

Article 14(7) of the ICCPR expressly provides for the proscription against retrials for the same criminal offence without exception, such as a tainted acquittal or indeed should fresh and compelling evidence of the accused’s guilt subsequently emerge following an acquittal. It is interesting to note, however, that the Human Rights Committee has suggested that the reopening of criminal proceedings where this procedure is “justified by exceptional circumstances” may not infringe the maxim *ne bis in idem*:

It seems to the Committee that most State parties make a clear distinction between a resumption of a trial justified by exceptional circumstances and a retrial prohibited pursuant to the principle of *ne bis in idem* as contained in paragraph 7 [of Article 14].¹¹⁶

Thus, domestic laws of signatory states may provide for an exception to the principle of *ne bis in idem*, albeit in strictly limited circumstances.

A significant feature of the relevant provisions of the ECHR and the ICCPR is that the principle of *ne bis in idem* is applicable only in accordance with the law and penal procedure of individual States. Consequently, these provisions are inapplicable between States *inter se* whereby an accused could potentially be re-prosecuted in a state following an acquittal or conviction for the same or comparative offence in another state. This scenario would most likely occur in the prosecution of cross-border crimes. However, this deficiency in the principle

of implementing the ICCPR). The ICCPR was signed by Ireland on 1 October 1973 and subsequently ratified on 8 December 1989.

115. In *AP v Italy* (Application No 204, 1986) at [7.3], the Human Rights Committee decided: “article 14, paragraph 7, of the Covenant ... does not guarantee *non bis in idem* with regard to the national jurisdictions of two or more States. The Committee observes that this provision prohibits double jeopardy only with regard to an offence adjudicated in a given State.”

116. United Nations Human Rights Committee, General Comment 13 (Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law), at [19].

of *ne bis in idem* in international law is currently being addressed by the EU Commission and a Framework Decision is anticipated in due course.¹¹⁷

CONCLUSION

With the continued unconditional application of the common law principle against retrials, an individual cannot be retried for the same criminal offence regardless of the cogency of fresh and compelling evidence of guilt. The criminal justice system needs to keep pace with the advancements made in forensic science. Just as forensic evidence can expose wrongful convictions so should it also be available to convict the guilty.

It has been judicially propounded that the accused's rights to fair procedures is superior to the community's right to prosecute alleged perpetrators of crime.¹¹⁸ However, this must be reconciled with the collective interest of society in prosecuting and punishing those who, as a matter of fact and law, are guilty of the criminal heinous offences even if this requires a second trial for the same criminal offence, albeit in strictly limited circumstances in the light of fresh and compelling evidence of the accused's guilt.

The proposed reform of the common law principle against double jeopardy in Ireland based on the subsequent discovery of fresh and compelling evidence of the accused's guilt, for example an eye-witness,¹¹⁹ DNA forensic evidence, fingerprints or blood samples, voice recognition and facial mapping technology, accords with recent and proposed reforms in other common law jurisdictions.

Reforming the law of double jeopardy thereby permitting a retrial for the same criminal offence does not create any new substantive criminal offence but merely makes an alteration to an aspect of criminal procedure, which is permissible without infringing the principle against non-retroactivity. The significance of retrospective effect is that procedures for gathering forensic evidence may not have been available at the time of the commission of the criminal offence, which may have occurred decades previously. Retrospective effect of the proposed reforms of double jeopardy law could serve to resolve unsolved cases.

Several contentions issues remain to be determined before double jeopardy is reformed in this jurisdiction. What will be considered "fresh and compelling" evidence as the basis for an application to quash an acquittal? What safeguards

117. See further Commission Green Paper on *Conflicts of Jurisdiction and the Principle of Ne bis in Idem in Criminal Proceedings* (COM(2005) 696 final).

118. *D v Director of Public Prosecutions* [1994] 2 IR 465 (SC); *Z v Director of Public Prosecutions* [1994] 2 IR 476 (HC & SC).

119. *DPP v O' Connor* 13 July 1994 (HC).

will be put in place to prevent the repetitive harassment of accused persons with the objective of seeking a retrial until a conviction is achieved? Would reform shift the balance in court from the accused to the prosecution and victims of crime? Is there a real danger that if the appellate court quashed an acquittal and ordered a retrial the jury may assume that in consideration of the fact that superior court judges considered new evidence persuasive as to the accused's guilt, their role as jurors is simply to endorse a conviction? Would a dilution of the principle against double jeopardy undermine the important values it protects? While these are valid considerations against retrials for the same criminal offence, these have to be reconciled with the collective interests of society in convicting and punishing those individuals who have committed heinous criminal offences.