A Review of Double Jeopardy Law in Ireland

Dr Gerard Coffey*

Introduction

Protection against retrials for the same criminal offence is a fundamental principle of criminal justice and procedure in legal systems concerned with securing due process of law.[1] The ancient common law prohibition on multiple trials, known as the double jeopardy principle, is a legal concept that is well known throughout the common law world.[2] The salutary principle has constitutional status[3] and finds expression in numerous human rights treaties.[4]

This article evaluates the prohibition on double jeopardy (including the recent statutory modification) and considers whether the protection is primarily a procedural right for the protection of the accused or a procedural rule to protect the institutional integrity of criminal justice process and judicial outcomes.

Exposition of the principle

Three essential protections are included in the principle of double jeopardy: protection from being retried for an acquittal, protection from retrial after a conviction, and protection from being punished multiple times for the same offence. Pleading double jeopardy does not entail the exercise of discretion, unlike the inherent power of the courts to stay a prosecution for abuse of process if oppression or prejudice to the accused can be established.

In *Registrar of Companies v District Judge Anderson*,[5] the Supreme Court considered the theoretical foundations and practical effect of double jeopardy. Murray CJ summarised the general principles:

> "It has for a long time been a principle of the common law that a person cannot be prosecuted and punished for an offence of which he has already been acquitted or convicted. This is commonly referred to as the rule against double jeopardy. It is a rule which applies to the prosecution of criminal offences. The rule, or what also might be called the notion, of double

* LL.B., Ph.D. (NUI), Lecturer in Law, Centre for Crime Justice and Victim Studies, School of Law, UL.

[1] Thomas O'Malley, *The Criminal Process* (Round Hall, 2009), pp. 121-139; Paul McDermott, *The Law on Res Judicata and Double Jeopardy* (Bloomsbury Professional, 2009); David Goldberg, "How Many Trials to Babylon?" (2008) 26 I.L.T. 219; David Goldberg, "Double Jeopardy: How Many Trials to Babylon?" (2008) 13(5) B.R. 119; Gerard Coffey, "Evaluating the Common Law Principle against Retrials" (2007) 29 D.U.L.J. 26.

[2] The principle dates back many centuries and is one of the oldest in the common law. Jill Hunter, "The Development of the Rule against Double Jeopardy" (1984) 5 J.L.H. 3; Jay Sigler, "A History of Double Jeopardy" (1963) 7 A.J.L.H. 285; Martin Friedland, *Double Jeopardy* (Oxford University Press, 1969), pp. 5-16.

[3] Implicit in Article 38.1 of the Constitution; Gerard Coffey, "The Constitutional Status of the Double Jeopardy Principle" (2008) 30 D.U.L.J. 138. Double jeopardy is a specified right provided for by many European constitutions: French Code of Criminal Procedure, Article 692; Basic Law of the Federal Republic of Germany, Article 103(3); Charter of Fundamental Rights and Freedoms of the Czech Republic, Article 40(5); Constitution of the Republic of Estonia, Article 23(3); Constitution of the Republic of Lithuania, Article 31; Constitution of Malta, Article 39(8); Constitution of the Portuguese Republic, Article 29(5); Constitution of the Republic of Slovenia, Article 31; Constitution of the Slovak Republic, Article 50(5).

[4] European Convention on Human Rights, Protocol No. 7, Article 4; International Covenant on Civil and Political Rights, Article 14(7); Charter of Fundamental Rights of the European Union, Article 50; Convention Implementing the Schengen Agreement, Article 54; Rome Statute of the International Criminal Court, Article 20.

[5] [2005] 1 I.R. 21.

> jeopardy is not normally relied upon in express terms in the sense that if a person is prosecuted for an offence arising out of the same breach of the law or the same essential ingredients for which he has previously been tried and either convicted or acquitted, his defence to the second prosecution will be based on the pleas of *autrefois acquit* or *autrefois convict*. If either plea is successful the prosecution may proceed no further.…[I]f a prosecution was initiated against a person for an offence for which he had previously been prosecuted and was awaiting trial, he or she might well invoke the rule of double jeopardy in a general sense but the fundamental basis for resisting the second prosecution would be grounded more on an abuse of process or that the court concerned with the second prosecution had no jurisdiction to deal with the matter when another court was already seized with an existing prosecution for the same offence."[6]

This authoritative explanation of the *autrefois* pleas was further emphasised in *DS v Judges of the Cork Circuit and the DPP*[7] where Denham J stated:

> "*Autrefois convict* refers to a situation where an accused was formerly convicted of the crime in issue. It enables a plea, and a decision if true, that he has already been tried and convicted of the same offence before a court. An accused may not be retried for an offence for which he has already been tried and convicted, and he may not be put in jeopardy of such a trial. *Autrefois acquit* refers to a situation where an accused was previously acquitted of the crime in issue. Similarly, an accused may not be retried for an offence for which he has already been tried and acquitted, and he may not be put in jeopardy of such an occurrence."[8]

In *DS* the Supreme Court held that two previous trials for sexual offences, which had ended without resolution when the jury failed to reach a verdict, did not amount to *autrefois convict* (previously convicted) nor *autrefois acquit* (previously acquitted).[9]

Applicability of the pleas in bar

Double jeopardy is a procedural defence that prohibits retrials following a legitimate acquittal or conviction. The accused may enter a peremptory plea of *autrefois acquit* or *autrefois convict* and consequently he cannot be retried for the same offence.[10]

The principle also applies to summary trials.[11] The applicability of *autrefois* pleas in the District Court is important given its extensive jurisdiction in terms of the number and gravity of offences and the punishments that Court is empowered to impose. Whereas trials on indictment involve a greater degree of trauma and adverse social stigma for the accused, this can equally be true where the accused has been summoned in respect of a multiplicity of summary offences which, when combined, have the potential to cause even greater distress to the accused.[12]

---

[6] [2005] 1 I.R. 21 at 26. This judicial consideration predates the statutory modification effected by the Criminal Procedure Act 2010.
[7] [2008] 4 I.R. 379.
[8] [2008] 4 I.R. 379 at 388.
[9] The rule of *autrefois convict* combines two different mischiefs, namely, that of the very existence of alternative convictions and that created by the possibility of double punishment for the same offence.
[10] Unless the defendant relies on a double jeopardy plea he will simply plead guilty or not guilty. Gerard Coffey, "Raising the Pleas in Bar against a Retrial for the Same Criminal Offence" (2005) 5(2) J.S.I.J. 124.
[11] In *The People (DPP) v O'Shea* [1982] I.R. 384 at 416, Walsh J stated that the *autrefois* pleas are "equally applicable to convictions [and presumably acquittals] in non-jury trials as it is to convictions arising from jury trials."
[12] Certain offences are offences can be tried either way, that is, by summary procedure in the District Court or on indictment in the higher courts. The choice of venue and how the offence is to be prosecuted is a matter for the DPP in

Double jeopardy plays a major role in the criminal justice process such as framing the indictment, recharging the accused with the same or substantially the same offence, post-acquittal retrials,[13] with prejudice prosecution appeals,[14] discharging the jury, *nolle prosequi*, sentencing,[15] the relationship between courts, the recognition of foreign criminal judgments (*ne bis in idem*),[16] and the extent of the prohibition's application to companies.[17] Furthermore, there are numerous legislative provisions for the protection against double jeopardy, many of which have extraterritorial effect.[18]

Collateral challenges

The double jeopardy prohibition was not only designed to protect against multiple prosecutions but also to prevent the imposition of multiple punishments for the same offence. As a general proposition the pleas in bar have no application as between a criminal trial and later tribunals investigating the same facts. The degree of proof required before a tribunal is significantly less than that in the criminal courts.

Disciplinary proceedings

The determination of a disciplinary tribunal is not equated with a conviction or acquittal by a court of competent criminal jurisdiction. Nonetheless, the superior courts may exercise the inherent power to stay or prohibit a prosecution as an abuse of process if it is deemed to be an unfair or oppressive procedure.[19] Likewise, an acquittal by a court of competent criminal jurisdiction will not give rise to estoppel of subsequent disciplinary proceedings although the superior courts may exercise the discretionary power to injunct the subsequent proceedings on grounds of unfairness.[20]

---

the first instance but if she chooses to prosecute the offence in a summary procedure the District Court Judge must be satisfied that the offence is a minor one or he will refuse jurisdiction. The matter will then be sent to a higher court for trial. Thomas O'Donnell, "Summary v Indictable: Choices in the Disposal of Criminal Cases" (2006) 6(1) J.S.I.J. 15; James Hamilton, "The Summary Trial of Indictable Offences" (2004) 4(2) J.S.I.J. 154.

[13] Part 3 of the Criminal Procedure Act 2010. Gerard Coffey, "Post-Acquittal Retrials for Serious Offences in the Irish Criminal Justice Process: Lessons from England and Wales" (2013) 3(1) I.J.L.S. 36; Gerard Coffey, "Post-Acquittal Retrial for Serious Criminal Offences" (2009) 19(3) I.C.L.J. 80.

[14] Part 4 of the Criminal Procedure Act 2010.

[15] Gerard Coffey, "The Influence of Double Jeopardy on the Sentencing Process" (2006) 16(1) I.C.L.J. 8.

[16] Gerard Coffey, "Resolving Conflicts of Jurisdiction in Criminal Proceedings: Interpreting *Ne Bis in Idem* in Conjunction with the Principle of Complementarity" (2013) 4(1-2) N.J.E.C.L. 59; Gerard Coffey, "The Principle of *Ne Bis in Idem* in Criminal Proceedings" (2008) 18(1) I.C.L.J. 2.

[17] Ailbhe O'Neill, "The Rule against Double Jeopardy and the Company: Some Thoughts on Interpretive Seepage (2005) 15(3) I.C.L.J. 16.

[18] Examples include: Criminal Justice (Female Genital Mutilation) Act 2012, section 7; Biological Weapons Act 2011, section 6; Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, section 15; Criminal Law (Human Trafficking) Act 2008, section 9; Criminal Justice Act 2006, section 77; Criminal Justice (Terrorist Offences) Act 2005, schedule 7; Criminal Justice (Terrorist Offences) Act 2005, section 46; Maritime Security Act 2004, Schedule 2 and section 9; European Arrest Warrant Act 2003, section 41; 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.

[19] In *Myers v Commissioner of An Garda Síochána*, unreported, High Court, 22 January 1988, the Court held that in the absence of a request that an immediate disciplinary inquiry be held was such that the Garda authorities had acted fairly in postponing the inquiry and suspending the applicant (on a suspension allowancce) while criminal charges were pending ahainst the applicant.

[20] In *McGlynn v Commissioner of An Garda Síochána*, unreported, High Court, 12 June 1998, the Court restrained disciplinary proceedings on the basis that the proceedings related to the same matters in respect of which the applicant had been prosecuted and acquitted.

In *Garvey v Minister for Justice, Equality and Law Reform*,[21] the Supreme Court held that an acquittal on the merits did not necessarily preclude an internal disciplinary inquiry being pursued to investigate the same allegation that was at issue in the criminal trial. In deciding whether or not to allow an internal disciplinary inquiry relating to the same allegation the court must consider whether the surrounding facts and circumstances of the case rendered it oppressive and unfair to allow the disciplinary inquiry to proceed. If on the particular facts and circumstances of the case, it would be basically unfair to conduct an internal disciplinary inquiry into the same matter that was at issue in the criminal trial, the internal disciplinary inquiry should not be allowed.

In contrast to the scenario in *Registrar of Companies v District Judge Anderson*[22] an accused who has been tried and acquitted may be subject to later disciplinary proceedings in respect of the same allegations. Pleas of *autrefois acquit* have seldom succeeded to prohibit disciplinary proceedings, although some have on the broader fairness-based grounds. Nonetheless, if the accused cannot rely on a plea of *autrefois acquit*, disciplinary proceedings may be restrained if the court is convinced that it would be unfair or oppressive to subject the acquitted person to a further investigation with the possibility of punishment in respect of the same or substantially the same matter as the previous criminal trial.

There is no general principle that an acquittal must always prevent subsequent disciplinary proceedings in all circumstances. In *McGrath v Commissioner of An Garda Síochána*,[23] the applicant was charged with embezzlement relating to three sums of money paid to him on foot of court orders imposing fines. A Circuit Court jury acquitted him on all three charges. He subsequently received notification that he was to be charged with breaches of Garda discipline that were the subject matter of the criminal charges. The High Court granted an order prohibiting the respondents from holding such an inquiry. However, the Court permitted an inquiry into breaches of discipline in relation to charges of improper practice (rather than to reopen the allegations of embezzlement). The respondents appealed to the Supreme Court where a unanimous Court held that to reopen an allegation of dishonesty which had been clearly determined by a jury verdict given on the merits, for the purpose of again exposing the applicant to the possibility of punishment constituted an unfair and oppressive procedure which should be restrained by the Court. Finlay C.J. stated:

> "…there cannot … be any general principle that an acquittal on a criminal charge in respect of an offence, irrespective of the reason for such acquittal, or the basis on which it was achieved, could be inevitably an estoppel preventing a disciplinary investigation arising out of the same set of facts….In those circumstances, it seems to me that a disciplinary hearing now prosecuted, arising out of the identical facts and allegation of corruption, would be a basically unfair procedure."[24]

Hederman J. said "[t]he hearing of the alleged breaches of discipline before the disciplinary inquiry would seek to repeat the same ground as in the criminal trial."[25]

McGrath was applied in *McCarthy v Commissioner of An Garda Síochána*,[26] where the applicant was charged with embezzlement and fraudulent conversion following an investigation into his handling of public monies. He was acquitted by a verdict of the jury on all counts. Subsequently,

[21] [2006] 1 I.R. 548.
[22] Discussed below in text accompanying footnote 35.
[23] [1991] 1 I.R. 69.
[24] [1991] 1 I.R. 69 at 71.
[25] [1991] 1 I.R. 69 at 72.
[26] [1993] 1 I.R. 489.

the Garda authorities convened an inquiry into alleged breaches of discipline which had already been the subject matter of the former criminal trial and dismissed the applicant from the force. The applicant claimed that this placed him in double jeopardy in relation to matters of which a jury had formerly acquitted him following a criminal trial. The High Court made an order setting aside the order of dismissal made by the disciplinary inquiry, which tended to set at nought the verdict of the jury.

If the allegation relates to matters of internal discipline and is not in any way equated with the criminal charges of which the respondent has been acquitted, then as a general rule, there is no impediment to holding an inquiry provided that it would not amount to an unfair or oppressive procedure.[27]

Inquiries into allegations of professional misconduct

In circumstances where sanctions have been imposed by a professional body subsequent to a criminal trial this may not necessarily infringe the double jeopardy prohibition nor indeed constitute the imposition of multiple punishments for the same criminal offence. The basis for this proposition is that the purpose of the inquiry into allegations of professional misconduct is not to punish the individual for the commission of an offence, but rather to exercise control over the members of the profession so as to ensure their conduct conforms to the required professional standards of behaviour. The same is true where an individual has been subject to an inquiry first by a professional body and then prosecuted for an offence because. The accused will still be required to answer to society for the criminal aspects of his unlawful activity in addition to an internal disciplinary inquiry to which he is also subject due to the nature and his membership of the profession.

AA v Medical Council[28] concerned a medical doctor who had been acquitted on charges of sexual assault. He sought further temporary registration from the Medical Council who decided there was a *prima facie* case for holding an inquiry. The doctor brought judicial review proceedings in which he was unsuccessful in prohibiting the inquiry from proceeding on the grounds of double jeopardy. Ó Caoimh J. stated:

> "The essential issue … is whether in light of the nature of the complaints to be investigated by the Fitness to Practise Committee it can be said to amount to an unfair or oppressive procedure to investigate in particular the charges of sexual or indecent assault alleged to have been perpetrated by the applicant on the two patients concerned. I am satisfied on the facts of this case that no assault other than those the subject matter of the criminal charges are sought to be inquired into. In other words what is at issue is whether the proposed inquiry into items one and two referred to should be precluded, whatever about the conduct of inquiry into the allegations of professional misconduct…. In this regard what remains is not an issue as to whether the principles of double jeopardy have any application or whether the principle of *autrefois acquit* has any application to the facts of the instant case. I am satisfied that the issue

[27] In *Walsh v Commissioner of An Garda Síochána* [2010] IEHC 257, Kearns P. noted the following: "Matters of internal discipline in the Garda Síochána were not to be equated with the criminal charges of which the applicant had already been acquitted....To acquit a Garda of assault would not preclude a Garda investigation into a breach of discipline such as abuse of authority in failing to behave with due courtesy towards a member of the public....The critical question, it seems to me, is to consider whether it would be unfair or oppressive to continue the disciplinary proceedings in the particular circumstances. If the disciplinary inquiry crosses that threshold, the matter then becomes, as was emphasised by Hederman J. in *McGrath*, "a form of unfair and oppressive procedures which calls for the intervention of the court'." See also *McKenna v Commissioner of An Garda Síochána* [2016] I.E.H.C. 175; *Walsh v Revington* [2015] I.E.S.C. 34.

[28] [2002] 3 I.R. 1.

> is whether it would be manifestly unfair to permit the proposed inquiry or any part of it to proceed in light of the acquittal of the applicant on the charges preferred against him and tried by the Circuit Criminal Court. In conclusion, I am of the opinion that there is no reason why the Fitness to Practise Committee should not hear the proposed evidence and consider it in relation to the conduct of the applicant. I am of the opinion nevertheless that it would be essentially unfair were the respondent to enter upon a hearing to determine that the applicant was guilty of an assault of which he has been acquitted by the Circuit Criminal Court. This is not to say that the committee should not hear all of the evidence proposed to be given in assessment of whether the conduct alleged against the applicant is conduct which it considers to have been established and to determine whether in the light of this fact he is a person who may have been guilty of inappropriate behaviour … in relation to each of the complainants who were allegedly examined by him when in hospital."[29]

In *Shine v Fitness to Practise Committee of the Medical Council*[30] the High Court had undertaken the task of examining a large number of complaints of indecent assault made by 29 complainants against a medical consultant, who was seeking, by way of judicial review, to prevent the Medical Council from inquiring into them. The Court granted relief in the case of five complainants on the ground of double jeopardy, because the complaints of those five persons had been the subject of criminal charges which had gone to trial and the applicant had been acquitted.[31] The respondent successfully appealed to the Supreme Court. Kearns J stated:

> "… this is not a case which would permit the application of the principle of 'double jeopardy'. This is not a case of one criminal trial being followed by another. The proposed inquiry is being undertaken in a different context and for different purposes, including the protection of the public. While I am far from convinced that considerations of 'fairness' would normally preclude the first respondent from further inquiring into allegations which had been the subject matter of a criminal trial in which an applicant had been acquitted…."[32]

Thus, where the inquiry was undertaken in a different context to the criminal proceedings which had been brought against the applicant, with different objectives, including protection of the public, the pleas in bar would not apply.

Oireachtas joint committee inquiries

In *Curtin v Dáil Eireann*,[33] the applicant claimed that having been acquitted at a criminal trial he could not be investigated by the Joint Oireachtas Committee Inquiry effectively for the same offence.[34] The High Court *per* Smyth J rejected the argument based on double jeopardy as the investigation of alleged 'stated misbehaviour' was a constitutional function of the Oireachtas designed to protect public confidence in the judiciary. On appeal, the Supreme Court held that the acquittal of the applicant of the charges laid against him in the indictment means that he can never

[29] [2002] 3 I.R. 1 at 32-33.
[30] [2009] 1 I.R. 283.
[31] On the grounds that the applicant would be exposed to double jeopardy regarding such complaints.
[32] [2009] 1 I.R. 283 at 297.
[33] [2006] 2 I.R. 556.
[34] Judge Curtin was acquitted in 2004 when it was ruled An Garda Síochána had improperly executed a search warrant (to search Judge Curtin's home under section 7 of the Child Trafficking and Pornography Act 1998 issued from the District Court) that led to the seizure of a personal computer allegedly containing downloaded pornographic images of children.

be prosecuted again in respect of those matters.[35] The Inquiry into the conduct of former Judge Brian Curtin were considering an entirely different matter, that is, whether the applicant had conducted himself in respect of those or very similar matters to the extent that constitutes 'stated misbehaviour' of sufficient gravity to warrant his removal from the bench. A claim of double jeopardy was not pressed.[36]

Administrative penalties

The issue may arise as to whether an accused may plead *autrefois convict*, or similar plea in bar, where he has been subject to an administrative penalty or civil sanction that is in respect of the same matter for which he is being prosecuted. *Register of Companies v District Judge Anderson*[37] involved criminal proceedings after the imposition of an administrative penalty. There was no previous trial consequently the issue of double jeopardy did not arise. Nonetheless, the Supreme Court stated that where a heavier administrative penalty was imposed the court would examine the process leading to its imposition. An administrative penalty might be treated as a penal sanction in substance if it was excessive or disproportionate to the administrative objective being pursued.[38]

Verdict finality

One of the primary aims of double jeopardy is the preservation of the finality of judgements. A verdict of acquittal or conviction arises only at the proper conclusion of the criminal trial and there can be no conclusion of the trial until the verdict has been formally pronounced by the trial court.[39]

The courts whose decisions are invested with finality and conclusivity are the Supreme Court and the Court of Appeal, which are both primarily appellate courts. The finality attaching to the judgments of other courts are, as Finlay CJ in *Dalton v Minister for Finance*[40] expressed it, are "subject to a proper right of appeal as provided by law."[41] It therefore appears that where there is a right of appeal provided by law, finality cannot be said to attach to the decision of a court which is subject to that right of appeal unless and until the appeal has concluded or no appeal has been taken within the time limited for doing so.

In *O'Brien v District Judge Fahey, District Judge McCarthy and the DPP*,[42] where the accused had previously been subjected to an unresolved criminal trial, this was not sufficient grounds to prohibit any further prosecution in respect of the offences. There were no special circumstances that would have rendered it an injustice to require the accused to meet the charges against him for a second time. Hedigan J stated:

> "…I cannot accept that the proposed *de novo* hearing of the case against the applicant would amount to a violation of the rule against double jeopardy. The applicant himself sought to

[35] The Court held that it was within the powers of the Houses of the Oireachtas to give the Joint Committee the power to report on Judge Curtin's alleged misbehaviour without making findings of fact, making recommendations or expressing opinions.
[36] Laura Cahillane, "Judicial Discipline: Where do we Stand? A Consideration of the *Curtin* Case" (2009) 27 I.L.T. 26; Brian Hunt, "Judge Not, Lest Ye be Judged in Turn: Judicial Misconduct and Reform Proposals" (2008) 102(3) L.S.G. 22 and (2008) 102(4) L.S.G. 26.
[37] *Op. cit.*
[38] Dara Lynott and Ray Cullinane, "Administrative Sanctions" (2010) 17(1) I.P.E.L.J. 12.
[39] *Cleary v DPP* [2011] 2 I.R. 48.
[40] [1989] 1 I.L.R.M. 519.
[41] *ibid* at. XXX.
[42] [2009] I.E.H.C. 252.

> have the proceedings before the second named respondent adjourned pending the resolution of the Commission's investigation. This was something which was ultimately done by the second named respondent of his own volition, albeit at a later stage in proceedings. The crucial point, however, is that the District Court never reached, nor purported to reach, any finding as to the guilt or innocence of the applicant. Put quite simply, the proceedings have not been concluded and as such, a plea of *autrefois convict* or *autrefois acquit* can not avail.[43]

The District Court trial did not conclude with a finding of guilt or innocence of the applicant and as the proceedings had not concluded a plea of *autrefois convict* or *autrefois acquit* could not avail.

It is clear from the Supreme Court decisions in *DS v Judges of the Cork Circuit Court*[44] and *AP v DPP*[45] that if an accused has been previously subjected to one or more unresolved criminal trials will not, of itself, be sufficient grounds to prohibit any further prosecution in respect of the offences alleged. However, in *DS,* Denham J. explained the position as follows: "[t]here is no firm rule as to the number of potential trials. In each case all the circumstances require to be considered." The Court in *DS* was concerned with successive disagreements by a jury after a complete trial. In *AP*, the Supreme Court held that a fourth trial was not *per se* prohibited where the trial had commenced on three separate occasions but on each occasion had not advanced beyond the first witness. The Court noted that there was no rule under statute law, common law or the Constitution that limited the number of prosecutions or retrials that might occur. There may be special circumstances. Each case was to be considered on its own facts to determine whether, in all the circumstances, a further prosecution would be constitutional.

There are competing public and personal, or private interests to be considered. The public interest is to prosecute crime and to protect the public interest in fair process. The private interest of the accused in fairness in his trial, and the interests of the victim of crime whose interests must not be "swept aside" in this balancing exercise.[46] Moreover, the position of the victim is integral to the matrix of facts in the analysis of the situation as to whether a retrial should be permitted.

It is the duty of the court in accordance with due process to strike a fair and proportionate balance between competing public interests in the criminal trial process.[47] Although the public interest in prosecuting offenders is of paramount importance, the integrity of the criminal trial process also requires protection, to be guarded against the inherent dangers of repeated trials for the same offence.

An applicant seeking to prohibit a trial following previously unresolved criminal proceedings must demonstrate some form of prejudice arising as a result of the renewed efforts to prosecute. The issue as to whether it would be unjust to permit the prosecution to bring the case against the accused having had the benefit of hearing the entirety of his defence was considered in *McNulty v. Director of Public Prosecutions*.[48] Hardiman J. considered such an argument and reached the following conclusions:

---

[43] [2009] I.E.H.C. 252 at para. 22.
[44] [2008] 4 I.R. 379.
[45] [2011] 1 I.R. 729.
[46] *McFarlane v DPP* [2007] 1 IR 134, *per* Kearns J.
[47] Double jeopardy is a complex area of the criminal justice process, the application of which presents procedural dilemmas for prosecutors and defendants alike. The interests of the victim of crime are also of paramount importance in securing justice for victims while respecting the due process rights of the accused. Deirdre Duffy, "Balance in the Criminal Justice System: Misrepresenting the Relationship between the Rights of Victims and Defendants" (2009) 19(1) I.C.L.J. 2.
[48] [2009] 3 I.R. 572 at 580-581.

> "The trial process may involve two or more hearings for a number of reasons. The jury may disagree, as happened in this case and happens not infrequently. Or the first jury may be discharged for one reason or another. In either event the prosecution may bring the case on again for trial before a separate jury unless the defendant can show that such a step would be oppressive. Where there is a second trial, neither side is bound to approach the case in the same way that they approached the first trial. New witnesses may be called, or witnesses called on the first occasion may be omitted. Almost every trial, especially if it proceeds to the point where the defendant is given in charge to the jury, will develop in a way which could not be wholly predicted before it started. Each side will have learnt a good deal more about the other side's case. A witness who looked very impressive on paper may appear to some disadvantage in giving oral evidence, cross-examination may put an entirely different complexion on certain evidence, and legal argument, where there is any, may reveal weaknesses in the case of either side in the way they address certain topics, which had not previously occurred. It is perfectly legitimate for either the prosecution or the defence to adapt to these discoveries by looking again at how it will present its own case. Where there is a second trial, almost inevitably, each side will know more about the other side's case than it did when the first trial started."[49]

Once the defendant has been returned for trial the court remains seized in the matter until the trial ends in either conviction or acquittal or the DPP enters a *nolle prosequi*.

Same criminal offence

The pleas in bar should be entered on arraignment and should be reduced to writing. However, in an exceptional case it may be raised at any time during the trial.[50] The plea is tried by the judge alone. It is for the defendant to prove that he is entitled to the benefit of double jeopardy which he may do by producing a certified copy of the record of a previous criminal trial, especially judgments of a foreign court. If the accused unsuccessfully plead *autrefois acquit* or *autrefois convict* he may then plead guilty or not guilty.

The central ingredient of raising the special pleas in bar is either a previous conviction or a previous acquittal for an offence possessing the same essential ingredients.[51] The second prosecution must not only be for the same conduct (act or omission) but also for the same offence. In *Connelly v DPP*,[52] Lord Devlin opined:

> "For the doctrine of *autrefois* to apply it is necessary that the accused should have been put in peril of conviction for the same offence as that with which he is then charged. The word 'offence' embraces both the facts which constitute the crime and the legal characteristics which make it an offence. For the doctrine to apply it must be the same both in fact and in law."[53]

[49] [2009] 3 I.R. 572 at 580-581.
[50] *Connelly v DPP* [1964] A.C. 1254 *per* Lord Devlin.
[51] This is the most problematic and most litigated element of double jeopardy jurisprudence, as exemplified in *Connelly v DPP* [1964] A.C. 1254 at 1331 (one of the leading authorities on the common law principle of double jeopardy) where Lord Hodson opined: "What is meant or involved in the words 'the same crime'? It is in the answer to this question that so much difficulty has arisen and so much argument has been entertained down to the present day not only in this country but in other countries where the common law prevails."
[52] [1964] A.C. 1254 at 1340. In *Connelly*, an acquittal on a charge of murder could not be raised in bar to a subsequent trial for robbery, even though the murder had been committed in the course of the robbery.
[53] [1964] A.C. 1254 at 1340.

Thus, offences must be factually and legally the same.

The superior courts have adopted the generally accepted 'same elements' broader test of sameness of criminal offences. In *Conlon* v *Judge Kelly and the DPP*,[54] the applicant had been charged with a number of counts of fraudulent conversion together with one count of larceny. The jury failed to agree on the verdict and were discharged by the trial judge and a new trial was ordered. McGuinness J. stated:

> "In the instant case the accused has neither been acquitted nor convicted on the original counts and makes no objection to retrial - or more properly a new trial - on these counts. The additional counts are not based on the same facts or on similar offences arising out of the same facts; they are different offences alleged to have been perpetrated on different victims, and with different evidence. The additional offences are alleged to be committed contrary to the same section of the same statute and are all offences of fraudulent conversion…."[55]

This is predicated on the factual and legal determination of sameness of criminal offences. There is no legal impediment against a second trial for the same offence based on different factual circumstances.

In *O'Brien v District Judge McCarthy*,[56] Hedigan J. stated it is clear "that the central ingredient of any invocation of the rule against double jeopardy is either a previous conviction or a previous acquittal in respect of an offence possessing the same essential ingredients." In *Registrar of Companies v District Judge Anderson*,[57] the Supreme Court *per* Murray CJ applied the "same breach of the law or the same essential ingredients for which he has previously been tried and either convicted or acquitted" test. Furthermore, in *Re National Irish Bank (No. 2)*,[58] the High Court *per* Kelly J. stated it was clear that double jeopardy "is a narrow principle of limited effect. It concerns itself with identical or similar charges not with identical evidence."

With regard to the issue of lesser-included offences, an acquittal on a charge also prohibits a subsequent prosecution for an offence of which the accused could have been convicted. A typical example being an acquittal on a charge of murder being raised as a plea in bar to a subsequent prosecution for manslaughter. However, where the consequences of the defendant's criminal conduct have changed, with the result that a more serious offence may now be proceeded with, the common law pleas in bar would not be available to the accused. In *The People (DPP) v Finnamore*,[59] the Court of Criminal Appeal *per* Macken J stated the case law does not "support a principle or rule that a plea in bar against a retrial on a more serious charge must succeed where a person has been convicted at an earlier trial, or on an earlier indictment, on a lesser charge." In *R* v *Thomas*,[60] the Court of Appeal held that where a defendant had been convicted of wounding with intent to murder and the victim subsequently died of the wounds inflicted, a plea of *autrefois convict* could not be raised against a subsequent indictment for murder. In these circumstances, there is a separate and distinct new offence that may be prosecuted. This procedure is logical to the extent that where the circumstances have substantially changed and the defendant's criminal conduct was the cause of the more serious offence, both legally and factually, there should be no legal impediment against a prosecution for the more serious charge.

[54] High Court, unreported, McGuinness J., 14 December 1999.
[55] *ibid*. pp. 10-11 of the unreported judgement .
[56] [2009] I.E.H.C. 252 at para. 23.
[57] [2005] 1 I.R. 21 at 25.
[58] [1999] 3 I.R. 190 at 204.
[59] [2009] 1 I.R. 153 at 171.
[60] [1950] 1 KB 26.

The 'same elements' test (or what is otherwise known as the 'same ingredients' or 'legal characteristics') of sameness of criminal offences which appears to have been adopted by most common law jurisdictions is the more logical approach in determining sameness of criminal offences for double jeopardy purposes, otherwise the prosecution would be required to prosecute at one trial all offences committed during the course of one criminal transaction or indeed under the same evidence test. The same elements test would permit the prosecution to re-indict the accused for an offence arising out of the same criminal transaction where it can be established that the offence in the second indictment may be distinguished by an examination of its defining elements; in other words, in circumstances where the accused is being prosecuted on a second occasion based on the same facts or indeed evidence as adduced at the former trial, he is not being retried for the same criminal offence. Indeed, with the ever-increasing volume of regulatory offences an increasing range of activities may result in charges under several statutory provisions or under the common law. Otherwise, the prohibition on double jeopardy would be ineffective because the 'same transaction' (criminal episode) may leave an accused open to prosecution and conviction under several different statutory or common law provisions. Thus, retrials are prohibited for the same offence or the same subject-matter.

The Criminal Justice (Administration) Act 1924 mandates the form of the indictment.[61] The choice of indictment is limited to the charges expressed or implied in the book of evidence served on the accused.[62] In *The People (DPP) v ED*,[63] the accused was convicted of 32 offences of unlawful carnal knowledge and indecent assault. Each of the charges on the indictment referred to a specific, unknown date occurring, generally, in a specified quarter of a calendar year. The accused argued that the number of counts on the indictment was prejudicial to him and that insufficient particulars as to location and time had been provided in the indictment, particularly when it was clear from the book of evidence and the evidence given by the complainant that the offences were alleged to have occurred at five specific locations. The Court of Criminal Appeal cited relevant English authorities and held that the trial judge should have ordered an amendment of the indictment so that each count indicated, with as much particularity and specificity as the circumstances of the case would allow, the nature of the offending behaviour.

Statutory modification of the common law principle

One of the most significant recent developments in criminal justice and procedure is the statutory modification of the common law prohibition on double jeopardy introduced by the Criminal Procedure Act 2010. Part 3 of the 2010 Act entitled "exceptions to rule against double jeopardy", made provision for post-acquittal retrial for relevant offences[64] where new and compelling evidence becomes available[65] or where the previous acquittal was tainted (i.e. where there is evidence that a

[61] Section 4(1) of the 1924 Act provides: "Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge."
[62] The 1924 Act permits amendment of an indictment before the conclusion of the trial.
[63] [2007] 1 I.R. 484.
[64] Relevant offences are those that for the most part carry a mandatory or discretionary life sentence. The offences under the International Criminal Court Act 2006 which carry a maximum of 30 years in some circumstances are the exception. The Schedule to the 2010 Act provides that relevant offences include serious crimes including murder, manslaughter, rape, genocide, trafficking, offences against the State, organised crime, assault causing harm, aggravated burglary and robbery, arson and damaging property. Part 3 of the 2010 Act effectively follows Part 10 of the Criminal Justice Act 2003 which reformed the law on double jeopardy in the United Kingdom. Rosemary Craig, "Double or Quits? A Discussion on Retrials for Serious Offences under the Criminal Justice Act 2003" (2008) 26 I.L.T. 238.
[65] Criminal Procedure Act 2010, s. 8.

former acquittal occurred in circumstances of interference with the criminal justice process such as jury or witness tampering).[66] The offences listed in the Schedule include:

- murder (including murder to which section 3 of the Criminal Justice Act 1990 applies), manslaughter, treason, rape
- genocide, crimes against humanity, war crimes and ancillary offences under sections 7 and 8 of the International Criminal Court Act 2006

- offences under any of the following provisions of the Criminal Justice (United Nations Convention against Torture) Act 2000: section 2(1) (offence of torture by a public official), section 2(2) (offence of torture instigated by a public official); section 3(a) (attempt or conspiracy to commit torture); section 3(b) (obstructing prosecution of another)

- offences under section 3 (aggravated sexual assault) and section 4 (rape) of the Criminal Law (Rape) (Amendment) Act 1990; any offence under section 2 of the Criminal Law (Sexual Offences) Act 2006 (defilement of child under 15 years of age); an offence under section 1 of the Punishment of Incest Act 1908 (incest by males)

- offences under any of the following provisions of the Non-Fatal Offences against the Person Act 1997: section 4 (causing serious harm); section 6(5) (syringe offences); section 8(2) (placing or abandoning syringe); section 15(1) (false imprisonment)

- offences under section 3(1) of the Child Trafficking and Pornography Act 1998 (trafficking, taking etc., for the purposes of sexual exploitation); Any offence under section 2 (trafficking etc., of children) and section 4 (trafficking of persons other than children) of the Criminal Law (Human Trafficking) Act 2008

- offences under section 6 of the Offences against the State (Amendment) Act 1998 (directing an unlawful organisation). An offence under any of the following provisions of the Criminal Justice (Terrorist Offences) Act 2005: section 9(1) (hostage taking), section 9(2) (attempted hostage taking); section 10(1) (terrorist bombing); section 10(2) (terrorist bombing causing major economic loss); section 10(3) (attempted bombing)

- offences under section 71A of the Criminal Justice Act 2006 (directing a criminal organisation)

- offences under sections 15(1) (possession of controlled drugs for unlawful sale or supply), 15A (offence relating to possession of drugs with value of €13,000 or more) and 15B (importation of controlled drugs in excess of certain value) of the Misuse of Drugs Act 1977

- offences under section 15 of the Firearms Act 1925 (possession of firearms with intent to endanger life); An offence under section 27 of the Firearms Act 1964 (prohibition of use of firearms to resist arrest or aid escape)

[66] Criminal Procedure Act 2010, s. 9. A retrial in the case of tainted acquittals may be ordered in respect of any offence tried on indictment where the first trial was tainted by an offence against the administration of justice such as bribery, intimidation or any other activity designed to pervert the course of justice including perjury. There must be reasonable grounds to believe that the offence affected the outcome of the trial, and the DPP must be satisfied that the acquittal was not merited. With regard to the new evidence exception, the DPP will generally have a Garda report on its investigation of the new evidence. Applications for retrial based on the tainted acquittal exception has a broader scope given that it applies in the case of all acquittals for serious offence following a trial on indictment.

- offences under section 2 of the Explosive Substances Act 1883 (causing explosion likely to endanger life or damage property)

- offences of arson under section 2(1) or (3) or an offence under section 2(2) (whether arson or not) of the Criminal Damage Act 1991 (damaging of property)

- offences under section 13(1) (aggravated burglary) and section 14 (1) (robbery) of the Criminal Justice (Theft and Fraud Offences) Act 2001

- offences under section 11 of the Air Navigation and Transport Act 1973 (unlawful seizure of aircraft); An offence under section 3 (1) of the Air Navigation and Transport Act 1975 (unlawful acts against the safety of navigation)

- an offence under section 2(1) of the Maritime Security Act 2004

- references in the Schedule to an offence include references to participation as an accomplice of a person who commits the offence

- an offence of attempting or conspiring to commit any offence mentioned in the Schedule

Part 4 of the 2010 Act made provision for "with prejudice prosecution appeals." *DPP v JC*[67] was the first attempt under the 2010 Act to achieve a retrial following a with prejudice appeal of an acquittal.[68] The case *inter alia* pertained to the scope of appeals which can be brought to the Supreme Court by the prosecutor under section 23 of the 2010 Act. This provision expressly provides for exceptions to the rule against double jeopardy. A unanimous seven judge panel held that it would not be in the interests of justice to direct a retrial in this case. Clarke J stated:

> "If an appeal properly lies, then it forms part of the same process as the trial itself. If there is a successful appeal and a retrial is directed, then that retrial, in turn, is part of the same process. Any earlier acquittal is, therefore, set at nought by a successful appeal by the D.P.P. under section 23 and it cannot, in my view, therefore, be properly regarded as an acquittal any more than any judgment and order of any court which is altered on appeal can be regarded as a binding judgment at all save in the limited historical sense that it was, up and until the time when it was overturned on appeal, the position adopted by a court of competent jurisdiction.
>
> The question of double jeopardy properly arises when whatever procedure is available for the trial of an accused in a relevant jurisdiction runs its natural course and results in an acquittal. The issue which then arises is as to the circumstances, if any, in which it may be permissible to commence an entirely new process or reopen a process which has come to a natural end. But such is not the case here. The issue does, of course, depend on the proper interpretation of section 23. However, there can be no doubt that section 23 must be taken to apply in some circumstances. In those circumstances, an accused can properly be convicted after a retrial which has been directed resultant on a successful appeal by the D.P.P. under section 23. It is not correct, in my view, to characterise such a retrial as being in any way affected by any principles against double jeopardy. Rather, such a retrial is part of a single, continuous

[67] [2015] I.E.S.C. 31. Cecilia Ní Choileáin and Anna Bazarchina, "Admissibility of Unconstitutionally Obtained Evidence after *DPP v JC*" (2015) 20(4) B.R. 83.

[68] Part 4 of the 2010 Act provides the DPP with a right of appeal to the Supreme Court on a 'with prejudice' basis against an acquittal where the acquittal arises from an erroneous ruling by the trial court on a point of law arising during the trial. Furthermore, it provided the Director of Public Prosecutions with a right of appeal on a 'with prejudice' basis against a decision by the Court of Appeal not to order a re-trial following the quashing of a conviction.

process in which an appeal court has corrected the error of a trial court, directed a retrial, and the result of that retrial will stand as the proper determination of the criminal process in the case in question."[69]

JC involved a with prejudice prosecution appeal on a point of law under section 23 on the basis that there had been an error of law during the original trial (erroneously excluded compelling evidence). This is not *per se* a double jeopardy issue, which is predicated on a lawful acquittal or conviction. This was not the case in *JC*.

Conclusion

The superior courts have provided extensive guidance on the double jeopardy principle. The primary rationale is to protect the accused from being prosecuted and punished more than once for the same offence. The principle safeguards the individual from the risks of a verdict of acquittal being distorted by the dangers of multiple trials, and also serves to protect the public interest in preserving the integrity of the criminal trial process.

The potential volume of applications for post-acquittal retrial in the interests of justice will need to be reconciled with the procedural safeguards to ensure that the provisions are used sparingly and in the appropriate cases. In each case there should be a balance sought between competing interests. While protecting the public interest in prosecuting offenders, the integrity of the criminal justice process also requires protection against the inherent dangers of retrials.

Exposing an accused to a series of repeated trials, or post-acquittal retrial, undermines fair procedures and finality in the criminal process. Indeed, this could expose the accused to a statistically greater risk of being convicted.

In the final analysis, the prohibition on double jeopardy is a process to achieve a fair trial and consequently part of the integrity of the criminal justice process.

[69] *ibid*. at paras. 2.26-2.27.