

# Post-Acquittal Retrial for Serious Criminal Offences

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## Introduction

The common law principle against double jeopardy is a proscription against retrials for the same criminal offence following a trial on the merits by a court of competent criminal jurisdiction.<sup>1</sup> The Minister for Justice, Equality and Law Reform has indicated that the law on double jeopardy might be reformed in this jurisdiction.<sup>2</sup> This proposed statutory modification would not abolish the principle but rather provide for an exception where fresh and compelling evidence of the accused's guilt is discovered following an acquittal or indeed where the acquittal has been tainted by an administration of justice offence.

This article evaluates policy considerations in favour of the retention of the double jeopardy principle and alternatively whether the law on double jeopardy should be reformed in this jurisdiction as it has been in several common law jurisdictions.

## Rationale of the double jeopardy principle

In *Green v United States*,<sup>3</sup> Black J. gave the following justification for the principle:

“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.”<sup>4</sup>

The principle developed at common law in response to the deficiencies in medieval criminal trial procedure to the advantage of the prosecution, in addition to the cruel and inhumane punishments traditionally imposed on defendants.<sup>5</sup>

## Multiple punishments for the same criminal offence

The principle of double jeopardy was also designed to prevent the imposition of multiple punishments for the same criminal offence in separate proceedings. Typically, this includes

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<sup>1</sup> This assumes that the appellate process has been exhausted. Double jeopardy is expressed by the special pleas in bar, *autrefois acquit* (formerly acquitted) and *autrefois convict* (formerly convicted). Most of the issues pertaining to double jeopardy law reform apply equally to a retrial following an acquittal or conviction.

<sup>2</sup> “Dermot Ahern announces Justice for Victims Initiative” 19 June 2008: <http://www.justice.ie/en/JELR/Pages/Dermot%20Ahern%20announces%20Justice%20for%20Victims%20Initiative> (accessed 16 January 2009).

<sup>3</sup> (1957) 355 US 184 (SC).

<sup>4</sup> *Ibid.* at 187-188.

<sup>5</sup> See Hunter, “The Development of the Rule against Double Jeopardy” (1984) 5 *Journal of Legal History*, 3; Sigler, “A History of Double Jeopardy” (1963) 7 *American Journal of Legal History*, 283.

sentence review, the confiscation of criminal assets and the proceeds of crime, and professional disciplinary proceedings.

Where a conviction has been quashed and a retrial ordered,<sup>6</sup> if the defendant is reconvicted and sentenced without credit been given for the period of imprisonment served on the original sentence this would constitute an infringement of the double jeopardy principle. Likewise, if the prosecution authorities appeal an unduly lenient sentence,<sup>7</sup> and the appellate court increases the original sentence imposed by the trial court, the defendant must be credited with the period of imprisonment served on the original sentence. This is referred to as the ‘double jeopardy discount.’<sup>8</sup>

The issue of multiple punishments also pertains where the prosecution instigate civil proceedings for the confiscation of criminal assets or the proceeds of crime, prior to, or following a criminal trial.<sup>9</sup> This issue was considered in *Ursery v United States*,<sup>10</sup> where the Supreme Court held that civil forfeiture would not *per se* constitute punishment for purposes of the Double Jeopardy Clause of the United States Constitution. The Court distinguished proceedings that are civil and remedial (which do not violate the double jeopardy principle) from proceedings that are criminal and punitive (that would constitute an infringement of the double jeopardy principle).

The prosecution authorities may proceed with parallel proceedings, that is, a criminal trial and *in rem* civil forfeiture proceedings based on the same criminal transgressions.<sup>11</sup> Proceedings that are civil and remedial would not prevent a court of competent criminal jurisdiction from subsequently imposing punishment arising out of the same set of facts. It is only in circumstances where the prosecution is attempting in both the civil proceedings and the criminal trial to impose multiple punishments for the same offence that the courts would intervene to prevent this procedure either as being an abuse of the process of court or indeed constituting an infringement of the common law principle against double jeopardy. The prosecution authorities would also be estopped from attempting to establish in subsequent civil proceedings that the accused was in fact guilty of the criminal offences for which he had been formerly acquitted by a court of competent criminal jurisdiction.

The issue of multiple punishments also pertains to cases where the individual is summoned before a professional disciplinary inquiry (committee of discipline) following a criminal trial. In *Re National Irish Bank (No. 2)*,<sup>12</sup> Kelly J. remarked: “[t]he principle of double jeopardy is normally one associated with the criminal law. It may arguably extend to other tribunals which exercise disciplinary functions.”<sup>13</sup> Typically, this relates to public bodies with statutory authority to impose disciplinary sanctions where the individual was formerly acquitted or convicted of a criminal offence,<sup>14</sup> or professional misconduct.<sup>15</sup> However, where an individual has been acquitted or

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<sup>6</sup> Criminal Procedure Act 1993, s. 3(1)(c) and s. 4; Courts of Justice Act 1928, s. 5(1)(b) and (2).

<sup>7</sup> Criminal Justice Act 1993, s. 2.

<sup>8</sup> See Coffey, “The Influence of Double Jeopardy on the Sentencing Process” (2006) 16 *Irish Criminal Law Journal*, 8.

<sup>9</sup> See Campbell, “Theorising Asset Forfeiture in Ireland” (2007) 71 *Journal of Criminal Law*, 441.

<sup>10</sup> (1996) 518 US 267 (SC).

<sup>11</sup> *In rem* (against property) civil forfeitures are not punitive whereas *in personam* (against the individual) penalties such as fines are punitive. In *Gilligan v Criminal Assets Bureau* [1998] 3 IR 185 at 217 (HC) McGuinness J. stated: “The means used in the procedures under the [Proceeds of Crime Act 1996] do not, however, have ‘all the features of a criminal prosecution.’ The action is strictly speaking an action ‘*in rem*’ rather than ‘*in personam*’....”

<sup>12</sup> [1999] 3 IR 190 (HC).

<sup>13</sup> *Ibid.* at 204.

<sup>14</sup> *Garvey v Minister for Justice* [2006] 1 ILRM 486; *Mooney v An Post* [1998] 4 IR 288; *McCarthy v Commissioner of An Garda Síochána* [1993] 1 IR 489 (HC); *Keady v Garda Commissioner* [1992] 2 IR 197 (SC); *McGrath v Commissioner of An Garda Síochána* [1991] 1 IR 69 (SC).

conviction on a criminal charge, a disciplinary inquiry is not thereafter precluded from considering the circumstances which gave rise to the criminal charges been proffered and whether the individual should be dismissed or other sanctions imposed for breach of institutional regulations.

## **Arguments against retrials**

The principle of double jeopardy prevents the prosecution authorities from convicting an accused solely through persistence by repeated, perhaps inefficient, criminal trials. Reforming the law on double jeopardy could ultimately erode the multifarious rights of the accused in the criminal justice process with the result that the accused would not receive a fair trial.<sup>16</sup>

### ***Presumption of innocence***

In liberal democratic states the presumption of innocence is a fundamental right of the accused in the criminal justice process.<sup>17</sup> It is an implied constitutional right in accordance with Article 38.1, and is also provided for by the European Convention on Human Rights.<sup>18</sup>

The presumption of innocence could be undermined if the law on double jeopardy is reformed and statutory provision is made for the prosecution authorities to make an application to the appellate court to quash an acquittal in the light of fresh and compelling evidence of the accused's guilt. Eroding the presumption of innocence through repeated prosecutions for the same offence could result in wrongful convictions and punishment of innocent persons.

In jurisdictions that have modified the double jeopardy principle, the prosecution can make an application to the appellate court for an order quashing an acquittal and an order for retrial in the interests of justice where there is new and compelling evidence of the accused's guilt. There must be a strong case that the accused would be convicted if a retrial is ordered. However, if a retrial is ordered, the jury must not see their function as simply 'confirming' a conviction. The jury in the case of a retrial could be biased against the accused due to adverse pre-trial publicity (quashing an acquittal and ordering a retrial). Both the trial court and the jury must be impartial in the criminal trial process and the determination of the guilt or innocence of an accused based on the evidence tendered during the course of the criminal trial. Otherwise the decision of the court may be subject to a judicial review based on procedural impropriety.

### ***Risk of wrongful convictions***

Retrials for the same criminal offence significantly increase the risk of wrongful convictions and there is also a real danger of miscarriages of justice. Friedland,<sup>19</sup> writes:

“In 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

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<sup>15</sup> *AA v Fitness to Practice Committee of the Medical Council* [2002] 3 IR 1 (HC); *Cf. Shine v Fitness to Practice Committee of the Medical Council* [2008] IESC 41.

<sup>16</sup> *Cf. Roberts*, “Justice for All? Two Bad Arguments (and Several Good Suggestions) for Resisting Double Jeopardy Law Reform” (2002) 6 *International Journal of Evidence and Proof*, 197.

<sup>17</sup> See Hamilton, *The Presumption of Innocence in Irish Criminal Law: Whittling the Golden Thread* (Irish Academic Press, 2007).

<sup>18</sup> Article 6(2).

<sup>19</sup> Friedland, *Double Jeopardy* (Clarendon Press, 1969).

witness-box himself. The prosecutor can study the transcript and may thereby find apparent defects and inconsistencies in the defence evidence to use at the second trial.”<sup>20</sup>

This reflects the infallibility of the criminal trial process.

The prosecution authorities would have a tactical advantage in the sense of knowing the core strategies put forward by the defence, and could modify their prosecution strategies for a retrial. This might enhance the probability of a conviction despite a proper determination of the guilt or innocence of the accused on the merits. Conversely, the defence could also adapt their case to the prosecution strategies during the first trial.

In a criminal trial the burden of proof rests with the prosecution authorities to establish the guilt of the accused beyond reasonable doubt. This is a very high standard which in conjunction with rules of evidence and criminal procedure is designed to prevent wrongful convictions. These procedural safeguards are equally applicable in the case of a retrial and it is unlikely that additional weighting is needed against wrongful convictions so that retrials would be prevented altogether.

Retrials are generally permitted where a conviction has been quashed or where the jury had failed to agree a verdict following the initial trial. In order for the prosecution to make an application to quash an acquittal and order for retrial, there must be fresh and compelling new evidence, that is, strong evidence of the accused’s guilt. It follows that the risk of wrongful convictions in the case of a retrial could be reduced in the light of such strong evidence; this could reduce the number of wrongful acquittals for serious criminal offences. This raises the policy issue as to whether the risk of wrongful conviction should outweigh statutory modification of the double jeopardy principle based on fresh and compelling evidence of the accused’s guilt;

### ***Adverse pre-trial publicity***

This pertains to fettering the discretion and impartiality of the criminal trial process whereby the jury may be influenced by adverse pre-trial publicity against the accused, via print and electronic media, including the internet.<sup>21</sup>

The potential for adverse pre-trial publicity associated with a retrial based on fresh and compelling evidence of guilt or where there has been a tainted acquittal could infringe the right to a fair trial in due course of law. This would be prejudicial to a fair retrial. It could also result in the accused’s fundamental right to the presumption of innocence being eroded.

In *R v Maxwell*,<sup>22</sup> Phillips J., rejecting defence submissions that publicity would preclude a fair trial, stated:

“...the court will only be justified in staying a trial on the ground of adverse pre-trial publicity if satisfied on a balance of probabilities that if the jury returns a verdict of guilty the effect of the pre-trial publicity will be such as to render that verdict unsafe and unsatisfactory. In considering this question the court has to consider the likely length of time the jury will be subject to the trial process, the issues that are likely to arise and the evidence that is likely to be called in order to form a view as to whether it is probable that – try as they may to disregard the pre-trial publicity – the jury’s verdict will be rendered unsafe on account of it.”

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<sup>20</sup> *Ibid.* p. 4.

<sup>21</sup> See Duffy, “Pre-trial Publicity, Prejudice, and the Right to a Fair Trial” (1994) 4 *Irish Criminal Law Journal*, 113.

<sup>22</sup> Unreported, 6 March 1995; cited in *R v Dunlop* [2007] 1 WLR 1657 at 1663 (CCA), *per* Lord Phillips.

It is the responsibility of the trial judge to determine whether there was an unavoidable unfairness of trial. The issue was considered in *The DPP v His Honour Judge Kevin Haugh and Charles J. Haughey (No. 2)*,<sup>23</sup> where Carroll J. stated:

“The possibility of asking prospective jurors at the time of empanelling a jury to say whether in view of adverse publicity they would not be able to bring an open mind to the trial and if so to inform the trial judge if chosen, was never canvassed before the respondent. It may be that there would not be an unavoidable unfairness of trial unless the procedure of allowing jurors to disqualify themselves because of the effect of adverse publicity, was followed. However...it is the trial judge who must decide the question of whether there is an unavoidable unfairness of trial and there is no requirement of law that an attempt to empanel an unbiased jury must first be made.”<sup>24</sup>

The trial 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. It is imperative that proposed reforming legislation provides for restrictions on media reporting of an application by the prosecuting authorities to quash an acquittal with an order for a retrial; alternatively, the *sub judice* rule could be applied.<sup>25</sup>

Statutory modification of the double jeopardy principle must ensure a fair retrial. If there is adverse pre-trial publicity/reporting on the decision by the appellate court to quash an acquittal based on new and compelling evidence, then a fair retrial could be prejudiced. The courts retain an inherent discretion (despite reporting restrictions) to stay criminal proceedings in the interests of justice so as to prevent an abuse of the courts process, which could also operate to prevent a 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.

### ***Public confidence in the criminal justice system***

In *Connelly v DPP*,<sup>26</sup> having outlined the injustices in permitting retrials Lord Devlin opined “[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.”<sup>27</sup> Permitting retrials in circumstances where the State had failed to establish the guilt of the accused could diminish public confidence in the efficiency of law enforcement and prosecution authorities in the investigation and prosecution of serious crime.

Investigative and prosecutorial efficiency, by the police and prosecution authorities, are important issues to be considered in any proposed reforms of the double jeopardy principle. Permitting retrials could potentially lead to inefficient investigations and prosecution of serious criminal offences, with the prospect of a second trial for the same offence.

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<sup>23</sup> [2001] 1 IR 162 (HC).

<sup>24</sup> *Ibid.* at 168-169. See O’Donnell, “The Jury on Trial: Reflections on *DPP-v-Haugh*” (2000) 5 *Bar Review*, 470.

<sup>25</sup> See Law Reform Commission of Ireland, *Report on Contempt of Court* (LRC 46-1994), chapter 6 “The *Sub Judice* Rule.”

<sup>26</sup> [1964] AC 1254 (HL).

<sup>27</sup> *Ibid.* at 1353.

### ***Trial (and verdict finality) within a reasonable period of time***

The accused enjoys the right to an expeditious criminal trial as provided for by the Constitution<sup>28</sup> and the ECHR.<sup>29</sup> The general policy issue of finality in criminal litigation also pertains to proposed double jeopardy law reform. Permitting retrials for the same criminal offence could unduly prolong the prosecution of serious criminal offences. The principle of double jeopardy also serves to ensure finality in litigation which is essential for the effective administration of the criminal justice system. For the accused, it ensures that he is not 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.<sup>30</sup>

The principle of finality of litigation in criminal trials 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. However, where the challenge to a conviction is well-founded the individual's constitutional right to personal liberty could take priority over the importance attached to the stability of verdicts in criminal trials.

Finality of verdicts pertaining to acquittals has generally been regarded as taking priority over convictions. Following an acquittal, individuals should be able to plan the rest of their life without the fear of a possible retrial at some future unspecified date. The right to self-determination in this context stipulates that the individual should be able to make a fresh start in life without undue restraints such as the knowledge that he may be required to undergo a retrial at some future unspecified date if the acquittal is reopened.

### ***Investigative and prosecutorial diligence***

Double jeopardy law reform is premised in the discovery of fresh and viable evidence of the accused's guilt, provided that this evidence could not have been discovered with the exercise of due diligence for the initial trial. However, prior to the first trial, the police and prosecution authorities would not have the knowledge of this evidence might become available, so the incentive for the police and prosecution authorities to efficiently prosecute the case against the accused at the first trial should not be lost.

The double jeopardy principle also serves to promote efficient investigation of crime by the police and prosecution of offenders by the prosecution authorities (to marshal their resources for an effective prosecution) with the knowledge that only one prosecution is permitted (subject to a conviction being quashed or a hung-jury). Thus, there is an incentive to pursue other aspects of criminal activity / suspects by the police and for the prosecution to prepare their case adequately.

Would the fresh 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 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 challenges to be made against evidence tendered by the prosecution and this is no less applicable in the case of a retrial. Should the risk of evidence being fabricated against the accused be sufficient to outweigh statutory provision for retrials?

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<sup>28</sup> The right to a trial within a reasonable time of arrest and detention is an unspecified constitutional right in accordance with Article 38.1.

<sup>29</sup> Article 6(1).

<sup>30</sup> See *e.g.* Doherty and O'Keefe, "Justice Denied: Delay in Criminal Cases" (1998) 49 *Northern Ireland Legal Quarterly*, 385.

### ***Resources in the criminal justice process***

There is an inherent imbalance between the resources available to the accused, financial and otherwise, with those of the prosecution authorities, for example, the Forensic Science Laboratory, which forms part of the Department of Justice, Equality and Law Reform, offers a full scientific service from crime scene to court to various agencies, mainly An Garda Síochána.<sup>31</sup> Likewise, the Forensic Science Service provides police forces in England and Wales with forensic science services.<sup>32</sup>

Most individuals would not have the stamina or indeed the resources to challenge 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. This is exacerbated in the case of a retrial in circumstances where an acquittal has been quashed and a retrial ordered as the accused would not have the resources and stamina to endure a retrial for the same offence following an acquittal.

### ***Harassment factor***

In liberal democracies it is the duty of the state to treat its citizens with dignity and due respect.<sup>33</sup> Retrials by the state following an acquittal could be viewed as an instrument of oppression in consideration of the distress and anxiety already endured by the accused. The distress of the criminal justice process presents a dilemma in the case of double jeopardy law reform. However, retrials are already permitted in defined circumstances notwithstanding this aspect of the trial process. Where the jury has failed to agree or the Court of Criminal Appeal has quashed a conviction, a retrial may proceed notwithstanding the repeated (and perhaps increased) distress and anxiety.

While the harassment factor may be invoked in support of the retention of the double jeopardy prohibition, the principle is already subject to exceptions, and this could be extended to include double jeopardy law reform. If fresh and viable evidence is discovered following an acquittal, the victims of crime and witnesses at the first trial may very well be willing to endure the repeated distress associated in the case of a retrial with the possibility that the perpetrator may be convicted. Should the distress and anxiety to victims of crime where a retrial is not permitted counterbalance the distress and anxiety visited on the accused?

## **Statutory modification of the double jeopardy principle**

The criminal justice system serves to enforce the criminal law. Double jeopardy law reform provides for the general public interest in the prosecution, conviction and punishment of serious criminal offences.

The law on double jeopardy has recently been reformed in several common law jurisdictions, which has been premised on two procedural issues: that a retrial should be permitted where fresh and compelling evidence of the accused's guilt is discovered by means of contemporary forensic techniques; or where there has been a tainted acquittal. A retrial in any particular case must be in the interests of justice.<sup>34</sup>

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<sup>31</sup> <http://www.forensicscience.ie/> (accessed on 16 January 2009).

<sup>32</sup> <http://www.forensic.gov.uk/> (accessed on 16 January 2009).

<sup>33</sup> This is provided for by the Preamble to the Irish Constitution.

<sup>34</sup> See Hamer, "The Expectation of Incorrect Acquittals and the 'New and Compelling Evidence' Exception to Double Jeopardy" (2009) *Criminal Law Review*, 63; Roberts, "Double Jeopardy Law Reform: A Criminal Justice Commentary" (2002) 65 *Modern Law Review*, 393; Corns, "Retrial of Acquitted Persons: Time for Reform of the Double Jeopardy

Proposed legislative reform in this jurisdiction would make provision for the prosecution authorities to make an application to the appellate court, subject to defined procedures, to quash an acquittal where fresh and compelling evidence of the accused's guilt has emerged following an acquittal. A complete eradication of the double jeopardy protection could potentially result in retrials *ad infinitum*, which is anathema to criminal justice systems in liberal democratic states.

The European Convention on Human Rights makes provision for the prohibition against retrials for the same offence within the jurisdiction of the same state.<sup>35</sup> This is not an absolute right as a retrial may proceed "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."<sup>36</sup>

Principal arguments against retrials for the same criminal offence must be reconciled with the general public interest in the prosecution of serious criminal offences, which may necessitate a statutory modification of the double jeopardy principle in this jurisdiction.

### *New and compelling evidence*

Fresh and compelling evidence of guilt of the accused's guilt could be discovered with new forensic techniques previously unavailable to law enforcement authorities. Likewise, where there has been a change to the laws governing the admissibility of evidence this could result in evidence of the accused's previously inadmissible at the original trial could now be tendered in evidence.

New forensic techniques for gathering evidence of crimes typically include voluntary post-acquittal confessions, DNA evidence,<sup>37</sup> voice recognition and facial recognition technology, and fingerprint evidence,<sup>38</sup> which could assist the police in solving older cases resulting in some acquittals being revisited. Further, the Serious Crime Review team was established in March 2007 as a specialist unit within An Garda Síochána to investigate and review unsolved homicides. Cases from January 1980 are currently within the purview of 'cold case review', however this may be extended where evidence or materials from cases pre-1980 is made available.<sup>39</sup>

This raises the policy issue as to whether the test for determining the strength 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.

### *Acquitting the guilty*

The principle of double jeopardy proscribes retrials for the same criminal offence following an acquittal notwithstanding the subsequent discovery of fresh and compelling evidence of the accused's guilt. Consequently, there is a legal impediment against retrying individuals who might be guilty of serious criminal offences.<sup>40</sup> It may be the case that an accused has been wrongfully

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Rule?" (2003) 27 *Criminal Law Journal*, 80, Parkinson, "Double Jeopardy Reform: The New Evidence Exception for Acquittals" (2003) 26 *University of New South Wales Law Journal*, 603.

<sup>35</sup> ECHR, Protocol 7, Art. 4(1).

<sup>36</sup> *Ibid.*, Art. 4(2).

<sup>37</sup> See Law Reform Commission of Ireland, *Report on the Establishment of a DNA Database* (LRC 78-2005); Heffernan, "A DNA Database" (2008) 18 *Irish Criminal Law Journal*, 105; Heffernan, "The Law Reform Commission's Proposed DNA Database: Issues of Scope" (2006) 12 *Medico-Legal Journal of Ireland*, 56. Cf. Young, "DNA Evidence: Beyond Reasonable Doubt?" (1991) *Criminal Law Review*, 264; Bond and Hammond, "The Value of DNA Material Recovered from Crime Scenes" (2008) 53 *Journal of Forensic Sciences*, 1.

<sup>38</sup> Cf. Newman, "The Limitations of Fingerprint Identifications" (2007, Spring) *Criminal Justice*, 36.

<sup>39</sup> See *Annual Report of An Garda Síochána 2007*, p. 4: <http://www.garda.ie/home.html> (accessed on 14 January 2009).

<sup>40</sup> Cf. Laudan, *Truth, Error, and Criminal Law: An Essay in Legal Epistemology* (Cambridge University Press, 2006), chapter 8 "Double Jeopardy and False Acquittals: Letting Felons and Judges off the Hook?"



acquitted because of an administration of justice offence, such as witness or jury intimidation, or an error by the trial judge, with the result that a retrial for the same offence would not be permissible. It is not uncommon for an ‘acquittee’ to boast or confess to his guilt following an acquittal.

If the accused had given evidence on oath at the original trial that he did not commit the offence, but later confesses to his crimes for which he had been acquitted, he could be charged with perjury, unless he had exercised his right to silence,<sup>41</sup> which is of little consequence to the victim.

The fundamental policy issue pertaining to double jeopardy law reform is whether the state should be prohibited from reopening an acquittal. New and compelling evidence of guilt, including post-acquittal confessions, are real possibilities for establishing the accused’s guilt of a serious criminal offence. This raises fundamental policy issues as to whether finality of acquittals should be absolute and unconditional and whether the principle of justice and finality in criminal litigation should be reconsidered?

### ***Public confidence in the criminal justice system***

The general interest of society in the effective investigation and prosecution of serious criminal offences could be eroded in circumstances where an accused cannot be prosecuted in the light of fresh and compelling evidence of guilt, or indeed where the accused confessed following an acquittal. Reforming the law on double jeopardy could enhance public confidence in the criminal justice process to efficiently investigate and prosecute serious criminal offences.<sup>42</sup>

In the case of acquittees who publically confess, and perhaps describe in detail how the offence was committed, the commission of serious offences, the criminal justice system could be brought into disrepute if it appears unable to respond efficiently.

### **How many retrials and for which offences?**

Only one application for retrial would be permissible. Where the accused has been acquitted following a second trial based on new and compelling evidence of his guilt, then the legitimacy of the second acquittal should be beyond doubt. In jurisdictions that have reformed the law on double jeopardy, the relevant legislation provides for one retrial only. The issue of concern here is that legislation might be amended by parliament and therefore it is possible that more than one retrial could proceed by statutory amendment.

Statutory modification of the double jeopardy principle is concerned with the most serious offences on the criminal calendar, 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. For less serious offences a purported retrial could be estopped by the inherent power of the criminal courts to prevent an abuse of the courts process.<sup>43</sup>

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<sup>41</sup> The accused enjoys an unspecified constitutional right to silence, this being a corollary of the specified constitutional right of freedom of expression in Article 40.6.1<sup>o</sup>.

<sup>42</sup> Cf. Green, “Public Opinion versus Public Judgment about Crime” (2006) 46 *British Journal of Criminology*, 131.

<sup>43</sup> See Young, Summers and Corker, *Abuse of Process in Criminal Proceedings* (3<sup>rd</sup> ed., Tottel Publishing, 2009); Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (2<sup>nd</sup> ed., Oxford University Press, 2008).

## Retrospectivity of double jeopardy law reform

The principle of non-retroactivity stipulates that laws shall not be enacted criminalizing acts or omissions that were not criminal offences at the time of their commission or omission, and is provided for by the Constitution<sup>44</sup> and the ECHR.<sup>45</sup> However, this does not prevent statutory modifications to criminal procedure having retrospective effect.

This is an important aspect of double jeopardy reform as contemporary forensic techniques for gathering evidence may not have been available to law enforcement authorities at the time the offence was committed, perhaps several decades previously. Statutory modification of the double jeopardy principle does not create any new substantive criminal offence but rather modifies a procedural aspect in the prosecution of offences and therefore would not *per se* present any legal impediment against double jeopardy law reform having retrospective effect.

## Reform in England and Wales

Double jeopardy law reform in England and Wales has been the model for reform in several other jurisdictions.<sup>46</sup> The spur to reform was the acquittal of five youths suspected of the racist murder in 1993 of a teenager, Stephen Lawrence. The defendant's were acquitted because of an inefficient police investigation and alleged institutional racism, in addition to the bungled prosecution of the case by the prosecution authorities. The *Macpherson Inquiry*,<sup>47</sup> which was established to report into the bungled prosecution of the defendants, recommend *inter alia* that there should be an exception to the double jeopardy principle in circumstances where fresh and compelling evidence of the accused's guilt is discovered following an acquittal.<sup>48</sup> The Macpherson Report considered that the absolute protection against retrials afforded by the double jeopardy principle 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.

The National Crime Faculty has considered that approximately 35 acquittees of murders, including those acquitted of the murder of Stephen Lawrence, might now face a retrial.<sup>49</sup>

The Home Affairs Select Committee reviewed the law on double jeopardy and considered arguments for and against statutory modification of the principle.<sup>50</sup> It concluded that there was a strong case for a statutory exception that would make provision for a retrial where there is new evidence that renders the acquittal unsafe, and the offence is very serious, typically carrying a life sentence on conviction.

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<sup>44</sup> Article 15.5.1°.

<sup>45</sup> Article 7(1).

<sup>46</sup> See e.g. Taylor, "England and Australia Relax the Double Jeopardy Privilege for Those Convicted of Serious Crimes" (2005) 19 *Temple International and Comparative Law Journal*, 189.

<sup>47</sup> Macpherson Inquiry, *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny* (Cm. 4262, 1999). The *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. Moreover, the police investigation failed to take action into lines of inquiry that were clearly available following the murder. See Storry, "The Implications of the Macpherson Report Into the Death of Stephen Lawrence" (2000) 12 *Current Issues in Criminal Justice*, 106; Bridges, "The Lawrence Inquiry: Incompetence, Corruption, and Institutional Racism" (1999) 26 *Journal of Law and Society*, 298.

<sup>48</sup> Macpherson Inquiry, *op. cit.*, recommendation 38.

<sup>49</sup> Home Affairs Committee, *Third Report* (1999-2000) HC 190, "The Double Jeopardy Rule", at para. 20; Rosie Cowan, Crime Correspondent, *The Guardian*, "First Double Jeopardy Trial Given Go-ahead" <http://www.guardian.co.uk/uk/2005/nov/11/ukcrime.prisonsandprobation> (accessed 16 January 2009).

<sup>50</sup> See Home Affairs Committee, "The Double Jeopardy Rule", (*Third Report*, 1999-2000) HC 190.

In 1999, the Law Commission published a consultation paper,<sup>51</sup> which provisionally recommended that the double jeopardy protection should be relaxed where new evidence is discovered following an acquittal. In 2001, the Commission published a joint report that reviewed the current state of the law pertaining to prosecution appeals and the double jeopardy principle.<sup>52</sup> While the Report followed the Consultation Paper's recommendation that there should be a statutory exception to the principle, it was more conservative in that it reduced the list of offences to which the proposed statutory modification would apply, typically murder, which it considered to be qualitatively different from other serious offences. In the light of this restricted list of offences, the Law Commission suggested that the proposed statutory exception could apply retrospectively.

In 2001, 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 punishable either by life imprisonment or other long terms of imprisonment.<sup>53</sup>

The Government White Paper, *Justice for All*, concurred with the Auld Report's proposals for reform, that is, a modified version of the Law Commission's recommendations in that reforming legislation should include other serious criminal offences including rape, manslaughter and armed robbery.<sup>54</sup>

Double jeopardy law reform in England and Wales was provided for by Part 10, sections 75 to 97, of the Criminal Justice Act 2003,<sup>55</sup> which makes provision for a retrial of approximately 30 'qualifying' offences punishable with life imprisonment.<sup>56</sup> An exception had previously been introduced in the case of tainted acquittals such as jury or witness bribing or intimidation, however, this does not operate retrospectively.<sup>57</sup>

This statutory modification "contains a formidable set of hurdles that have to be cleared before the Court of Appeal is able to quash an acquittal."<sup>58</sup> The accused must have been formerly acquitted of the offence on indictment or on appeal.<sup>59</sup> The accused is deemed to have been acquitted of a qualifying offence for which he could have been convicted at trial, that is, for a lesser-included alternative. The accused may not be retried of an offence for which he has previously been convicted.

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<sup>51</sup> Law Commission, Consultation Paper No 156, *Double Jeopardy: A Consultation Paper* (The Stationary Office, London, 1999); see Dennis, "Rethinking Double jeopardy: Justice and Finality in Criminal Process" (2000) *Criminal Law Review*, 933. Dennis, "Double Jeopardy: A Second Bite at the Cherry" (1999) *Criminal Law Review*, 927.

<sup>52</sup> Law Commission, Report No. 267 (Cm 5048), *Double Jeopardy and Prosecution Appeals* (The Stationary Office, London, 2001); see Dennis, "Prosecution Appeals and Retrial for Serious Offences" (2004) *Criminal Law Review*, 619.

<sup>53</sup> The Right Honourable Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (The Stationary Office, 2001), chapter 2, Summary and Recommendations, p. 30: "I support 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..."

<sup>54</sup> See Government White Paper, *Justice for All* (CM 5563, 2002), para. 4.64.

<sup>55</sup> See Ward and Davies, *The Criminal Justice Act 2003: A Practitioner's Guide* (Jordans, 2004), chapter 11.

<sup>56</sup> These 'qualifying offences' are provided for in Schedule 5 to the Criminal Justice Act 2003, which include: offences against the person; sexual offences; drugs offences; criminal damage offences; war crimes and terrorism; and conspiracy.

<sup>57</sup> Criminal Procedure and Investigations Act 1996, ss. 54 - 56.

<sup>58</sup> Editorial, "The Criminal Justice Act 2003" (2004) *Criminal Law Review*, 251 at 251.

<sup>59</sup> Criminal Justice Act 2003, s. 75(1).

A prosecutor can make an application to the Court of Appeal (Criminal Division) for an order quashing an acquittal for a qualifying offence and an order for retrial.<sup>60</sup> An application to quash an acquittal is premised on the written consent of the DPP who must be satisfied that there is new and compelling evidence of guilt and that it would be in the public interest for a retrial to proceed for the same offence.<sup>61</sup> Only one application is permitted.<sup>62</sup> The Court of Appeal 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.<sup>63</sup> The provisions of the 2003 Act pertaining to the modification of the double jeopardy principle have retrospective effect.<sup>64</sup> Exceptions to these provisions apply in cases where the accused has been found not guilty by reason of insanity.<sup>65</sup>

Provision is made for the Court of Appeal to 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.<sup>66</sup> It is an offence to breach a restriction on publication order.<sup>67</sup> Provision is also made for reporting restrictions in the case of a retrial if the Court of Appeal is of the opinion that publication would be prejudicial to the administration of justice.<sup>68</sup> Therefore, this is not an absolute protection against adverse pre-trial publicity, but rather at the discretion of the court.

Procedural issues are also 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.<sup>69</sup> As a general rule, the police may not arrest, question conduct searches, seize certain items or fingerprints a suspect subject to a retrial investigation, unless the DPP has consented or alternatively has certified that an acquittal would not be a legal impediment to a retrial.<sup>70</sup> However, there is no requirement under the 2003 Act that the police obtain the consent of the DPP to conduct investigations, which are not stipulated for in section 85(3), such as interviewing witnesses, etc. The 2003 Act also makes provision for arrest, detention and bail.<sup>71</sup>

The accused must be served with notice that the DPP is making an application within two days, and the accused is entitled to be present at the oral hearing and to be represented. The DPP may also make an application to reopen an acquittal following a private prosecution.<sup>72</sup> 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 of Appeal.<sup>73</sup> An accused shall be indicted within two months after an order for retrial; however the Court of Appeal (Criminal Division) may give leave for an indictment to be proceeded with beyond this period.<sup>74</sup>

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<sup>60</sup> *Ibid.*, s. 76.

<sup>61</sup> *Ibid.*, s. 76(3).

<sup>62</sup> *Ibid.*, s. 76(5).

<sup>63</sup> *Ibid.*, s. 77-79.

<sup>64</sup> *Ibid.*, s. 75(6).

<sup>65</sup> *Ibid.*, s. 75(2)(b).

<sup>66</sup> *Ibid.*, s. 82(1) and (3).

<sup>67</sup> *Ibid.* s. 83.

<sup>68</sup> *Ibid.*, s. 82.

<sup>69</sup> *Ibid.* s. 80.

<sup>70</sup> *Ibid.*, s. 85(6).

<sup>71</sup> *Ibid.*, s. 87-91.

<sup>72</sup> *Ibid.* s. 79(4).

<sup>73</sup> *Ibid.*, s. 83(3).

<sup>74</sup> *Ibid.* s. 84(2).

Evidence is considered new if it was not adduced at the original trial, including an appeal.<sup>75</sup> Evidence that was withheld by the prosecution for a tactical advantage at retrial would not be considered 'new'. New evidence may also constitute a new discovery in relation to a piece of old evidence, which typically includes new testing techniques *i.e.* DNA – thus if a sample had been in police custody for many years it may now constitute 'new' evidence. Evidence is deemed compelling if it is reliable, substantial and it is highly probative.<sup>76</sup>

The Court of Appeal 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, whether the police had exercised due diligence in locating evidence for the original trial.<sup>77</sup> The Court may quash an acquittal on the application of the prosecution authorities,<sup>78</sup> with a right of appeal to the House of Lords available to both the acquitted person and the prosecutor.<sup>79</sup>

The first acquittal to be successfully challenged under the provisions of the 2003 Act was *R v Dunlop*.<sup>80</sup> The defendant was twice tried in 1991 for murder allegedly committed in 1989, the first trial resulting in the jury being unable to agree on a verdict, and 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.<sup>81</sup> In September 2006, he pleaded guilty and in October 2006 he was sentenced to life imprisonment.

*R v Miel*,<sup>82</sup> was the second acquittal to be challenged under the provisions of the 2003 Act. The issue was 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. giving the judgment for the Court 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.

## Reform in Australia

The Council of Australian Governments (COAG) adopted a model for double jeopardy law reform,<sup>83</sup> with a stipulation that jurisdictions would implement the recommendations of the Double Jeopardy Law Reform COAG Working Group pertaining to statutory modification of the double jeopardy principle. In view of the fact that this is a federal jurisdiction, the scope and extent of double jeopardy law reform would inevitably vary between jurisdictions thus reflecting divergences in the structure of each jurisdiction's criminal law and procedure.

The law on double jeopardy has already been modified in three states and it is likely that other states will also amend their laws on double jeopardy in due course. Whether an accused could be retried for the same offence in Australia depends on the State in which he was formerly acquitted.

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<sup>75</sup> *Ibid.*, s. 78.

<sup>76</sup> *Ibid.*, s. 78(3).

<sup>77</sup> *Ibid.*, s. 79(2).

<sup>78</sup> *Ibid.* s. 77(1).

<sup>79</sup> *Ibid.* s. 81.

<sup>80</sup> [2007] 1 WLR 1657 (CCA).

<sup>81</sup> 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.

<sup>82</sup> [2008] 1 WLR 627 (CCA).

<sup>83</sup> Council of Australian Governments, *Double Jeopardy Law Reform Model Agreed by COAG*, 13 April 2007: [http://www.coag.gov.au/coag\\_meeting\\_outcomes/2007-04-13/docs/double\\_jeopardy\\_law\\_reforms.pdf](http://www.coag.gov.au/coag_meeting_outcomes/2007-04-13/docs/double_jeopardy_law_reforms.pdf) (accessed on 16 January 2009).

### ***New South Wales***

The law on double jeopardy was modified in New South Wales, with the passing of the Crimes (Appeals and Review) Amendment (Double Jeopardy) Act 2006. This legislation provides that the double jeopardy principle may be relaxed in the light of fresh and compelling evidence of guilt, and also in cases where there has been a tainted acquittal. These reforms operate retrospectively and apply to indictable offences carrying a fifteen year sentence or greater.

### ***Queensland***

The law on double jeopardy was recently modified in Queensland, with the enactment of the Criminal Code (Double Jeopardy) Amendment Act 2007. These reforms operate retrospectively, and apply to offences carrying a sentence of twenty-five years or longer.

### ***South Australia***

The Criminal Law Consolidation (Double Jeopardy) Amendment Act 2008 modified double jeopardy law in this jurisdiction. A retrial may be permitted based on fresh and compelling evidence of guilt or where there has been an administration of justice offence. It applies to a wide range of offences ranging from trafficking in a commercial quantity of controlled drugs and aggravated robbery to more serious offences on the criminal calendar such as murder and manslaughter. This statutory modification has retrospective effect.

### **Reform in New Zealand**

The Criminal Procedure Bill 2008 was passed authorising retrials where there is new and compelling evidence or an administration of justice offence. This statutory modification applies to offences carrying a sentence of fourteen years imprisonment or more. This statutory modification only applies prospectively.

### **Proposed reform in Ireland**

A General Scheme for the Criminal Procedure Bill 2009 has been published, which includes provision for double jeopardy law reform in this jurisdiction.<sup>84</sup> Part 3 deals with the recommendations of the Report of the Review Group pertaining to reopening acquittals. This would empower the DPP to make an application to quash an acquittal and order a retrial where newly discovered evidence emerges or an administration of justice offence. The most likely option for a reviewing court would be the Court of Criminal Appeal, with an appeal to the Supreme Court.<sup>85</sup>

This proposed statutory modification would apply to a wide range of offences which *inter alia* include murder, manslaughter, rape, offences against the person, offences against the state, firearms offences, robbery and burglary. However, these reforms would not apply retrospectively.

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<sup>84</sup> Available at: [http://www.justice.ie/en/JELR/Pages/General\\_Scheme\\_of\\_the\\_Criminal\\_Procedure\\_Bill\\_2009](http://www.justice.ie/en/JELR/Pages/General_Scheme_of_the_Criminal_Procedure_Bill_2009) (accessed on 20 February 2009).

<sup>85</sup> However, note that section 4 of the Court and Court Officers Act 1995 apparently provides for the eventual abolition of this Court with “powers, jurisdiction and function, being transferred to the Supreme Court.”

## **Conclusion**

The law on double jeopardy has been reformed in several common law jurisdictions in recognition of the advances made in forensic sciences; these reforms also apply to acquittals tainted by administration of justice offences. Statutory modifications in these jurisdictions vary as to whether the exception to the double jeopardy principle has retrospective effect. Proposed statutory modification in this jurisdiction should have retrospective effect, as this would serve to solve older cases. Otherwise, it may be several years or decades by the time the provisions of proposed statutory modification in this jurisdiction would take effect.

Before an application is made for an order quashing an acquittal and ordering a retrial, the reviewing court must be satisfied that there is new and compelling evidence and that a retrial is justified in the general public interest. Only one application by the prosecution authorities to quash an acquittal so that a retrial would be permissible.

Proposed reforms of the double jeopardy principle in this jurisdiction must strike a fair and proportionate balance between the fundamental rights of the accused in the criminal justice process and the general public interest to protect itself against serious criminal offences.