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Prohibited Methods of Obtaining and Presenting Evidence

IRELAND

Dr. Yvonne Marie Daly*

OBTAINING EVIDENCE

Ireland operates one of the strictest, if not *the* strictest, exclusionary rules in the common law world in relation to evidence obtained in breach of constitutional rights. Evidence obtained in breach of mere legal rights, which have not been recognised as being of constitutional status, may also be excluded at trial, but the rule in that regard is more flexible than its constitutional counterpart.

Where evidence that has been obtained in breach of constitutional rights is proffered at trial it *must* be automatically excluded, unless there are extraordinary excusing circumstances in place to justify its admission.[1] This strict rule is based on a rationale of protectionism and requires no *mala fides* on the part of the garda (police officer) who obtained the evidence in the relevant manner for it to operate. In fact, even if the garda is unaware that his actions are in breach of constitutional rights the evidence must be excluded in order to vindicate those rights that have been breached.

While deterrence of garda misconduct is not the primary concern of the exclusionary rule in Ireland, the operation of the rule still clearly impacts on the manner in which evidence is obtained.

The exclusionary rule was first set down in the 1965 case of *People (A.G.) v O'Brien*[2] and it has been revisited and reformulated since then. In 1990, the Supreme Court in *People (D.P.P.) v Kenny*[3] expressly clarified the protectionist rationale of the rule and the then Chief Justice acknowledged that the strict stance adopted could and would lead to the loss of probative evidence. However, he considered that the duty of the courts to vindicate the constitutional rights of the accused could not be outweighed by the public interest in the prosecution of crime.[4]

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* Lecturer in Law, Socio-Legal Research Centre, School of Law and Government, Dublin City University, Dublin, Ireland; Visiting Researcher at the Faculty of Law, University of Auckland, New Zealand during the academic year 2010/2011.

[1] An inexhaustive list of potential extraordinary excusing circumstances was provided by Walsh J. in *People (A.G.) v O'Brien* [1965] I.R. 142 and included the need to rescue a victim in peril, the imminent destruction of vital evidence, and a search without warrant which was incidental to and contemporaneous with a lawful arrest [1965] I.R. 142 at 170. However, this proviso has rarely been relied upon in the caselaw.

[2] [1965] I.R. 142.

[3] [1990] 2 I.R. 110.

[4] "[T]he detection of crime and the conviction of guilty persons, no matter how important they may be to the ordering of society, cannot … outweigh the unambiguously expressed constitutional obligation 'as far as practicable to defend and vindicate the personal rights of the citizen'" *per* Finlay C.J. [1990] 2 I.R. 110,

A more flexible rule persists in relation to evidence proffered at trial that was obtained in breach of legal rights only. In such cases, the trial judge holds a discretion to admit or exclude the evidence based on his assessment of the totality of the circumstances, taking into account the nature and extent of the illegality; whether it was intentional or unintentional; whether it was an illegality of a trivial nature or otherwise; whether it was the result of an *ad hoc* decision or represented deliberate, settled policy; and, whether the public interest would be best served by the admission or exclusion of the relevant evidence. In practice the courts are very slow to exclude evidence on the basis of a breach of legal rights only. However, given the nature of pre-trial investigations and the gathering of evidence, constitutional rights are very often at play and the threshold for the operation of the stricter rule is accordingly somewhat low.

Of course, these exclusionary rules operate only in the context of evidence proffered at trial that has been improperly obtained. The rules cannot reach evidence that is not proffered at trial (unless there is a causative link in place between the evidence sought to be admitted at trial and other evidence which was improperly obtained[5]). Therefore, in cases where a guilty plea is entered, for example, any rule of exclusion is impotent. Other consequences also exist outside of the criminal process in a given case to address improper obtaining of evidence. These include internal garda discipline (which has historically been very weak and unsatisfactory[6]), civil actions taken by injured parties against offending gardaí, and criminal actions taken by the state against gardaí where their conduct amounts to a criminal offence.

Unconstitutionally Obtained Evidence

As outlined above, the exclusionary rule operates to suppress evidence which has been improperly obtained. A strict, automatic rule operates in the context of breaches of constitutional rights. The Irish Constitution, *Bunreacht na hEireann*, protects both rights which are expressly listed therein and a significant number of so-called "unenumerated rights" which, although not apparent in the text of the Constitution, have been recognised by the courts as having constitutional status.

The most notable constitutional rights in the context of obtaining evidence are as follows:

- The right to the inviolability of the dwelling;

134; quoting Art.40.3.1 of the Constitution. On the rationale of the Irish exclusionary rule see further Martin, F. "The rationale of the exclusionary rule of evidence revisited" (1992) 2(1) I.C.L.J. 1; McGrath, D. "The Exclusionary Rule in Respect of Unconstitutionally Obtained Evidence" (2004) 11(1) D.U.L.J. 108; McGrath, D. *Evidence* (Dublin: Thomson Round Hall, 2005) Ch.7; and Daly, Y.M. "Unconstitutionally Obtained Evidence in Ireland: Protectionism, Deterrence and the Winds of Change" (2009) 19(2) I.C.L.J. 40.

[5] In relation to a causative link between evidence obtained in breach of rights and evidence derived therefrom see *People (D.P.P.) v Buck* [2002] 2 I.R. 269 and *People (D.P.P.) v O'Brien* [2005] 2 I.R. 206. See also Daly, Y.M. "Does the Buck Stop Here? An Examination of the Right to pre-trial Legal Advice in Light of O'Brien v D.P.P." (2006) 28 D.U.L.J. 345.

[6] On this see further Walsh, D. "Twenty Years of Handling Police Complaints in Ireland: a Critical Assessment of the Supervisory Board Model" (2009) 29(2) *Legal Studies* 305.

- The right to liberty;
- The right to privacy;
- The right to bodily integrity;
- The right to pre-trial silence;
- The right to pre-trial legal advice; and,
- The general right to a fair trial, which includes concepts such as the presumption of innocence and the requirement that any statement made by a detained suspect be voluntary.

If any garda action, which is not accidental or unintentional, results in a breach of constitutional rights, the evidence gathered as a result must be excluded at trial.

The right to the inviolability of the dwelling, protected under Article 40.5 of the Constitution, has been very fruitful in terms of jurisprudence on the exclusionary rule in Ireland. The right to privacy in Ireland is quite underdeveloped, in comparison with other jurisdictions, but the more specific right to the inviolability of the dwelling has been given considerable attention. Indeed, both the seminal case of *O'Brien* and the highly influential *Kenny* case centred on alleged breaches of this right due to difficulties with the issuing and execution of search warrants.

In *O'Brien*, two brothers were suspected of involvement in stealing and receiving stolen property. A search warrant was issued for their home and a search carried out thereunder. However, a mistake was made on the warrant such that it was issued for 118 Cashel Road when it should have referred to 118 Captain's Road. The evidence obtained during the search was admitted at trial and this was later appealed. The appellants argued that the search of their dwelling in the absence of a valid warrant was both illegal and unconstitutional (due to the breach of Article 40.5) and that the evidence obtained as a result ought to have been excluded at trial.

While it was in this case that the two-tiered exclusionary rule was first formulated, on the facts the Supreme Court unanimously held that the mistaken address on the warrant was a pure oversight; there was nothing to suggest deliberate treachery, imposition, deceit or illegality; there was no apparent policy to disregard the Constitution or to conduct searches without a warrant[7]; and there was clearly no deliberate and conscious violation of the rights of the accused on the part of the gardaí.[8] Therefore, it was held that the trial judge had correctly exercised his discretion to admit the evidence in the circumstances of this case, which did not amount to a breach of constitutional rights.

In *Kenny*, however, an altogether different finding on the facts was made. In that case, the search warrant was not defective due to errors on the document itself, rather it was found to be invalid because it had been issued by a peace commissioner without any evidence that he himself was satisfied that there were reasonable grounds for the suspicion held by the member of the Garda Síochána who swore information before him.[9]

[7] *per* Kingsmill Moore J. [1965] I.R. 142 at161.
[8] *per* Walsh J. [1965] I.R. 142 at 170.
[9] As is required under the provisions of the Misuse of Drugs Act, 1977.

Therefore, the search warrant had been issued without lawful authority. Unlike the situation in *O'Brien*, the defects on the warrant in *Kenny* were not apparent on the face of the warrant: there was no way that the gardaí could have known that the warrant was invalid and that in executing it they were breaching the suspect's constitutional right to the inviolability of his dwelling under Article 40.5.

In this case, despite the ignorance of the gardaí that they were breaching rights, the Supreme Court held that there had indeed been a breach of the constitutional right to the inviolability of the dwelling, as the search warrant had no lawful authority.

The strict exclusionary rule in relation to breaches of constitutional rights has been applied in the courts for many years. There are some detractors, however, and in recent times there have been notable calls for change. The primary call for change came from the majority of the Balance in the Criminal Law Review Group, which was set up by the Minister for Justice on an *ad hoc* basis to enquire into certain elements of the criminal process, including the right to silence and the exclusionary rule. The majority of this group recommended that the current strict rule in relation to breaches of constitutional rights ought to be replaced by a more flexible rule, which would allow the trial judge to exclude or admit the impugned evidence in the exercise of his discretion, taking into account the totality of the circumstances, with particular regard for the rights of the victim.[10] The Chairman of the Group, Dr. Gerard Hogan S.C., dissented from this recommendation, considering that the current rule exists for the protection of constitutional rights, that these rights should be taken seriously, and that society should be prepared to pay the price for upholding these rights in the form of the occasional exclusion of evidence obtained in breach thereof.[11]

A recent case also gave rise to some judicial comment on the exclusionary rule. Charleton J., in the High Court in *D.P.P. (Walsh) v Cash*, made it clear that while he was bound by the doctrine of precedent to apply the strict exclusionary rule, he did not favour that rule, finding it overly restrictive. He considered that

> "[a] rule which remorselessly excludes evidence obtained through an illegality occurring by a mistake does not commend itself to the proper ordering of society which is the purpose of the criminal law".[12]

Charleton J. considered that the decision whether or not to exclude evidence at trial should be based on a balancing of the interests of society as against the interests of the accused, taking into account also the rights of the victim.

The appeal in this case was heard in the Supreme Court and judgment was handed down in January 2010. It was thought that the Court might take the opportunity to address the ongoing application, or otherwise, of the strict exclusionary rule. In the event, the Court side-stepped such a discussion, though its judgment is still of relevance to the law in this area.

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[10] Balance in the Criminal Law Review Group, *Final Report* (Stationery Office, Dublin, 2007), p. 166.

[11] Note of Dissent on Exclusionary Rule by the Chairman of the Balance in the Criminal Law Review Group, Gerard Hogan, *Final Report* (Stationery Office, Dublin, 2007), pp. 287–288.

[12] [2007] I.E.H.C. 108; Unreported, High Court, March 28, 2007, *per* Charleton J. para. 65.

In terms of the relevant facts, defence counsel sought to have a set of fingerprints taken from the accused following his arrest on a burglary charge excluded from evidence. He had been arrested on the basis of a match between fingerprints taken from the scene and prints taken from him in relation to another matter some years previously which were held on file in the Garda Technical Bureau. The prosecution had been unable to clearly state the legal position of the retained prints: whether they had been taken with consent or under the relevant statutory regime[13]; whether or not they ought to have been destroyed following the passage of some time and the fact that no proceedings had been instituted in relation to the earlier matter.[14]

In the Supreme Court, Fennelly J. held that the exclusionary rule is only relevant to the exclusion of evidence proffered at a criminal trial and is not concerned with the lawful provenance of evidence used to ground a suspicion leading to an arrest. He suggested that the appellant in this case was seeking to extend the exclusionary rule beyond its correct boundaries and that doing so would blur the distinction between the arrest and the trial.

Quoting from Charleton J. in the High Court, Fennelly J. observed that it has never been held that:

> ''what would found a reasonable suspicion in law, requires to be based on the kind of evidence that would be admissible under the rules of evidence during the hearing of a criminal trial''.

While this seems correct to a certain extent, it is disappointing and somewhat at variance with previous Irish jurisprudence, that the Court did not consider the derivative nature of the evidence proffered at trial. If the earlier-obtained fingerprints in this case ought to have been destroyed then their retention could be seen as breaching the appellant's right to privacy, both under the Constitution and the ECHR,[15] and their use to ground an arrest could be seen as a breach of the right to liberty. It might have been thought, on the basis of previous caselaw relating to evidence "causatively linked" to a breach of rights,[16] that the impugned evidence in this case would have been excluded.

The distinction drawn in the case between evidence that might ground an arrest and evidence that is acceptable under the evidentiary rules of the courts is interesting. It is indeed correct that evidence in the first category would not always fit into the second category, however, it is arguable that a further distinction should be made between evidence unconstitutionally obtained and evidence that would be excluded at trial for other reasons. One example of the type of evidence that might ground arrest but would not be admissible at trial is hearsay evidence. The rationale for the exclusion of hearsay evidence at trial centres on the reliability of such evidence and the dangers inherent in not being able to adequately test it in the courtroom. However, the rationale for the exclusion

[13] Criminal Justice Act 1984, s. 6.

[14] Criminal Justice Act 1984, s. 8, as amended by the Criminal Justice Act 2006, provides that fingerprints taken from suspects who have been arrested and detained under the Criminal Justice Act 1984 and any copies thereof must be destroyed at the expiration of 12 months from the taking of such prints if proceedings are not instituted against the relevant suspect and the failure to institute the proceedings within that period is not due to the fact that he has absconded or cannot be found.

[15] Article 8 ECHR. See *S and Marper v U.K.*, 4 December 2008.

[16] For example, *People (D.P.P.) v Buck* [2002] 2 I.R. 269 and *People (D.P.P.) v O'Brien* [2005] 2 I.R. 206.

of unconstitutionally obtained evidence from trials in Ireland, as expressly set out in *Kenny*, is the protection of constitutional rights. The decision in *Cash*, which appears to have set pre-arrest investigative methods beyond the reach of the exclusionary rule, is accordingly somewhat strange.

Nonethless, the Supreme Court notably avoided any question of altering the strictness of the exclusionary rule when evidence that has been obtained in breach of constitutional rights is tendered before a court. Consequently, the exclusionary rule as set out in *O'Brien* and reformulated in *Kenny* continues to be applied in Ireland and, although deterrence is not its central tenet, it restrains the police from obtaining evidence in breach of fundamental rights.

Illegally Obtained Evidence

As outlined above, the consequence of obtaining evidence in breach of the constitutional rights of the accused is that the evidence must automatically be excluded at trial. The consequence of breaching mere legal rights is that the evidence may be excluded at trial, at the discretion of the trial judge.

In relation to this second element of the Irish exclusionary rule, it can be said that the courts almost never exclude evidence on the basis of a breach of legal rights only. Hogan has suggested that this is because there is almost always a reason why such evidence should be admitted in the overall public interest.[17] Evidence obtained in breach of legal rights is generally only excluded by the courts where there have been multiple breaches. Indeed, it is specifically set down in legislation that certain breaches of procedure ought not to lead, in and of themselves, to the exclusion of evidence. This relates to breaches of both the Criminal Justice Act 1984 (Treatment of Persons In Custody in Garda Síochána Stations) Regulations 1987 and the Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997. The parent statute in relation to both of these sets of regulations, the Criminal Justice Act 1984, provides that a breach of the respective regulations alone will not of itself affect the admissibility in evidence at trial of any statement made by a suspect in the pre-trial process.[18]

Alternative Consequences

As noted above, there are consequences for the improper gathering of evidence that exist outside of the exclusionary rule in relation to criminal evidence also.

Garda Discipline—The experience in Ireland in relation to garda discipline has to date been less than positive. In the past, the European Committee for the Prevention of Torture

[17] Note of Dissent on Exclusionary Rule by the Chairman of the Balance in the Criminal Law Review Group, Gerard Hogan, *Final Report* (Stationery Office, Dublin, 2007), p. 289.

[18] Criminal Justice Act 1984, s. 7(3) in relation to the Custody Regulations 1987, and s. 27 in relation to the Electronic Recording Regulations 1997. In relation to the 1987 Custody Regulations, see *People (D.P.P.) v Connell* [1995] 1 I.R. 244; *D.P.P. v Spratt* [1995] 1 I.R. 585; *People (D.P.P.) v Van Onzen* [1996] 2 I.L.R.M. 387; *People (D.P.P.) v Darcy*, unreported, Court of Criminal Appeal, July 29, 1997; *People (D.P.P.) v Smith*, unreported, Court of Criminal Appeal, November 22, 1999; *People (D.P.P.) v Murphy*, unreported, Court of Criminal Appeal, July 12, 2001. In relation to the *Electronic Recording Regulations, 1997* see *People (D.P.P.) v Holland*, unreported, Court of Criminal Appeal, June 15, 1998; *People (D.P.P.) v Paul Kelly*, unreported, Special Criminal Court, November 26, 2004; *People (D.P.P) v Connolly* [2003] 2 I.R. 1; *D.P.P. v Diver* [2005] 3 I.R. 270.

and Inhuman or Degrading Treatment or Punishment (CPT) questioned the effectiveness of the garda complaints procedure and it is clear from the governmental responses to their reports that the number of complaints which actually lead to disciplinary action against gardaí has been very low in comparison to the number of complaints made.[19]

In 2007, the Garda Complaints Board (which had been in existence since 1987) was replaced by the Garda Síochána Ombudsman Commission (GSOC), which it is hoped will improve the process of disciplining the gardaí. As the Commission is still in its infancy it is difficult to draw any conclusions on this issue at present. However, at least one concerning matter is already apparent which had previously been seen as a significant flaw under the Garda Complaints Board procedures: the Ombudsman Commission has begun to allow gardaí to carry out some of its investigatory work such that gardaí are investigating gardaí, at least in certain circumstances.[20]

Criminal Proceedings against Gardaí—Where criminal prceedings are taken against members of the Garda Síochána there appears to be a very low rate of prosecution and conviction. While statistics are sparse in this regard some indication of the levels of prosecution is available within the Response of the Irish Government to the Report of the CPT in 1998. According to the figures produced therein, in 1998 the Garda Complaints Board referred one hundred and ninety-six cases to the Director of Public Prosecutions. Prosecutions were directed in respect of nine complaints during that year. Six cases were dealt with in 1998, resulting in a withdrawal of charges in one case; in the other five cases, no member was convicted.[21] The previous year, 1997, was largely similar.[22] Quite clearly there is a very low level of criminal prosecution of gardaí in Ireland. This may be a reflection of the high standards attained by the gardaí in carrying out their duties,

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[19] See the *Response of the Irish Government to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Ireland from 31 August to 9 September 1998* para. 28-31. In 1998, for example, the Garda Complaints Board processed five hundred and ninety-six complaints. Of these:
• one hundred and ninety-two were ultimately withdrawn;
• eighty-two were deemed inadmissible by the Board;
• twenty-four were informally resolved;
• two hundred and forty-four were said to show no offence or breach of garda discipline;
• twenty-eight were said to show a minor breach of discipline and were dealt with by way of advice, admonition or warning by the Garda Commissioner; and
• twenty-seven were referred to the higher Tribunal of the Board.
However, only eleven cases were finalised by the Tribunal (some of those having been carried forward from the previous year) and of those eleven, five were found to have committed no breach of discipline and six were found to be in breach of discipline. Of these six:
• one case was dismissed;
• one garda was required to resign;
• one garda was reduced in rank;
• and, fines of IR£200, IR£250 and IR£300 were imposed in the remaining three cases.
So, from a total of five hundred and ninety-six complaints only six were found to be in breach of discipline: that is, 1% of the total complaints which were processed in that year.

[20] See further Conway, V. "A Sheep in Wolf's Clothing? Evaluating the impact of the Garda Síochána Ombudsman Commission" (2008) 43 *Irish Jurist* 109.

[21] *Response of the Irish Government to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Ireland from 31 August to 9 September 1998,* para. 32.

[22] *Ibid*.

although given the high numbers of cases referred to the D.P.P. and the low level of prosecution, it might instead reflect a reluctance to prosecute gardaí.

Civil Actions against Gardaí—While information in regard to the number of civil cases taken against gardaí for violation of personal rights is not widely available, it can be suggested on the basis of the Response of the Irish government to the Report of the CPT in 1993 that such cases are rarely taken in Ireland and even more rarely pursued to their conclusion.[23] That response. Although a little outdated, shows that in 1992 thirty-one civil proceedings were initiated against members of the gardaí for violations of individual rights that allegedly occurred in circumstances ranging from wrongful search to assault. Of these thirty-one proceedings, only one award for damages was made in that year and only one case was settled; seventeen of the cases were not pursued; eleven were still pending by year's end; and one case was dismissed.[24] The position was similar the following year.[25] This may be related to the fact that civil legal aid is not entirely free in Ireland and is means tested. The potential legal costs for taking a tort action against a member of the Garda Síochána then may be thought to outweigh any compensation which might be payable. This could act as a deterrent to potential litigants. The relatively recently introduced Garda Síochána Act, 2005 provides, at s. 48, that the State may be held vicariously liable in damages in respect of an "actionable wrong" perpetrated by a member of the gardaí in the course of performing his duties.[26] While this, to some extent, merely places current practice on a statutory footing, the statutory clarification of the fact that the State may pay damages for the improper conduct of gardaí in obtaining evidence in the pre-trial process, may lead to more civil actions being taken in the future than has been the case in the past.

Of course, even if a significant improvement were to come about in relation to these alternative remedies, the Irish exclusionary rule would be unaltered given it rationale of protectionism, rather than deterrence.[27]

1. Describe briefly the legal rules in your country that restrain persons from obtaining evidence in breach of fundamental rights, such as physical and moral integrity, privacy, etc.

- Two-tiered exclusionary rule in relation to improperly obtained evidence
    - Strict rule re unconstitutionally obtained evidence
    - Discretionary rule re illegally obtained evidence

[23] See *Response of the Irish Government to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Ireland from 26 September to 5 October 1993*, pp. 10–12.
[24] *Ibid.* p. 11.
[25] *Ibid*. p. 12.
[26] An "actionable wrong" is defined as a tort or breach of a constitutional right, whether or not the wrong is also a crime and whether or not the wrong is intentional.
[27] Contrast this with the apparent view of the U.S. Supreme Court that improvements in police discipline and accountability have lessened the necessity for exclusion as a remedy: see *Hudson v Michigan* (2006) 547 US 586. See also Daly, Y.M. "Unconstitutionally Obtained Evidence in Ireland: Protectionism, Deterrence and the Winds of Change" (2009) 19(2) I.C.L.J. 40.

- Alternative Consequences
    - Garda discipline
    - Civil actions against Gardaí
    - Criminal proceedings against Gardaí

2. What are the legal/procedural consequences of such breaches?

- Exclusion of evidence from trial; potential dismissal of charges if remaining evidence is insufficient.

- Alternative Consequences
    - Disciplinary proceedings: punishment ranging from a warning to dismissal
    - Payment of damages
    - Criminal prosecution

3. Do the consequences vary with the gravity of the matter (eg, are there special rules for serious crimes)?

The operation of the exclusionary rule is not predicated on the seriousness of the offence in question – if rights have been violated then rights have been violated and the rule operates in the same manner.

However, when the matter of exclusion is at the discretion of the trial judge (i.e. when there has been a breach of legal, but not constitutional, rights) then the seriousness of the violation of rights may be taken into account along with a number of other matters in considering the totality of the circumstances and the value or otherwise of exclusion. In some cases, the seriousness of the crime under investigation has been taken into account in considering the balance between admission or exclusion, in the public interest,[28] though it is still correct to say that the operation of the rule is not generally predicated on the seriousness of the offence.

The rules in relation to police discipline and other remedies external to the criminal process in a given case operate in a similar manner: it is the extent of the intrusion on rights which might lead to differing consequences, rather than the seriousness of the relevant crime.

4. Do the rules that apply to evidence obtained by the prosecution differ from those that apply to the defense?

There is no distinction between the rules, though clearly, the usual factual scenario which arises is that the defence challenge the admissibility of prosecutorial evidence.

5. Describe the practical effect of these rules and how they are applied by the courts.

The operation of the exclusionary rule and alternative consequences for the improper gathering of evidence in Ireland has been set out above.

[28] See *People (D.P.P.) v McMahon, McMeel and Wright* [1987] I.L.R.M. 87.

PRESENTING EVIDENCE

The Irish courts apply particular rules of procedure and evidence that impact on the manner in which certain evidence is presented, or may indeed operate so as to prevent certain types of evidence from being presented to the court at all. Most of these rules are based on the need to ensure an appropriate balance between the probative value of the relevant evidence and its potential to prejudice the accused. The constitutional right to a fair trial[29] underlines the importance of achieving such an appropriate balance.

A number of clear examples are set out below:

***The Rule Against Hearsay*—**The Irish courts operate a "best evidence" rule in order to ensure that the most reliable evidence available in a criminal case is provided.[30] The rule against hearsay forms a part of this, though, as in other jurisdictions, there are many exceptions to the rule.[31]

The most recent exception to the rule against hearsay in Ireland was brought about by way of legislation aimed at ensuring that witness testimony was not lost due to fear caused by intimidation. Section 16 of the Criminal Justice Act 2006 provides that a witness statement may be admissible in court as evidence of the facts stated therein even though the witness may refuse to give evidence at trial, denies making the statement or gives evidence which contradicts in a material manner that which is mentioned in the original statement. Certain safeguards surround this newly-established exception to the rule against hearsay, e.g. the witness must be available for cross-examination[32]; the witness must confirm, or it must be proved, that he made the statement[33]; the court must be satisfied that direct oral evidence of the fact concerned would be admissible, that the statement was made voluntarily and that it is reliable[34]; and, either the statement was given on oath or affirmation or contains a statutory declaration by the witness that it is true to the best of his knowledge or belief, or the court is otherwise satisfied that when the statement was made the witness understood the requirement to tell the truth.[35]

***Voluntariness of Confessions*—**Only a confession that has been voluntarily given may be admitted in evidence.[36] This rule is based on the belief that coerced confessions are

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[29] Protected under Article 38.1 of the Constitution.

[30] *Teper v R* [1952] A.C. 480; *Dascalu v Minister for Justice* unreported, High Court, November 4, 1999. See McGrath. D. *Evidence*, (Thomson Round Hall, Dublin, 2005) p. 214.

[31] See McGrath, D. *Evidence*, (Thomson Round Hall, Dublin, 2005) Ch. 5. For Irish caselaw on the rule against hearsay see *Cullen v Clarke* [1963] I.R. 368; *People (A.G.) v Crosbie* [1966] I.R. 490; *People (A.G.) v Casey (No.1)* [1961] I.R. 264; *People (D.P.P.) v McGinley* [1998] 2 I.R. 408. See also Criminal Evidence Act 1992, ss. 5 and 8; Children Act 1997, ss. 23 and 24; Criminal Assets Bureau Act 1996, ss. 8(5) and 8(7); Proceeds of Crime Act 1996, s. 8; and the Criminal Justice (Theft and Fraud Offences) Act 2001, s. 52.

[32] Criminal Justice Act 2006, s. 16(1).

[33] Criminal Justice Act 2006, s. 16(2)(a).

[34] Criminal Justice Act 2006, s. 16(2)(b).

[35] Criminal Justice Act 2006, s. 16(2)(c).

[36] See *In re National Irish Bank (No.1)* [1999] 3 I.R. 145 at 186-187 where Barrington J. stated that ""any trial at which an alleged confession other than a voluntary confession [was] admitted in evidence against the accused person would not be a trial in due course of law within the meaning of Art.38 of the Constitution…"

more likely to be unreliable than those that are freely given.[37] The traditional voluntariness rule sought to exclude from evidence confessions obtained either by threats or inducements,[38] though this has more recently been expanded to include also confessions obtained in circumstances of oppression.[39]

***Corroboration*—**In certain circumstances corroboration of evidence may be required.[40] In relation to specific offences, or elements of offences, corroboration is required for a conviction to be handed down: treason,[41] perjury,[42] procuration (procuring a woman or a girl to become a prostitute),[43] and in order to prove speed, where necessary, in relation to road traffic offences.[44]

Where uncorroborated confession evidence is given at a trial on indictment the trial judge is statutorily mandated to warn the jury to have due regard to the absence of corroboration.[45] While there is no legislation on the matter, a similar warning must generally be given in relation to uncorroborated accomplice evidence.[46]

Where uncorroborated identification evidence is before the court, it is thought to be highly desirable, though not mandatory, that a corroboration warning be given to the jury.[47]

Statutory provision is made for the potential issuing of a corroboration warning to juries in relation to the evidence of a complainant in a sexual offence case also.[48] The decision as to whether or not to issue such a warning lies with the trial judge in the exercise of his discretion.

***Opinion Evidence*—**Generally, opinion evidence is inadmissible. Only the professional opinion of experts, such as doctors, psychiatrists, forensic analysts and so on, may be heard by the court. This expert opinion should only be given so as to put the court in the position of being able to make an informed decision on the facts, and should not go so far as to answer the central question before the court. Furthermore, it is thought that expert opinion should only be sought on matters outside of the ordinary understanding of

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[37] Reliability is an important concern given that, as Hardiman J. noted in *Braddish v D.P.P.* [2001] 3 I.R. 127 at 133 "…relatively recent history both here and in the neighbouring jurisdiction has unfortunate examples of the risks of excessive reliance on confession evidence".

[38] *Ibrahim v R* [1914] A.C. 599; *A.G. v McCabe* [1927] I.R. 129; *McCarrick v Leavy* [1964] I.R. 225.

[39] *R v Priestly* (1965) 50 Cr. App. Rep. 183; [1966] Crim. L.R. 507; *R v Prager* [1972] 1 All E.R. 1114; [1972] 1 W.L.R. 260; *People (D.P.P.) v Breathnach* (1981) 2 Frewen 43; *People (D.P.P.) v Pringle, McCann and O'Shea* (1981) 2 Frewen 57; *People (D.P.P.) v Lynch* [1982] I.R. 64.

[40] See McGrath, D. *Evidence*, (Thomson Round Hall, Dublin, 2005) Ch. 4.

[41] Treason Act 1939, s. 1(4).

[42] This is a common law rule. See *R v Parker* (1842) Car. & M. 639 at 645; *R v Linehan* [1921] V.L.R. 582 at 588; *R v Sumner* [1935] V.L.R. 197 at 198.

[43] Criminal Law Amendment Act, 1885 s. 2.

[44] Road Traffic Act 1861, s. 105.

[45] Criminal Procedure Act 1993, s. 10.

[46] See *People (A.G.) v Phelan* (1950) 1 Frewen 98.

[47] *People v Casey (No. 2)* [1963] I.R. 33; *People (D.P.P.) v O'Reilly* [1990] 2 I.R. 415.

[48] Criminal Law (Rape)(Amendment) Act 1990 s. 7. On the application of this provision see *People (D.P.P.) v Molloy*, unreported, Court of Criminal Appeal, July 28, 1995; *People (D.P.P.) v Wallace*, unreported, Court of Criminal Appeal, April 30, 2001; and *D.P.P. v Peter Dolan* [2007] I.E.C.C.A. 30.

ordinary members of the community, not on matters that come within that understanding.[49]

***The Residual Discretion*—**Trial judges in Ireland hold a residual discretion to exclude any evidence where its probative value is outweighed by its prejudicial effect.[50]

***The Accused as a Witness*—**Specific rules relate to the questioning of the accused if he chooses to take the stand to give evidence at his own criminal trial. These rules, set out in the Criminal Justice (Evidence) Act 1924, attempt to create a fair balance between the prosecution and the defence by modifying the accused's privilege against self-incrimination so as not to stymie the prosecution, but giving the accused a "shield" in relation to any past criminal behaviour so as not to unfairly disadvantage him.

This shield can be lost, however, if the evidence of past behaviour is deemed by the court to be admissible similar fact evidence[51]; if the accused has given evidence against another person charged with the same offence[52]; or, if the accused has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution[53].

Along with the above-outlined rules, as noted in the section on "*Obtaining Evidence*" improperly obtained evidence may be excluded from presentation at trial, depending on the operation of the exclusionary rule and the nature of any rights which have been breached.

Generally, the response to any breach of the rules surrounding the presentation of evidence at trial would be a warning from the trial judge to the jury to disregard any such evidence. While this is problematic to begin with, it is particularly problematic in the Special Criminal Court in Ireland,[54] which sits as a three-judge court with no jury, largely to hear cases involving paramilitary or gangland crimes. The judges of the Special Criminal Court often need to consider the admissibility of an item of evidence, e.g. considering whether the evidence of a particular witness would amount to a breach of the rule against hearsay. It is a clearly difficult for the same judges to then go on to hear and decide the case without reference to any previously considered evidence which they deemed inadmissible.

If all of the evidence in a given case was excluded on the basis that it would breach any of the rules outlined above, then the charges would have to be dismissed. If a case has been heard to its conclusion and challenges to the manner in which evidence was presented are made on appeal, the decision of the trial court may be affirmed; overturned

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[49] See *Attorney General (Ruddy) v Kenny* (1960) 94 I.L.T.R. 185; *R v Turner* [1975] QB 834; [1975] 1 All E.R. 70; *People (D.P.P.) v Kehoe* [1992] I.L.R.M. 481.

[50] *People (D.P.P.) v Quinn* unreported, Court of Criminal Appeal, March 23 1998; *People (D.P.P.) v McMahon, McMeel and Wright* [1987] I.L.R.M. 86.

[51] Criminal Justice Act 1924 s. 1(f)(i).

[52] Criminal Justice Act 1924 s. 1(f)(iii).

[53] Criminal Justice Act 1924 s. 1(f)(ii). See *People (D.P.P.) v McGrail* [1990] 1 I.R. 38.

[54] Established under the Offences Against the State Act 1939, Part V.

and a retrial ordered; overturned and no retrial ordered; or, overturned and another verdict substituted (e.g. manslaughter substituted for murder). The centrality of the impugned evidence to the decision of the trial court will be an important consideration in any appeal decision, though it can be difficult for an appeal court to determine the basis of a jury verdict.

The central concern of the courts in all of this is the fairness of the trial and thus there is no difference in the rules which apply to the defence or the prosecution in terms of the presentation of evidence. Furthermore, while many of the rules are based on the need for reliability in the evidence presented to the courts, the courts do not engage in individual assessments of whether a particular item of tendered evidence is reliable or otherwise, they simply consider whether any such evidence would breach the procedural or evidential rules.

6. Does the law in your country prohibit certain means of presenting evidence (e.g. hearsay testimony) due to concerns about its probative value?

Yes. These rules are outlined above.

7. What are the legal/procedural consequences of presenting evidence by such means?

As outlined above, the consequences for breaching the procedural or evidential rules range from a warning to the jury in relation to the evidence so presented, to the dismissal of all charges, or the overturning of the verdict given in the case on appeal.

8. Do the consequences vary with the reliability of the evidence and its necessity for the record?

While the rules are generally based on the need for reliability, and the fairness of the accused's trial, individual assessments are not made on the reliability of particular items tendered in evidence. That is to say, trial judges do not directly engage in a process of balancing the need to allow the evidence in against any doubts about the reliability of the evidence. If the evidence breaches the procedural or evidential rules it cannot be admitted. If the evidence, on the other hand, is admissible it is up to the jury to consider its credibility/reliability.

9. Do different rules apply to the evidence relevant to the claim or the defence?

One major exception to the general rules of procedure and evidence is that when a defence of insanity is raised at trial, the burden of proof shifts to the defence. The burden of proof can also shift to the defence under statutory provisions,[55] or where certain matters fall within the "peculiar knowledge" of the defence.[56]

Outside of these matters, the rules of procedure and evidence are generally applicable in relation to all claims or defences.

10. Describe the practical effect of these rules and how they are applied by the courts.

A general outline of the operation of these rules has been provided above. Though somewhat brief this gives an overview of the operation of the various rules.

[55] See *O'Leary v A.G.* [1993] 1 I.R. 102 (HC); [1995] 1 I.R. 254 (SC) in relation to the Offences Against the State Act 1939 s. 24 and the Offences Against the State (Amendment) Act 1972 s. 3(2).

[56] See *D.P.P. v Best* [2000] 2 I.R. 17 in relation to the School Attendance Act 1926; see also *Minister for Industry and Commerce v Steele* [1952] I.R. 304; *McGowan v Carville* [1960] I.R. 330; and *A.G. v Shorten* [1961] I.R. 304.