

Civil Liability of Prosecutors under Irish Law¹

This paper was prepared by Helen Whately, Legal Researcher, Office of the Director of Public Prosecutions, in response to a questionnaire from the Prosecutor General of the Republic of Hungary in 2008. A conference was held in March 2010, entitled “Civil Liability of Prosecution Services and Individual Prosecutors” to discuss responses from various jurisdictions to the questionnaire. The paper was revised after the Conference and submitted for publication in the final report on the review process.

Introduction

The Irish legal system is made up from a combination of common law, statute law and constitutional law. The common law system relies on the doctrine of precedent, with a strong focus on previously decided case law. Irish law is subservient to a written Constitution, which guarantees the rights and freedoms of Irish citizens, among others. Ireland is also a party to the European Convention on Human Rights, which was incorporated into Irish law by the European Convention on Human Rights Act 2003. However the Convention was incorporated at a sub constitutional level: legislation cannot be struck down by the courts simply by virtue of it being incompatible with the Convention and compensation for any violations of Convention rights will not be paid as of right but on an *ex gratia* basis. In order to evaluate the liability of public prosecutors in Ireland one must consider the nature of the Office and its role in the Irish criminal justice system.

The Evolution of the Irish Prosecutor

The Constitution of Ireland, adopted in 1937, provides for an Attorney General “who shall be the advisor of the Government in matters of law and legal opinion”. The Constitution also provided for the prosecution of all indictable crime in the name of the People at the suit of the Attorney General or some other person authorised in accordance with law to act for that purpose. From 1937 to 1974 the Attorney General continued to exercise both these functions. In addition to exercising the function as legal advisor to the government, the Attorney General had, and continues to have, a function to act as representative of the public in legal proceedings for the assertion of protection of public rights.²

¹ Please note that this document is prepared by me in my capacity as legal researcher in the Office of the DPP, every effort has been made to ensure that the information contained herein is correct. This paper may not represent the views of the Director of Public Prosecutions or the Office of the Director of Public Prosecutions and may not represent the policy of the said Office.

² See Ministers and Secretaries Act, 1924, section 6

The Prosecution of Offences Act, 1974, effected a transfer to the newly created Office of Director of Public Prosecutions of “all the functions capable of being performed in relation to criminal matters and in relation to election petitions and referendum petitions by the Attorney General” immediately before the commencements of that Act. Section 2(5) of the 1974 Act dictates that the Director “shall be independent in the performance of his functions”. While the Act provides that the Director and the Attorney General “shall consult together from time to time in relation to matters pertaining to the functions of the Director” the Attorney General has no power to give an instruction to the Director. Any examination of the liability of the Office of the Director of Public Prosecution in civil law must be viewed in light of this independence.

The Office of the Director of Public Prosecution exercises its functions on behalf of the State and not individual complainants. As a result of this the Office originally maintained a policy of not giving reasons to victims for decisions taken not to prosecute. However this policy is currently under review; in October 2008 the Office began a pilot scheme whereby reasons for a decision not to prosecute would be provided in cases where there has been a fatality. In implementing any policy change, the Office must be aware of the rights of a suspect, such as the presumption of innocence and the right to a good name. Therefore should the review lead to a widespread policy change on this issue, it is likely that the Office’s duty towards those accused or suspected of a crime will come to the fore.

Statute Law

Statutory Remedy for Miscarriages of Justice

The Criminal Procedure Act 1993 introduced a statutory right to compensation where it is established that a newly discovered fact shows that there has been a miscarriage of justice by virtue of a conviction. Section 2 of the Act confers jurisdiction on Court of Criminal Appeal to quash a conviction or review a sentence imposed in a previously and finally decided case where the convicted person claims that a new or newly-discovered facts shows that there has been a miscarriage of justice in relation to the conviction or that the sentence imposed was excessive. Section 9 (1) details the conditions necessary for the payment of compensation:

- (1) Where a person has been convicted of an offence and either—
 - (a) (i) his conviction has been quashed by the Court on an application under section 2 or on appeal, or he has been acquitted in any re-trial, and

(ii) the Court or the court of re-trial, as the case may be, has certified that a newly-discovered fact shows that there has been a miscarriage of justice,

or

(b) (i) he has been pardoned as a result of a petition under section 7, and

(ii) the Minister for Justice is of opinion that a newly-discovered fact shows that there has been a miscarriage of justice,

the Minister shall, subject to subsections (2) and (3), pay compensation to the convicted person or, if he is dead, to his legal personal representatives unless the non-disclosure of the fact in time is wholly or partly attributable to the convicted person.

It will be noted that a plaintiff must have been convicted before any right to compensation arises. Therefore an acquittal at trial will not give rise to any such claim. Subsection 2 of section 9 dictates that an individual may apply for compensation under the Act or institute an action for damages arising out of the conviction; this would suggest that one cannot do both.

Section 9(4) dictates that the Minister for Justice, Equality and Law Reform shall determine the amount of compensation payable. Any person dissatisfied with the amount of compensation may apply to the High Court to determine the appropriate amount; section 9(5) states that the award of the High Court shall be final.

Section 9 was successfully invoked in the case of *Francis Shortt v. The Commissioner of an Garda Síochána Ireland and the Attorney General*³. The applicant's conviction was declared a miscarriage of justice in 2002⁴. It appeared that he had been convicted on the perjured evidence of two unscrupulous Gardaí wishing to further their careers. After successfully appealing his claim for damages to the Supreme Court the applicant was awarded €4,623,871.00.

Compensation under the Criminal Procedure Act 1993 is not merely available where there has been misconduct on the part of any State agent. In the case of *DPP v. Hannon*⁵ the applicant was convicted of sexual assault and common assault allegedly perpetrated against his ten year old neighbour. Nine years after the alleged offence the complainant admitted to Gardaí that the offence had not occurred at all and that she had fabricated the entire

³ Unreported, Supreme Court, 21st March, 2007

⁴ Unreported, Court of Criminal Appeal, 31st July, 2002

⁵ Unreported, Court of Criminal Appeal, 27th April 2009

incident. It was argued on behalf of the Office of the DPP that the applicant was not entitled to damages because there was no culpability on the part of the State or its agents. The Court of Criminal Appeal rejected this contention noting that international obligations required compensation where a miscarriage of justice has occurred; a requirement that there be evidence of state culpability before the right to compensation arose was not in keeping with such obligations. The case of an innocent person wrongly convicted was clearly found to be a miscarriage of justice.

Tort Law

There is limited opportunity under statute, outlined above, for an individual to make a claim for compensation against the State for wrongs committed in the criminal justice sphere. We must therefore turn to Irish tort law to determine whether any further rights to open a civil lawsuit exist.

At the outset it should be noted that in case of *Byrne v. Ireland*⁶ the Supreme Court rejected the State's contention that it was immune from tortious liability; the State was found to be a juristic person who would be vicariously liable for the negligent acts of its servants committed in the course of employment. The plaintiff, therefore, succeeded in her action for damages for injuries sustained when she fell into a trench dug on the authority of the Minister for Posts and Telegraphs. The Court further held that the Attorney General is the appropriate person to represent the State against such a claim for damages.

The concept of vicarious liability suffers from difficulties of interpretation: who is a servant and when are their actions in the course of employment? However the Irish courts have declared a number of actors to be state servants, for example judges, Gardaí⁷ and members of the defence forces have all been so classified. Therefore it would seem that public prosecutors could be so viewed. We will now turn to specific areas of tort law that may be of assistance to a civil litigant.

Malicious Prosecution

The tort of malicious prosecution was developed at a time when prosecutions were initiated by private individuals, which necessitated a remedy against such prosecutions brought with ulterior motives. To successfully prove the tort the plaintiff must show that:

⁶ [1972] IR 241

⁷ The Irish police force.

- (i) the criminal proceedings terminated in his favour;
- (ii) the defendant instituted and/or participated in the proceedings maliciously;
- (iii) there was no reasonable or probable cause for such proceedings;
- (iv) the plaintiff suffered damage.⁸

A crucial feature of this tort is the need for an acquittal; if the applicant has been convicted no action will lie, irrespective of the presence of evidence that such a conviction was obtained illegally. Quill⁹ notes that privileges afforded in the interest of public policy will not apply in malicious prosecution actions, nor will public prosecutors be immune from such actions.

In the case of *McIntyre v. Lewis*¹⁰ the applicant was assaulted by two Gardaí, arrested and brought to the garda station where he was informed that he was being prosecuted for assault. The applicant succeeded in his action for malicious prosecution and false imprisonment in the High Court. On appeal it was argued that he had not adequately proved that there was an absence of a “reasonable and probable cause” for bringing the assault charge. Hederman J. in the Supreme Court rejected this argument and approved the following charge of the trial judge:

I have already shown you how closely false imprisonment and assault relate to each other in the nature of the action and what happened. But malicious prosecution has another element in it and that is invoking a purported authority and abusing it; using it where they have no right to be using it, abusing the authority of the courts for the purpose of bringing about a prosecution and the consequences of that. And that's why that's a completely different element and the onus there is on the plaintiff to show that if he is to get any damages under that heading, that in fact the Gardaí did abuse their position and they brought a prosecution against him for a completely wrongful motive and in the circumstances in which there was no reasonable cause to bring it at all.

Hederman J. added that in this case the simple fact that had to be decided was who had committed the assault; once it was found that the Gardaí had in fact committed the assault there was no need for the plaintiff to go further and “prove a negative”: the absence of a reasonable and probable cause for

⁸ Per Hederman J. in *McIntyre v. Lewis* [1991] 1 IR 121.

⁹ Quill, *Torts in Ireland*, Dublin, 1999.

¹⁰ [1991] 1 IR 121

bringing the charges. The Supreme Court upheld the findings in this case but reduced the award.

In November 2007 a Donegal publican, Frank McBrearty, settled his action against the state for personal damages arising from malicious prosecution, wrongful imprisonment, defamation and wrongful arrest for €3 million, albeit without any admission of liability. Mr McBrearty was the victim of a police conspiracy to frame him for the murder of one Richie Barron; who had in fact died accidentally. Such a substantial award could encourage a greater number of malicious prosecution actions coming before the courts.

In the absence of any direct case law, the Irish courts have been unclear as to the liability of the Office of the Director of Public Prosecutions for malicious prosecution actions. In the case of *JF v. DPP*¹¹, Hardiman J. noted *obiter* that in malicious prosecution cases the courts have taken a practical view of the tort to fit complainants within the definition of “prosecutors”. He stated as follows:

Because the Director of Public Prosecutions or, occasionally, another public official, has a monopoly of prosecutions on indictment in Ireland, the complainant in such a case never functions as the prosecutor. Nevertheless, the law of tort acts realistically in regarding the complainant as the institutor of criminal proceedings and I believe that he should be so regarded for the purpose of this litigation as well. As such institutor, his position is far more closely analogous to a plaintiff in civil proceedings than to a witness who just happened to be there. By setting the criminal law in motion he plainly forfeited a degree of privacy, although in many situations his identity will be protected from disclosure to the public at large. A person accusing another of an offence involving disgrace, loss of liberty, loss of reputation and professional oblivion, cannot expect to control the degree to which relevant information about him will be shared with the person whom he accuses. He is not merely the institutor of the proceedings: he is himself the object of the alleged offence. His veracity and accuracy is central both to the criminal proceedings and to the contention at the centre of the case against the applicant's claim for judicial review.

It would appear, therefore, that as members of the Gardaí may be held liable for malicious prosecution along with individual complainants, it may be possible that a public prosecutor could be similarly found liable, provided there is sufficient evidence of malice. Developments in the relation to the duty of disclosure on the Office of the Director of Public Prosecution will be

¹¹ Unreported, Supreme Court, 26th April 2005

relevant in this regard as it would be very difficult for a plaintiff to establish malice if they cannot get access to documents relating to the decision to prosecute. As the Irish courts have accepted that decisions of the DPP are only judicially reviewable in exceptional circumstances it is likely that any request for information surrounding such a decision would be considered with caution.¹²

Negligence

In order to succeed in an action for negligence a plaintiff must show that they were owed a duty of care by the defendant arising from: the proximity of the parties; the foreseeability of the damage; and the absence of any compelling exemptions based on public policy. They must further show that such a duty was breached causing damage.

In general the judiciary have been reluctant to accept that the Director of Public Prosecutions, or the Gardaí, owe any duty of care to individuals. This reluctance stems from the public interest in the prosecution of crime and the public detriment which may ensue from attaching such a duty. The issue was discussed in the case of *W. v. Ireland (No. 2)*¹³. The applicant in this case, claimed that the Attorney General breached his duty of care and/or his constitutional duty along with statutory duties owed by failing to process speedily the extradition of Father Brendan Smyth to face charges of sexual assault against the applicant. Costello P. rejected the existence of any such duty, making the following observations:

Turning, then, to the facts of this case it seems to me that the denial of a right of claim for damages for negligence on the grounds of public policy arises from the functions which the Attorney General is called upon to perform in the public interest and the consequences for his ability properly to perform them, should the alleged duty exist. By conferring an important role on him in the extradition process, the Oireachtas has involved him in a significant way in ensuring that proper compliance with the State's international obligations in the field of extradition is achieved. The Act requires him to weigh the information made available to him relating both to the intention to prosecute the person named in the warrant, and also the evidence on which the intention to prosecute is based, and should the information he obtains not be sufficient, he is required to request further information. If in carrying out this function, he is also under a duty of care to the victim of the crime referred to in the warrant not to delay, there is a risk,

¹² See *The State (Killian) v. AG* (1958) 92 ILTR 182, *The State (McCormack) v. Curran* [1987] ILRM 225 and *H v. DPP* [1994] 2 IR 589.

¹³ [1997] 2 IR 142

which I do not think it is in the public interest he should be asked to run, that a conflict may arise between the proper exercise of his public function and the common law duty of care to the victim which might result in an improper exercise of his statutory functions.

There are further compelling reasons why, in the public interest, the duty claimed by the plaintiff in this action should not be allowed. If a duty under the Act of 1965 exists it must logically follow (a) that the Attorney General would be under a similar duty in respect of any prosecutorial functions conferred on him by s. 5 of the Prosecution of Offences Act, 1974 and (b) that in exercising his prosecutorial functions under that Act, the Director of Public Prosecutions would owe a like duty to all victims of crimes in the cases in which he is considering the institution of prosecution. Because of the inhibiting effect on the proper exercise by the Attorney General and the Director of Public Prosecutions of their prosecutorial functions, it would be contrary to the public interest that a duty of care at common law be imposed on them. So to conclude is not to submit to a "flood gates" argument of doubtful validity, it is to accept the logical consequences, should the duty of care at common law be imposed in the execution by the Attorney General of his functions under the Act of 1965.

Presumably similar policy considerations would apply to individuals suspected or accused of criminal behaviour. However in light of the European Court of Human Rights decision of *Osman v. UK*¹⁴ such a public policy exclusion may be regarded as disproportionate. In this case the Court found that an exclusionary rule that prohibited actions against the police by the victims of crime for negligent investigation on the grounds of public policy was contrary to Article 6 of the Convention.

The Irish Supreme Court displayed a greater willingness to review the workings of the DPP's Office in the case of *Eviston v. DPP*¹⁵. In this case the Supreme Court held that the decision to prosecute the applicant, where she had been previously been informed that she would not be so prosecuted, was a breach of fair procedures. In the circumstances the Court found that the applicant's prosecution could not continue. The approach in *Eviston* has remained exceptional and so would seem not to be indicative of a more watchful role on the part of the judiciary. In the case of *J.M v. DPP*¹⁶ McCarthy J. in the High Court outlined that the case of *Eviston* itself articulated a rule that the Director is entitled to review his decision and that all

¹⁴ (1998) 29 EHRR 245

¹⁵ [2002] 3 I.R. 260

¹⁶ [2008] IEHC 451

citizens are now deemed to have knowledge of the existence of this rule. As a result the case before him could be distinguished from that of *Eviston*, with the effect that the applicant was not entitled to an order of prohibition.

It should be noted that the question of duty of care in the sphere of criminal investigations has arisen in the Irish courts. Mr James Livingstone claimed that the Gardaí were guilty of negligence and breach of duty in their management of the investigation into the murder of his wife. He alleged that the Gardaí had an irrational fixation that he was the killer which caused him to be “pilloried” as a murderer causing him great damage. However as the matter was settled, with no admission of liability, an opportunity to examine the application of the tort of negligence to the criminal process was missed.

In light of the above developments it remains an open question whether a duty of care to those accused or suspected of crime will be recognised at some future date.

Other Applicable Torts

It should be noted that a broad range of torts have been argued in actions where individuals seek damages for acts committed during criminal investigations. In addition to the torts of malicious prosecution and negligence, applicants have claimed that they have been victims of defamation, false imprisonment and trespass to goods.

As mentioned above, the applicant in *McIntyre v. Lewis* was awarded damages for false imprisonment against the Gardaí who assaulted and then arrested him. In *Dowman v. Ireland*¹⁷ the State was held vicariously liable in an action for false imprisonment when the Gardaí unlawfully arrested the plaintiff. As the Director of Public Prosecution is independent of the Gardaí and exercises no control over their actions, it would be unlikely that prosecutors could be held liable for such false imprisonment.

It would seem unlikely that an action for defamation could lie against the DPP by virtue of the fact that under Irish defamation law, an absolute privilege attaches to all statements which are made in the course of the administration of justice and a qualified privilege attaches to actions committed or statements uttered under legal duty. Therefore, in the absence of malice it would seem that statements emanating from the Office would be privileged and therefore immune from suit.

¹⁷ [1986] 1 ILRM 111

The tort of trespass to goods may also be claimed where an individual has been deprived of their property in the course of criminal investigation. However, such an action has a limited prospect of success due to the fact that such acts will not be tortious where they have been committed with lawful authority. Irish criminal law allows extensive powers of search and seizure, which makes success in such a claim unlikely where the investigation of a crime is concerned. In the case of *Jennings v. Quinn*¹⁸ O'Keefe J. recognised the public interest in allowing the Gardaí a wide power of seizure in relation to goods that may have evidential value in support of criminal charges or which may be stolen property. However, should an individual successfully claim that the seizure was committed without lawful authority an action against the Gardaí may lie.

Civil Action for Breach of Constitutional Law

Finally, it has been argued that a right to damages should arise based on the concept of a tort of breach of constitutional rights. Such an argument stems from the judgment of Walsh J. in *Byrne* where he stated:

Where the people by the Constitution create rights against the State or impose duties upon the State, a remedy to enforce these must be deemed to be also available.

Following on from this in the case of *Meskell v. CIÉ*¹⁹ Walsh J. stated that:

It has been said on a number of occasions in this Court...that a right guaranteed by the Constitution or granted by the Constitution can be protected by action or enforced by action even though such action may not fit into any of the ordinary forms of action in either common law or equity and that the constitutional right carries within it its own right to a remedy or for the enforcement of it. Therefore, if a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a constitutional right, that person is entitled to seek redress against the person or persons who have infringed that right.

It was feared that such a broad statement would lead distinct torts to be subsumed into this general action, however in practice this did not occur. In the case of *W v. Ireland (No.2)*, discussed above, Costello J. held that such an action for damages would only arise where existing statutory or common law did not already provide a remedy for the breach in question. Costello J. added that a failure of the action at common law would not, of itself, indicate

¹⁸ [1968] IR 305

¹⁹ [1973] IR 121

that the plaintiff's constitutional rights are not adequately protected. Hogan and Whyte have observed:

...[T]he courts have tended to take the view that the law of tort generally provides adequate protection for personal rights and that it is only in those cases where common law remedies are inadequate or non-existent that an action based directly on the Constitution would arise.²⁰

The right to sue for damages for a breach of a constitutional right is not confined to action against the State or state agents, but has been found to exist against a private individual or entity.²¹

It would seem that provided the Irish judiciary exercise the caution demonstrated in the *W* case by refusing to extend the action more generally, that no action would lie in the circumstances outlined in the questionnaire. This is due to the fact that an individual who has been falsely accused, detained, prosecuted or deprived of their property would be covered under defamation, *habeas corpus*, malicious prosecution and trespass on property respectively.

Summary

In summary, the crucial social function provided by the DPP and the Gardaí has made the Irish Courts reluctant to impose any civil liability on them; fearing that such an imposition would hamper the effective operation of the criminal justice system. There may be extreme cases where misconduct makes it imperative that a civil remedy be afforded such as the *McIntyre* or *Shortt* or *McBrearty* cases. However, the courts are likely to avoid any broad statements of duty; limiting such actions to cases with clear evidence of malicious motives. As a result of recent high profile settlements it is likely that a greater number of cases will be taken against the Gardaí in the future; whether such actions will extend to prosecutors remains to be seen.

²⁰ Hogan and Whyte, Kelly: *The Irish Constitution*, 4th Ed., 2003, Dublin. Page 1311.

²¹ *Herrity v. Associated Newspaper* [2009] 1 IR 316

The Questionnaire

Turning to the questionnaire:

1. Is there a right to open a civil lawsuit by an accused who happens not to be indicted or an indicted who then becomes acquitted or any other person who feels prejudiced:

(a) for being suspected/accused or for being arraigned/indicted?

It would seem unlikely that an individual could succeed in a civil suit for being suspected/accused or for being arraigned/indicted unless there existed strong evidence of misconduct on the part of the authorities.

(b) for pre-trial confinement or the imposed arrest?

False imprisonment actions may be taken for pre-trial confinement or imposed arrest based on unlawful activities of the competent authorities.

(c) for seizure of the properties of the accused?

An action for the seizure of the properties of the accused could only be taken where such seizure constitutes an actionable trespass on property: a seizure without lawful authority. Therefore one must show unlawful activities of the competent authorities.

(d) for any other reasons?

Other possible avenues have been outlined above and would require unlawful activity on the part of the competent authorities.

2. Which party shall the lawsuit be issued against?

Any lawsuit taken against prosecutors should be issued against the State represented by the Attorney General, as outlined in *Byrne*. It should be noted that attempts have been made to bring actions against the Office of the Director of Public Prosecutions under the headings outlined above. Such actions have had limited success, as discussed. In one instance an applicant sought to take a case against the legal Counsel representing the Office personally for allegedly misleading the Court. The Office opposed such an action outlining that Counsel was acting for the Office, on the Director's instructions and so should not be personally responsible. The High Court accepted this argument and removed Counsel from the proceedings.

3. If compensation has been adjudicated to the claimant by the competent civil court, which party shall be liable to pay?

Should an action succeed and where the actions were in the course of employment by the State, the State will be vicariously liable to pay damages.

4. If compensation has been adjudicated against the State (or Prosecution Service, Ministry of Justice), can the individual prosecutor be obliged to reimburse the sum of indemnity back to the State (or Prosecution Service or Ministry of Justice)?

There is no statutory power to demand reimbursement of the sum of indemnity back to the State where one has caused the action. However, there may be circumstances where the State may wish to pursue the employee in tort law for damages, although such an action would clearly be exceptional.

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6 May 2010