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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **20/3/2013**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

MARTIN CHRISTOPHER BRESLIN (BY HIMSELF AND ON BEHALF OF THE ESTATE OF GERALDINE BRESLIN)
CATHERINA ANNE GALLAGHER
MICHAEL JAMES GALLAGHER (BY HIMSELF AND ON BEHALF OF THE ESTATE OF ADRIAN GALLAGHER)
EDMUND WILLIAM GIBSON
STANLEY JAMES McCOMBE (BY HIMSELF AND ON BEHALF OF THE ESTATE OF ANNE McCOMBE)
MARION ELAINE RADFORD (BY HERSELF AND ON BEHALF OF THE ESTATE OF ALAN RADFORD)
PAUL WILLIAM RADFORD
COLIN DAVID JAMES WILSON
DENISE FRANCESCA WILSON
GARY GODFREY CHARLES WILSON
GERALDINE ANNE WILSON (BY HERSELF AND ON BEHALF OF THE ESTATE OF LORRAINE WILSON)
GODFREY DAVID WILSON (BY HIMSELF AND ON BEHALF OF THE ESTATE OF LORRAINE WILSON)

Plaintiffs;

-and-

MICHAEL COLM MURPHY
SEAMUS DALY

Defendants.

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GILLEN J

Index **Paragraph**

BACKGROUND TO THIS ACTION

[1] The 12 plaintiffs in this action have claimed damages including aggravated and exemplary damages for personal injuries sustained by them as a result of the explosion of a bomb in Omagh Town Centre on 15 August 1998. In addition there are further claims for damages under the Fatal Accidents (Northern Ireland) Order 1977 and the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1937 as a result of the deaths of members of their families in the explosion.

[2] The plaintiffs were represented by Lord Brennan QC, Mr Lockhart QC and Mr McGleenan QC. The first-named defendant was represented by Mr Dermot Fee QC and Ms McMahon. The second-named defendant was represented by Ms Higgins QC and Mr Sharp. I have been greatly assisted throughout the course of this trial by written submissions which provided narrative thickened with analysis and which were augmented with informed oral argument on the part of all counsel. I also record my gratitude to District Judge Conal Gibbons who presided over proceedings in Dublin pursuant to Council Regulation (EC No 1206/2001)with characteristic skill, aplomb and expedition.

[3] On 8 June 2009 Morgan J concluded that the 12 plaintiffs had sustained their claim for damages for trespass to the person against, amongst others, Michael Colm Murphy ("Murphy") and Seamus Daly ("Daly"). In a judgment on 7 July 2011 the Court of Appeal (hereinafter referred to as "the CA") in Northern Ireland in Breslin and others v McKevitt and others [2011] NICA 33 (and hereinafter called "the CA judgment") allowed the appeals of Murphy and Daly and ordered a retrial of the claims against both these defendants. The CA did not permit an appeal against quantum and so my task was confined to that of liability.

[4] I recognise that a retrial is conceptually wholly independent of the first, that the rulings of the judge at the first trial are not res judicata and are not binding on me at this trial which is in substance a trial de novo. Nonetheless, given the protracted nature of the earlier trial I was conscious of the overriding objective found at Order 1 Rule 1A of the Rules of the Court of Judicature (Northern Ireland) 1980. Under this Order a court dealing justly with a case should so far as practicable ensure that the matter is dealt with expeditiously, fairly, proportionately and have in mind saving expense. Hence the trend of modern authority is to be more ready to look at the balance of cost and convenience in determining the manner in which cases should be heard.

[5] Accordingly, taking the view that the litigants in this action were entitled to have this case resolved with reasonable expedition, I invited counsel in the course of a case management review on 9 March 2012 to convene a meeting of legal representatives for the purpose of discussing factual issues, statements and

witnesses that could be agreed prior to the hearing of this action. On foot of that direction, counsel on behalf of both parties furnished competing schedules of background facts which they proposed could be agreed. In the absence of full agreement between the parties as to what essential core facts could be agreed, I concluded from a synthesis of their submissions certain background facts which did not did not appear to be in dispute using the following criteria:

- A full recognition that this is a de novo hearing.

- The need to conduct this retrial in an open and transparent manner for all to see and in particular so that the public can be reminded of all the relevant background facts to the case in order that an informed assessment of the eventual judgment that I shall give can be made.

- The need to ensure that only those facts which are not in dispute should be treated in this manner.

- I have included nothing which I discerned to have been the subject of dispute at the original trial or before the Court of Appeal

BACKGROUND TO THE OMAGH BOMBING

[6] The accumulated narrative of the events on the day of that bombing are as follows. On 15 August 1998 at 3.05pm a 500lb bomb planted in the boot of a car exploded on Market Street in the centre of Omagh, County Tyrone. The courthouse in Omagh, County Tyrone stands at the top of a hill in the centre of Omagh. In front of the courthouse to the east lies High Street which is the principal shopping location. After approximately 250 yards this thoroughfare becomes Market Street which continues to the Drumragh Crossroads approximately 425 yards from the courthouse. Market Street continues beyond the crossroads into that portion sometimes called lower Market Street. At either side of the upper end of Market Street and High Street there are a number of alleyways and entries, which give access to car parks and other amenities.

[7] The car used in the bomb was a maroon Vauxhall Cavalier. It was parked by its owner outside a house at Carrickmacross at 11.00pm on 12 August 1998. By 3.30am on 13 August 1998 it had been stolen. The theft was immediately reported to Garda.

[8] A number of people saw the bomb car prior to the explosion on 15 August 1998 and a synthesis of their evidence amounts to this. On the day of the bomb, a male aged between 20 and 24 was seen driving the car in lower Market Street between 2.00pm and 2.20pm. The car moved into the upper portion of Market Street. It parked outside Kells Shop at the lower end of Market Street approximately 365 yards from the courthouse. Another somewhat taller male was seen getting out of the car with the driver.

[9] There were 3 bomb warning calls: first, at approximately 2.30pm a Production Assistant at the UTV newsroom received a warning which she recorded as follows:

> "Bomb courthouse Omagh, Main Street. 500lbs explosion, 30 minutes. Martha Pope. IRA Oglanahan".

She immediately transmitted this message to police in Belfast and it was received by Police Communications in Omagh approximately 4 minutes later.

[10] A second call was made to the same newsroom 2 minutes later and another warning given:

> "Martha Pope 15 minutes, bomb Omagh Town."

This warning was received by Police Communications at Omagh at approximately the same time as the first warning.

[11] At about the same time a call was received by a Samaritan volunteer at Coleraine. It appears that the call had been diverted from the Samaritans Service at Omagh. The warning advised that a bomb was going to go off in the centre of Omagh in 30 minutes and gave the code word "Martha Pope". The volunteer asked for clarification as to where the bomb would go off:

> "Main Street about 200 yards from the courthouse".

This warning was received at the Communication Office at Omagh approximately 5 minutes after the first two warnings at 2.38pm.

[12] Police at Omagh realised quickly that this might well be a real attack rather than a hoax as they were advised that the code word "Martha Pope" had been used in a Banbridge bomb explosion 2 weeks earlier. The first warning to the UTV newsroom located the bomb at the courthouse in Main Street. There is no Main Street in Omagh. Police on the ground were advised that the target of the attack was the courthouse and the third warning that the bomb was 200 yards from the courthouse, which was given to the Samaritans in Coleraine, was not transmitted to or received by police responding to the bomb. Mobile patrols were at the scene within minutes of the first warning being transmitted.

[13] Police set about directing people away from the courthouse at High Street and set a cordon across the junction of High Street and Market Street at Scarfe's Entry. Other police directed members of the public out of shops and into the entries away from the main shopping area. Although the cordon was nearly 300 yards away from the courthouse, sometime after about 3.00pm police considered

that it would safer to move the cordon back towards the crossroads, a distance of approximately 440 yards from the courthouse.

[14] The bomb exploded shortly after 3.00pm. The bomb car was positioned approximately 375 yards back from the courthouse and the police officers guiding the cordon back towards the crossroads were in fact walking directly towards it. The explosion occurred approximately 35 minutes after the first warning call was made. The barrier of time has not served to disguise the enormity of this crime, the wickedness of its perpetrators and the grief of those who must bear its consequences. Even 15 years on nothing can dilute the pulsing horror of what happened. The numbing statistics are that 29 people and 2 unborn children were killed. Hundreds of people were injured. A substantial part of the commercial centre of Omagh was destroyed. Structural damage occurred over an area of 125 metres and blast damage occurred over an area of 500 metres.

[15] The bomb comprised 150/200kgs of fertilisers, sugar and Semtex and was set off by a detonator activated by an electrical circuit including a timing device. The time power unit was probably located in the passenger compartment of the bomb vehicle and connected by a cable to the boot and lead wires of the detonator.

[16] The timer in the bomb was a Coupatan which was part of a batch made at the factory in a particular week in 1997. The batch number was 99710 where the first 9 represented the place of manufacture, France, 97 representing the year of manufacture and 10 representing the week of manufacture. The timer was designed to provide a delay of up to 2 hours. The person aiming the device simply set the delay for the required period and at the end of the period electric current flowed so as to initiate the detonator. Although the timer was activated by turning the timer knob the settings were not graduated so the person arming the device had to make a judgment knowing that a 360 degree turn represented 2 hours. The judgment might be 3/4/5 minutes out.

[17] Coupatan devices were used in a number of terrorist devices before and after Omagh. From 24 March 1998 to 15 August 1998, 12 separate explosive devices used such timers each with the same batch number. Other explosive devices using the timer were found also in the Republic of Ireland and in England. Another device with the same batch number was discovered in England on 10 July 1998. Use of these timers in Northern Ireland commenced again on 25 February 2000 and between then and 24 November 2002 there were 9 incidents when Coupatan timers from this batch were used in explosive devices. The same Coupatan batch number was noted on devices at Hammersmith Bridge, London on 1 June 2000 and Acton/Ealing Railway on 19 July 2000. There were many similarities in the components used, how and in what configurations they were mounted on lunchboxes within which they were contained, the modifications to the lunchboxes, how the components were wired

together, the sequence of the components in the circuit and the configuration of the wiring colours used. It is not probable that the same person prepared all of the devices although the similarity suggested some sharing of the knowledge and source of the components.

[18] The explosion from the bomb would have been substantial in terms of blast effect and thermal energy released within the range of 10/20 metres of the blast. Outside the 10/20 metre area there would still be a risk of injury from blast or thermal effects although this would drop off relatively rapidly as compared to the risks from fragmentation mainly from the vehicle.

[19] Because of the long history of bomb explosions in Northern Ireland up to 1998 these effects were well known by those who would carry them out.

[20] On 17 August a person purporting to speak on behalf of Oglaigh na hEireann rang the news desk at RTE claiming that a 45 minute warning had been given and it had been made clear that the bomb was 300/400 yards from the courthouse. The caller asserted that it had not been intended to cause loss of life and injury. On the following day a caller claiming to represent Oglaigh na hEireann and giving the code word Martha Pope rang Ireland International, a news agency, and said that three 40 minute warnings had been given and that the location was 300 yards from the courthouse which the caller then corrected to 300-400 yards.

BACKGROUND TELEPHONE EVIDENCE

[21] Telephone evidence played a crucial part in the evidence in this case against the two defendants. For the sake of brevity I shall abbreviate the spelling of telephone to "phone" in the course of the remainder of this judgment. Counsel had responsibly agreed prior to the trial to draw up a schedule of agreed facts (exhibit PD1) in respect of the phone evidence in this case in light of the previous trial. In paragraphs [22]-[35] below I set out the content of that schedule of agreed facts. Where I have entered evidence which was not agreed, and which I found to be proven, I have usually prefaced such findings by the words "I find as proved …"

[22] Shortly after the bomb in Omagh it was established that two warning calls were made in south Armagh close to the border at 14.29 from a public call box at McGeough's Crossroads and at 14.31 from a public call box at Loyes Crossroads. Police considered it likely that communication with those who made the warning calls had been effected by mobile phone. Accordingly police then focused on mobile phone traffic between 2.00 pm and 2.30 pm in the Omagh and south Armagh areas.

[23] Police asked Vodafone to check their systems in respect of certain telephones operating on cell sites in Omagh and south Armagh on 15 August

1998. The results of that analysis were made available on 11 November 1998 when Vodafone Ltd passed on by way of fax to RUC HQ six sheets of data. These provided Vodafone's toll ticket analysis for certain phones ending in the three digits 430, 980, 585, 259 (a ready to go phone). This was marked TRS1 and on 12 November 1998 it was handed to Ms Lisa Purnell (hereinafter referred to as "LP"), senior research analyst. This witness gave evidence before me. She formed a report on TRS1 which she then handed on Detective Sergeant Stevenson. Her analysis called "LKP1" was thus conducted in respect of these four phones. I shall return later in this judgment to other exhibits that she prepared.

[24] TRS1 was an Excel file prepared from a toll ticket inquiry (a toll ticket is a print out of the original computer file and the inquiry related to all outgoing calls or calls received) and other source data. The Vodafone system did not record incoming calls and in order to carry out the search it was necessary to search all the dialled numbers in order to identify calls received by these phones.

[25] Thus the information that was available to underpin the Omagh cell site matrix was the original printed toll ticket analysis TRS1, evidence of cell site identification, location, coverage and antenna orientation or relevant masts and IMSI numbers of relevant phones (see [29] infra).

[26] I heard evidence from Mr Raymond Green of Vodafone and find as proved that he established a clear, documented and verifiable chain of evidence in relation to TRSI.

[27] The mobile phone network operates by enabling mobile handsets and SIM cards within them to communicate with masts known as cell sites or base stations using digital technology. Each network operation has a number of cell sites acting as transmitters and receivers which are usually placed on higher vantage points or in buildings. Each geographical area served is called a cell.

[28] The area served can be affected by the height of the mast, the number of antennas and their orientation, the output power of each of the masts and the geographical locality.

[29] The phone scans the signals it can see seeking the best quality signal it can find. When the mobile is in its idle state it is necessary for the mobile phone network to identify the mast through which the mobile phone can access the network and make calls so as to direct incoming traffic to that mast. The network does not store that location if the mobile phone does not make or receive a call. Mobile networks do not use the mobile telephone number used to call the phone to identify from which mobile phone a signal or a call is received. Instead they use IMSI (International Mobile Subscribers Identity Number), a unique identification number which is programmed into the SIM card of each mobile phone.

[30] Each call made creates a "toll ticket" or "call data record" (CDR). This record includes information such as the date and time at which the mobile originated, the call started and the time of the termination of the call so as to identify the cost incurred which can then be provided as a billing record to the mobile phone customer. The CDR would also record information about the cell site identification and the antenna orientation of the cell site through which the call was directed.

[31] Each base station/mobile phone mast typically operates several cells at one time. In the most common configuration the mast may have three sets of antenna facing outwards at angles separated by 120 degrees. One cell may be north of the base station (0 degrees), one may face southeast (120 degrees), while the third faces southwest (240 degrees). To interpret cell data so as to indicate the possible location of a user, the angle or bearing of each cell has to be known, stated and plotted to a map.

[32] Cell site coverage can range up 35.2 kms but the distance that will be covered depends on a number of factors. Where there are a number of masts networks may reduce this maximum to give concentrated coverage in a local area. In rural areas there are not as many masts because there is less phone traffic. In urban areas greater capacity is required. In urban areas typical coverage is 2-3 miles whereas in rural areas it is more likely to be ten miles or more. Mr Scott Southall, a Senior Engineer with Vodafone, carried out trials as to the coverage footprint of the Omagh cell site situated at the Technical College, Bridge Street, Omagh. He was able to establish that the coverage footprint is very limited due to two major factors. The topography of the land in and around Omagh which attenuates the Omagh cell site radiated transmitted signal and the location of the Omagh cell site being one of the lowest locations in the town. [33] This technology is used in many countries as a result of which people can travel with their phones into the telephone systems of other countries. The networks have roaming agreements so that charges are passed to the right company. In 1998 these systems operated in the United Kingdom and the Republic of Ireland. In the Republic of Ireland the relevant companies were Vodafone Ireland and Eircell. In Northern Ireland the relevant companies were Vodafone UK and BT Cellnet.

[34] There is a limit to the number of simultaneous calls that can be handled by a cell. If during the course of a call the mobile phone moves location it may transfer from one mast to another to give the best signal. The signal can sometimes transfer between masts during a call even when the phone remains static. In order to ensure that they provide good quality signal mobile phone companies measure signals on the ground. Using computer data the network will produce predictive maps to deal with coverage.

[35] It was agreed by all parties or else it was proved to my satisfaction that the registration of the following phones, which I shall identify only by the last three digits for ease of reference, had been established.

- 585 was an Eircell contract phone capable of roaming and was registered to the defendant Colm Murphy. This phone had been found at his house in Ravensdale, Dundalk, County Louth during a search by Garda on 21 February 1999. Two mobile phones were found there. One was a Motorola make and the other was a Nokia make. Ann Murphy, the wife of Colm Murphy, admitted that the Motorola phone was hers and her husband Colm Murphy owned the Nokia. Colm Murphy admitted the same.
- 980 was a BT Cellnet contract phone capable of roaming. It was proved before me that this was registered to the father-in-law of Patrick Terence Morgan and that Morgan was noted on the relevant documentation to be the principal user. It was proved before me that he worked as a foreman for Colm Murphy in his construction business at the time of the Omagh bombing.
- Mobile phone 259 was a "ready to go phone" which was attributable to a man who I shall identify as DSB in order to protect his privacy rights under the European Convention as he is not a party to these proceedings. It was proved before me that DSB admitted ownership of this phone at the time of the Omagh bombing to the Garda during the course of a Garda interview with DSB. In further interviews with another man that number with the name "S" beside it (DSB was clearly known by the moniker "S") was also recorded in a telephone book seized from the home of a man EM in Dublin. It was also proved before me that DSB had been convicted in the Republic of Ireland on a plea of guilty of possession on 21 March 1998 of an explosive substance namely in 1240lbs of an improvised explosive mixture, and other bombing material with intent by means thereof to endanger life or cause serious injury to property contrary to Section 30 of the Explosive Substances Act 1883 as substituted by Section 4 of the Criminal Law (Jurisdiction Act) 1976. The conviction took place on 20 February 2004 when he was sentenced to a period of 10 years imprisonment.
- 430 an Eircell contract phone capable of roaming which belonged to Oliver Traynor (variously spelt "Trainor","Treanor" and "Traynor" in the evidence before me) now deceased.

CAUSE OF ACTION

[36] Lord Brennan made clear at the outset of the trial that the plaintiffs in this case were relying upon the torts of trespass to the person (in this case battery), and conspiracy to trespass.

Trespass to the person

[37] A number of matters relevant to this trial were dealt with in great detail in the Court of Appeal and since I am bound by the decisions of that Court on matters of law I can deal with these decisions in fairly short compass. Clearly the tort of trespass may be committed by assault or battery. The plaintiffs' case is founded on the proposition that the defendants committed battery causing death and injury.

[38] In the CA judgment the Court dealt with this issue at [13] et seq. At paragraph [16] Higgins LJ said:

> "Battery is committed when a defendant culpably touches another. Anything which amounts to a blow whether inflicted by hand, weapon or missile (or it may be added by an explosion) is a battery. If a person plants a bomb designed to explode with the intention of injuring a person, common sense leads to the conclusion that this would be as unlawful as hitting the injured person or throwing a stone or firing a bullet at him."

[39] At paragraph 17 the Court went on to explore the issue in light of the finding of the trial judge, with which I do not take issue in so far as it is relevant for me to so state, that the miscreants involved in this bombing had not intended to kill or injure anyone but were reckless whether they killed or not.

> "A deliberate planting of a bomb with intent to kill or injure clearly constitutes a battery. The question for determination in this case is whether a person who plants a bomb with the intention that it should explode and when it explodes it kills or injures is guilty of battery when he did not intend that any person be killed or injured but was reckless whether death or injury would ensue. "

[40] In light of the submissions of Ms Higgins to which I shall shortly turn, it may be helpful to set out in full paragraph [19] and part of paragraph [20] of the judgment of Higgins LJ:

> "[19] Bearing in mind that whoever planted the bomb did in fact touch the plaintiffs when the bomb exploded the question is whether it can be said that the touching was intentional and culpable. … In effect the Judge reached the unassailable conclusion that there had been recklessness on the part of those who planted the bomb. They did so in circumstances

> which clearly alerted them to the grave danger presented to those in the town and regardless of that danger they proceeded with their enterprise. There is no doubt that in the criminal law of assault (which includes what in civil law is battery) recklessness will be a sufficient state of mind to establish the requisite intention … There is no reason for a difference of approach in the civil law of trespass. Civil liability arises from a negligent infliction of injury (whether it be termed negligence or trespass) and where there is a clear intention to inflict injury. There can be no logical exclusion of civil liability for the reckless infliction of injury … Negligent and non-negligent infliction of injury is a civil wrong.
>
> [20] Thus the trial Judge applied the correct test in determining whether trespass had been committed by those who planted the bomb which was intended to and did explode causing injury and death to those affected. The question is whether the appellants can establish that the trial Judge erred in reaching the conclusion that the evidence proved that the appellants individually or collectively were involved in the preparation, planting and detonation of the bomb. The Judge correctly concluded that those involved in assisting in those acts would be joint tortfeasors."

[41] This aspect of the decision of the Court had not earned the approval of Ms Higgins and she contended it had mistakenly concluded that the tort of intentional or negligent infliction of harm is to be included under the umbrella "trespass to the person". In short it has eluded the distinct categories of battery and intentional infliction of harm. Given the conclusion of Morgan J that the miscreants had not deliberately set out to kill and maim, counsel argued that the court has been distracted by the concepts of negligent trespass, negligent infliction of injury and intent to cause injury whereas the concept of trespass to the person takes simply three forms namely assault, battery and false imprisonment.

[42] Counsel contended that the two distinctive features of trespass were that it is actionable per se and that the interference with the plaintiffs' interest has to be a "direct" consequence of the defendant's act. (See Clerk and Lindsell on Torts 20th Edition at paragraph 15-01). She relied heavily on the final sentence in paragraph 15-09 of Clerk and Lindsell where the author records:

> "But when the contact is only indirectly consequential on the act of the defendant, as where he lays a trap for the claimant, there will be no battery".

[43] Ms Higgins asserted that there was no evidence of any act on the part of these defendants which inflicted unlawful force on any of the plaintiffs i.e. that they carried out any physical act which led directly to the contact with the person of the claimants. Counsel cited the 18th Edition of Clerk and Lindsell where an example was given of an explosion causing consequential and not direct damage and not amounting to a battery. She argued that the explosion in this case was not only an indirect application of force which was not targeted at a particular individual but also involved a process in which there is a time lapse between the act of detonation and the act of explosion.

[44] Similarly counsel argued that there was no case to answer in relation to trespass to the person in the form of assault because the tort of assault requires an overt act indicating an immediate intention to commit a battery coupled with the capacity to carry that intention into effect.

[45] I find the submissions of Ms Higgins flawed in a number of respects. First, her argument overlooks the simplicity of the concept of trespass to the person. It is the direct imposition of any unwanted physical contact onto another person. There is nothing about this tort which renders it necessary to import the concept of immediacy. Counsel was unable to refer to any authority or passage in a text book that demanded immediacy as an ingredient of a direct imposition of physical contact.

[46] In so far as Ms Higgins relied on her citation from the 18th Edition of Clerk and Lindsell the Court of Appeal dealt with that at paragraph [16] indicating that not only did the passage in Clerk and Lindsell fail to find repetition in the subsequent 19th and 20th editions, but the passage in any event may have been intended to convey no more than that the mere laying of the trap or planting of the bomb will not in itself constitute a battery and does not deal with the question of what happens when the injured party falls into the trap or is injured by the bomb when it explodes. The court cited Stephen J in R v Clarence [1888] 22 QBD 23 at 45 where the judge declared that if a man laid a trap for another who did fall into it after an interval, he would be guilty of an attempt to assault and of an actual assault as soon as the man fell into it.

[47] Similarly in Director of Public Prosecutions v Kay (a minor) [1990] 1 WLR 1067, a boy dumped acid into a hot air hand/face dryer intending to return later to clear it out. He was held guilty of assault when later a pupil went to the toilets to wash his hands and acid was blown into his face when he turned on the dryer. The court held that a person, who puts acid in a machine either with the intent that it should be ejected onto the next user causing him injury or with

recklessness as to the consequences, was guilty of an assault when such injury was caused.

[48] I therefore reject the submission that somehow the use of a timer on a bomb renders it incapable of constituting trespass to the person when it explodes and injures someone. There is clearly a difference between creating a hole which might cause a trap for a person and the detonation of a bomb. I have no doubt that impact caused by the detonation of a bomb is direct injury and a delay in the detonation makes no difference as long as the mental element required for the tort is established.

[49] Moreover that a bomb may be multidirectional does not prevent that action constituting a direct imposition of unwanted physical contact on the person thereafter injured. The fact that there may not have been an intention to injure the victims in this case is not essential to the action for trespass to the person. It is the mere trespass by itself which amounts to the tort. The plaintiffs' action against the defendants is on the basis of trespass to the person which in this case amounts to battery. The miscreants in this case were clearly guilty of such a tort.

Conspiracy to cause trespass to the person

[50] Ms Higgins contended that whilst there is an economic tort of conspiracy to injure, there is no such tort in respect of the infliction of personal injury. Moreover the mental element required for the economic tort is a specific intention to injure a particular plaintiff and that such an intention could not be inferred in this instance. In short the tort of conspiracy or conspiracy to injure is an economic tort and cannot ground a cause of action in a personal injuries case.

[51] It is right to say that Clerk and Lindsell include the tort of conspiracy under the chapter dealing with economic torts. The background to conspiracy as a tort was addressed in Midland Bank Trust Co Ltd v Green (No 3) [1979] Ch 496 where at (523)-(524) Oliver J said of the history:

> "Very little is heard of it until the 19th Century when it was brought into prominence as a result of the legislature having, in 1875, enacted that combination in furtherance of trade disputes should not be indictable as conspiracies in any case where the act, if committed by one person, would not be a crime."

[52] Lord Brennan on the other hand contended that the conspiracy in this instance involves a conspiracy to commit trespass as part of the conspiracy to conduct a terrorist campaign. He relies on Salmond on the Law of Torts, 18th Edition where the author states:

> "A second form of action for conspiracy exists when two or more combine to injure a third person by unlawful means – eg the commission of a crime or tort".

[53] In the instant case he contends that the object of the conspiracy namely the crime of bombing and the tort both arise involving trespass to the person. The bombing having occurred, the tort caused damage and the conspiracy was complete in that sense.

[54] Counsel helpfully drew my attention to an article by Philip Sales entitled "The Tort of Conspiracy and Civil Secondary Liability" Cambridge Law Journal November 1990 491. The author cites Lord Linley in Quinn v Leathem [1901] AC 495 at 535 where he expressed the view that the principle in the seminal decision in Lumley v Gye [1853] 2 E and B 216 establishing a general liability for intentionally inducing the breach of a contract represented but one example of the general rule:

> "The principle involved in it cannot be confined to inducements to break contracts of service, nor indeed to inducements to break any contract. The principle which underlies the decision breaches all wrongful acts done intentionally to damage a particular individual and actually damaging."

[55] Whilst it is unnecessary in this judgment for me to reach any fixed view on this debate, for my own part I find the logic of the Sales comment to be compelling particularly in the context of the instant case where the plaintiffs have clearly suffered loss and damage from a combination of wrongful acts of the miscreants. It is difficult to see why those miscreants should not be treated at law as jointly responsible for the whole course of the wrongful activities carried out pursuant to the conspiracy. However, it is for a higher court to authoritatively rule on this principle when the need arises. In these circumstances I confine my observations to one brief comment. Had it been necessary for me to arrive at a conclusion on this further issue I undoubtedly would have found the miscreants involved in this bombing to be guilty of conspiracy to cause a trespass to the person.

[56] As the Court of Appeal indicated in [20], the task of the trial judge in this case is to determine whether the plaintiffs can establish that the evidence proved that the defendants individually or collectively were involved in the preparation, planting and detonation of the bomb in circumstances where those involved in assisting in those acts would be joint tortfeasors.

STANDARD OF PROOF

[57] The correct standard of proof in this case is a civil standard of proof on a balance of probabilities. Higgins LJ said at paragraph [22] of the CA judgment:

> "[22] … Re D, an appeal from this jurisdiction contains a helpful statement of the law by Lord Carswell. In civil proceedings the seriousness of an allegation and the seriousness of the consequences for a defendant will be factors which underline the intrinsic unlikeliness of a party doing the disputed act. The court must apply good sense and exercise appropriate care before being satisfied of a matter which has to be established, but in civil proceedings the standard of proof remains proof on a balance of probabilities".

[58] To assist me in this matter, I have revisited the judgment of Lord Carswell in Re D [2008] UKHL at [27-28] where in a convenient synthesis of the principle she cited Richards LJ in R (N) v Mental Health Review Tribunal [2006] QB 468 para 62:

> "Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strengths or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities".
>
> In my opinion this paragraph effectively states in concise terms the proper state of the law on this topic. I would add one small qualification, which may be no more than explanation of what Richards LJ meant about the seriousness of the consequences. That factor is relevant to the likelihood or unlikelihood of the allegations being unfounded as I explained below.

> [28] It is recognised by these statements that a possible source of confusion is the failure to bear in mind with sufficient clarity the fact that in some contexts a court or tribunal has to look at the facts more critically or more anxiously than in others before it can be satisfied to the requisite standard. The standard itself is, however, finite and unvarying. Situations which make such heightened examination necessary may be the inherent unlikelihood of the occurrence taking place …, the seriousness of the allegations to be proved or, in some cases, the consequences which could follow from acceptance of proof of the relevant fact. The seriousness of the allegation requires no elaboration; a tribunal of fact will look closely into the facts grounding an allegation of fraud before accepting that it has been established. The seriousness of consequences is another facet of the same proposition; if it is alleged that a bank manager has committed a minor peculation that would entail very serious consequences for his career so making it the less likely that he would risk doing such a thing. These are all matters of ordinary experience, requiring the application of good sense on the part of those who have to decide such issues. They do not require a different standard of proof or a specially cogent standard of evidence, merely appropriately careful consideration by the tribunal before it is satisfied with the matter which has to be established."

[59] That is the standard of proof which I have exacted in this case.

Hearsay and the Civil Evidence (Northern Ireland) Order 1997 ("the 1997 Order")

[60] Much of the evidence in this case was hearsay evidence. The 1997 Order was considered in the CA and from that judgment I derived the following principles relevant to the Order:

- The central principle is that in civil law hearsay evidence is no longer inadmissible. The Order recognises the evidential problems created by such evidence the central weakness of which is that the opposing party is deprived of the benefit of cross-examination to test the correctness of evidence and the court is deprived of seeing and hearing the witness, to observe his demeanour and assess his veracity. It is essential to remember that although hearsay is thereby made admissible in more circumstances

than it previously was, this does not make it the same as first-hand evidence. It is not. It is necessarily second-hand and for that reason very often second best. Because it is second-hand, it is that much more difficult to test and assess. Those very real risks of hearsay evidence, which under lay the common law rule generally excluding it, remain critical to its management and the weight to be given to it. There will be of course many cases where the evidence will not suffer from the risks of unreliability which often attend such evidence and where its reliability can be realistically assessed. (See in the criminal law context R v Riat (2013) 1 All ER 349 at [3]).

- Citing with approval Welch v Stokes (2008) 1 WLR 1224 and Polanski v Conde Nast Publications Limited (2005) the CA asserted that when a case depends entirely on hearsay evidence the court should be particularly careful before deciding that it should be given weight and that the decision as to what weight, if any, to give to hearsay evidence involves an exercise of judgment.

- Provision is made for a party to call, if possible, the witness whose hearsay evidence has been adduced by another party (Articles 4-6).
- Article 4(2) directs the court to consider whether the party concerned has been given a proper opportunity to investigate the credibility of the witness and to investigate his statement.

- The Order at Article 5 sets out the factors to be taken into account when weighing the evidence which are as follows:

> "(1) In estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.
>
> (2) Regard shall be had, in particular, to whether the party by whom the hearsay evidence is adduced gave notice to the other party or parties to the proceedings of his intention to adduce the hearsay evidence and, if so, to the sufficiency of notice given.
>
> (3) Regard may also be had, in particular, to the following:
>
> (a) Whether it would have been reasonable and practicable for the party by whom the evidence is adduced to have produced the maker of the original statement as a witness;

(b) Whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;

(c) Whether the evidence involves multiple hearsay;

(d) Whether any person involved had a motive to conceal or misrepresent matters;

(e) Whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;

(f) Whether the circumstances on which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight."

[61] I pause to observe that I have applied these criteria in each instance when hearsay arose in this case and I have found it unnecessary to repeat this on each occasion.

CIRCUMSTANTIAL EVIDENCE

[62] Circumstantial evidence was a key component of this trial albeit it usually arises in the context of criminal trials. In R v Gary Jones [2007] NICA 28 Higgins LJ said at [33]:

> "Circumstantial evidence can be very compelling. It requires to be approached with care. Not only must the judge and jury be satisfied that the circumstances are consistent with guilt, but they must also be satisfied that they are consistent with any other rational conclusion than that the accused is guilty. Thus a fact or circumstance which is proved in the evidence and which is inconsistent with a conclusion of guilt is more important than all the other circumstances, because it undermines the proposition that the accused is guilty. In a case that depends on circumstantial evidence, a court or jury should have at the forefront of its mind four matters. Firstly, it must consider all the evidence; secondly, it must guard against distorting the facts or the significance of the facts to fit a certain proposition; thirdly, it must

be satisfied that no explanation other than guilt is reasonably compatible with the circumstances and fourthly, it must remember that any fact proved that is inconsistent with the conclusion is more important than all the other facts put together."

The Evidence against the First Defendant Murphy

Telephone Evidence

Use of mobile phones on the day of the Omagh bombing

[63] The analysis called "LKP1" was conducted in respect of four phones 259, 585, 980 and 430.I have already indicated that I was satisfied that 585 was an Eircell contract phone capable of roaming and was registered to the defendant Colm Murphy, 980 was a BT Cellnet contract phone capable of roaming registered to the father-in-law of Patrick Terence Morgan and that Morgan was noted on the relevant documentation to be the principal user, mobile phone 259 was a ready to go phone which was attributable to DSB who had been convicted on a plea of guilty of possession of an explosive substance and 430 was an Eircell contract phone capable of roaming which belonged to Oliver Traynor now deceased.

[64] The records of calls for these mobile phones were set out in document LKP5 drawn up by LP which was a cell site analysis of telephone traffic for the days of the town centre Omagh bombing 15 August 1998, Lisburn town centre bombing 30 April 1998 and Banbridge town centre bombing 1 August 1998. Additionally there was a diagrammatic map produced by Mr Telford (found at exhibit PD1 and see [68] infra). In the case of the Omagh bombing the Telford diagram was not a matter of deep contention save for the possible significance of the cell site footprints. It depicted the movements on the day of the bombing on 15 August 1998 by reference to location of cell sites. Whilst I will refer to the location of cell sites, I recognise that there is no fixed boundary to the coverage of any cell except that it must be in an area where coverage was provided. I draw attention to paragraphs [28]-[35] above which sets out the nature of the cell site coverage.

[65] The exhibit PD1 supplied to me (see [21] and [64] above) set out the schedule of agreed facts in respect of telephone evidence and contained a helpful illustrative diagrammatic map outlining a cell analysis of phone movement in and out of Omagh town. It related in red text the telephone calls indicating movement towards and within the Omagh area and in blue text the telephone calls indicating movement from Omagh towards and across the border in relation to telephones 585 and 980 on the day of the Omagh bombing. It also depicted the locations of the public call booths from where the warning calls were made. This was helpful in pictorially setting out the movement pattern.

- 12.41 – 585 first makes a call from Castleblaney to 980 in the Republic of Ireland and so no incoming site was identified.

- 13.13 – 585 calls 980 using a cell site at Emyvale in the Republic of Ireland. 980 was in the Republic of Ireland but it was clear that 585 had travelled between 12.41 and 13.13 in a north north-westerly direction.

- 13.29 – 585 calls 980 using the Aughnacloy cell site and was received using the same cell site. This indicates that both phones had roamed into Vodafone UK and that both were in Northern Ireland.

- 13.57 – 585 calls 980 using cell site sector 2 Bridge Street in the centre of Omagh and was received using sector 1 of Pigeon Top which is located on Mount Pollnaght five miles west of Omagh.

- 14.09 – 980 has moved from Pigeon Top west of Omagh and calls 585 using sector 3 of Bridge Street, Omagh and the call is received using section 1 of Pigeon Top i.e. 585 has now moved from the mast at Bridge Street Omagh to Pigeon Top whereas 980 has moved in the opposite direction into Omagh.

- 14.10 – 585 calls 430, the call being made at sector 1 of Pigeon Top while 430 was on the digital network using the cell site at Clermont Carn to the northeast of Dundalk. It was proved before me that Clermont Carn is a cell site in the vicinity of the public call boxes from which warning calls were made as mentioned above between 14.29 and 14.31.

- 14.14 – 980 phones 259 using sector 1 of the Pigeon Top to the west of Omagh i.e. 980 has now left Omagh. 259 is registered to DSB who worked for Murphy and has an explosives conviction committed in March 1998 (see [35] above).

- 14.19 – 980 phones 585 at a time when both were using sector 1 of Pigeon Top.

[66] I observe that based on this information between 13.57 and 14.19 calls by 585 and 980 were handled either by sector 1 at Pigeon Top or by sectors 2 and 3 antennae at the cell site at Omagh.

[67] I have already referred to the warning calls made from the public call boxes at McGeough's Crossroads at 14.29 to UTV and 14.31 to the Samaritans together with a further warning call made from a public call box at Loyes Crossroads at 14.31 to UTV. The two cell sites in the vicinity of those public call boxes are Mulleyash Mt and Clermont Carn. The call made at 14.10 from 585 to 430 was received using Clermont Carn. In addition 430 made a call to 971 at

14.37 using Mulleyash Mt. At 14.38 585 using Carnlome Hill i.e. moving further away from Omagh but still in Northern Ireland made a call to 430 which again used Mulleyash Mt.

[68] The following calls were also relevant in this context:

- 15.13 – 585 phones 980 using the Cavanagarvan cell site in the Republic of Ireland. It is evident that both are now back in the ROI because these are no longer roaming calls.

- 15.30 – 585 phones Denis O'Connor at 371 using the Castleblaney cell site. This a significant call to which I shall return in detail later in this judgment.

- 15.41 – 980 makes a call from the Clontibret cell site to a landline 0801693861105, the call lasting 1 minute 55 seconds. The plaintiffs alleged that this was to the home number of Daly's estranged wife in Silverbridge.

- 17.23 - 585,now at Clarmont Carns calls the family home of Daly at **088**

- 17.30 – 980 contacts 259, the number of DSB.

Other telephone evidence on 15 August 1998

[69] The plaintiffs adduced further evidence of what they alleged was relevant telephone traffic in the case on the day of the Omagh bombing. Records of telephones relevant to this part of the case that were registered to a list of customers of Vodafone during the 1998 period were introduced in evidence. These were referred to in the statement of Jim Faughnan an employee of Vodafone/team leader in the Fraud and Security Section who was responsible for dealing with requests from Garda for details of Vodafone accounts and also of Mary Cantwell, who occupied the position of fraud and security analyst with O2 Ireland and who was responsible for dealing with the requests from Garda and supplying details of O2 Ireland customer accounts. There was also the evidence of Detective Constable Robert Barr in this context who together with a draft agreed statement at exhibit 6(a) gave evidence before me. In addition I heard the evidence of Mr Fulton of the Forensic Science Department who had identified phone number 655 taken from the home of DH. In the case of Omagh, the cell sites were checked and identified by witnesses such as Mr Southwood and Detective Constable Robert Barr and set out in maps produced by Mr Green who was a fraud investigator with Vodafone.

[70] Much of their evidence was unchallenged. Some examples of this additional material are set out below:

- 12.53 - a call from Barney's filling station to telephone 144 registered to Town Glass Limited which is owned by Seamus McGrane who had received a term of imprisonment in 1999 for possession of a firearm on a plea of guilty.

- 13.35 - Telephone call from a ready to go phone 049 to DSB (who has an explosives conviction) at 259.

- 14.37 – Telephone 430, registered to Oliver Traynor, calls 971 registered to a man known as PC. The C brothers worked for Town Glass with which Traynor s linked.

- 14.38 – 585 at Granlome Hill contacts 430.

- 14.47 - Oliver Traynor's mobile phone at 406 contacts 430 also registered to Traynor which is followed by a call from Town Glass Limited 144 (a firm associated with Oliver Traynor) to 430.

- 18.15 – 076 (allegedly the telephone of Seamus Dal**y**) contacts the number of the Emerald Bar which is owned by Murphy.

[71] I found these calls too remote from the key issues before me and I attached no weight to them.

Discussion of the telephone evidence on 15 August 1998

[72] Mr Fee and Ms Higgins made a number of objections to the strength or weight to be given to the telephone traffic evidence. They have left no stone unturned in their submissions. Some of the more salient points made included:

- There was no evidence as to the actual user of the phones.

- There was no evidence that the 585 phone registered to Murphy was used by him and indeed it was the plaintiffs' case that it was being used by Daly.

- There was no evidence that either of these phones were associated with the carrying out of the Omagh bombing. It was pure speculation to suggest that the phones were used by the bombing team.

- Evidence that these phones moved to and returned from Omagh at about the time of the bombing falls far short of evidence that Murphy or Daly had been involved in the bombing. Movement of a phone without more cannot be taken as evidence of anything other than that a phone was within the service area of certain cell sites.

- An analysis of the six numbers that 585 made calls to or received calls from on 15 August 1998 contained no suggestion that those persons were involved in any previous convictions or terrorist activities.

- The service footprint for Omagh town centre mast was 5 kilometres and for Pigeon Top was in the region of 30 kilometres. The 585 phone could have been some distance outside Omagh even when using the town centre mast.

- There is no evidence of any of the public call boxes used for the bombing warnings ever being in contact with 585.

- Even if 585 was given by Murphy to someone else on 15 August 1998 and that phone was actively involved in the Omagh bombing there is no evidence to allow a court to come to a conclusion that Murphy knew or ought to have known what the phone was going to be used for. There could be a number of reasons – business, legitimate or otherwise, or social.

[73] Ms Higgins attacked the evidence of LP, an intelligence analyst (to whose evidence I shall turn later in the judgment when dealing with Lisburn and Banbridge bombings) who produced, inter alia, LKP5 a cell site analysis of telephone traffic for the days of the town centre Omagh bombing 15 August 1998, Lisburn town centre bombing 30 April 1998 and Banbridge town centre bombing 1 August 1998. For this purpose it is enough to set out that Ms Higgins argued that:

- LP's production of the document LKP5 was an amalgamation of LKP1, 2 and 3 which initially had been called LKP4. Her role was simply to input data which she received from others into a computer software programme which resulted in the program framing this information within a diagram.

- All the data was put in by hand by LP who stated she had no knowledge of the source of the data or its veracity. Her role was simply to facilitate through a software programme a diagrammatic representation of data about which she knew nothing. It was not up to her to check whether someone who was named as using a phone on the Omagh bomb run had been verified.

- No attempt had been made to ascertain if there was a pattern of phone calls relevant to this bombing other than the numbers which were given to her by the police as being of interest. There was no evidence as to what other calls may have been made from other phones in the location on the day of the Omagh bombing.

Assessment of the telephone traffic on 15 August 1998

[74] I am satisfied that there is a clear pattern emerging from the use of phones 585 and 980 notwithstanding that I am unable to be aware of the contents of the calls. They are registered to persons in the Republic of Ireland namely Murphy and Terence Morgan who both come from the County Louth area. 585 belonged to Murphy on his own admission, and 980 belonged to an employee of Murphy namely his foreman Morgan. How did the telephones of two people who clearly knew each other well come to be used in these circumstances?

[75] It was highly likely that the Omagh car bombing would involve the use of cars and mobiles phones to enable those in the bomb car to have the path cleared for them to enter and to escape. It is also likely that mobile phones were used to enable the three telephone warnings to be made about the impending bomb.

[76] The records in evidence reveal the 585 phone travelling from Castleblayney at 12.41, Emyvale at 13.13, Aughnacloy at 13.29 and Omagh at 13.57. All of these calls were made to the 980 phone which was in the Republic of Ireland for the first two calls but in the vicinity of Aughnacloy for the third call and the vicinity of Omagh for the fourth call. 980 then uses the Bridge Street cell at 14.09 to phone 585 which is received using Pigeon Top. This clearly indicates a direction of travel for the 585 phone from Castleblayney to Omagh and then away. I could not help but observe that Castleblayney is on the map not far from Carrickmacross which it has been agreed (see paragraph [7] of my judgment) was the location from which the bomb car was stolen. The 980 phone, in contact with 585, is obviously travelling in the same direction at this time. 980 during this time is also in contact with 259 registered to a convicted terrorist DSB. All of the timings of the calls are consistent with the bomb arriving in the centre of Omagh shortly after 2.00 pm which of course is entirely consistent with the evidence of the witnesses at the scene (see para [8]). Thereafter their return to the ROI is plotted by the subsequent calls.

[77] Both these phones travelled in the same direction and both roamed into the Vodafone UK cell sites in Northern Ireland from the Republic of Ireland. It is likely that the bomb was delivered to Omagh just after 2.00 pm given the civilian evidence, the nature of the warning calls and the explosion of the bomb about 3.00 pm. The coincidental timings of the calls of these two phones with these events was so striking as to compel a belief that they had been involved in the bombing run. Such phone movements cry out for explanation set in the context of the Omagh bombing alone.

[78] The geographical use of these mobile phones has been tracked by reference to the location of the phone calls made and the relevant cell sites and their coverage. Whilst a service footprint can vary from these masts up to substantial distances as Mr Fee pointed out, the directional flow of these phone calls is simply too coincidental with an arrival at Omagh and its environs to be

overlooked. The users stay a short time before setting off back to the ROI coincidental with the material times for this bombing. Why? There was strength in Lord Brennan's assertion that the most likely and obvious route taken by the vehicles of the miscreants between Castleblayney and Omagh (and back) would have been along the A5 road rather than some illogical corkscrew route. The cell sites identified are close to that road as evidenced on a map exhibited before me. The cell site analysis indicating movement in and out of Omagh town which was put before me in the core trial bundle was compelling. Common sense dictates that an explanation is required.

[79] I believe these telephone encounters have served to unhinge the whole plot and identified at least the phones involved. I found this compelling circumstantial evidence that the users of these phones played a role in the bombing absent some explanation from the phone owners.

[80] I was therefore satisfied that those who knowingly provided or who used these mobile phones in the circumstances played a central role in assisting the bombing itself and were joint tortfeasors.

[81] When, as I will deal with shortly in this judgment, it emerges that the registered owner of 585, namely Murphy, denies ever being in Omagh and can give no rational explanation for his phone being used in these circumstances, there is undoubtedly a strong prima facie case for him to answer. Similarly, when, as I shall later indicate, there is evidence that Daly was using 585 at 3.30 pm, without explanation as to how that comes about, that in itself creates a strong prima facie case in the absence of explanation.

The interviews of Murphy

[82] Murphy was arrested at his home on 21 February 1999 and taken to Monaghan Garda Station where he was interviewed on 21 February 1999 and 22 February 1999. Although he faced further interviews which have been discounted in the earlier trial because of aberrant behaviour on the part of other Garda officers the only interviews relevant to this case were those that took place with Garda King and Reidy as hereinafter set out.

[83] He was interviewed on 21 February 1999 between 1.30 pm and 3.30 pm by these officers. He was cautioned, and interviewed in connection with alleged unlawful possession of an explosive substance on 13-15 August 1998 at Dundalk. He was requested to give an account of his movements for a specified period namely from 10.00 pm on 12 August 1998 to 10.00 pm on 15 August 1998.

[84] Murphy gave the following account of his movements between those dates:

- On Wednesday 12 August he was at home.

- Thursday 13 August was a day when he arranged wages for those in his building business. He went to a site in Dundalk on Thursday morning and Thursday night would have been taken up with making out wage packets. He described John McCoy and Patrick Morgan being two foremen on the Dublin sites calling round to him between 9.00 pm – 10.00 pm.

- On Friday 14 August 1998 he spoke to people on the site in Dundalk and then went to Dublin. In the evening he spent time in his own bar the Emerald in Dundalk leaving the pub to go home between 8.00 pm and 9.00 pm.

- On Saturday 15 August 1998 he alleged that he and his 12 year old son collected a quad bike and drove up into the mountain in Ballymakellet. He returned the bike from where he had obtained it and then went to the Emerald Bar where he was between 1.00 pm and 2.00 pm. He said "I know for a fact that I was in the Emerald Bar from before 2.00 pm to closing time that day." He recalled only once going to Dungannon about 30 years ago and that was the only time he had ever been in Tyrone.

[85] He was interviewed on the same date between 6.45 pm and 9.00 pm by the same Garda officers. During this interview he made the following assertions:

- He thought his mobile 585 "should have been in the house" on 15 August 1998 and that he did not give it to anybody that day. He could not recall making any telephone calls from his mobile or his landline that day.

- He knew DSB (see [35] of this judgment) who had been working for him around the time of the Omagh bombing and he also knew Oliver Traynor who had fitted windows for him on different occasions (see [35]).

- He admitted that Terence Morgan was his foreman but that he could not recall any contact with him on Saturday 15 August 1998.

- He was adamant he did not lend his mobile to anybody on the day of the Omagh bombing. The only time he would have loaned the phone to anybody "would be on site and I would be present when the calls would be made".

- "To my knowledge" he did not receive or transmit calls on his mobile phone 585 to Terence Morgan or Oliver Traynor on 15 August 1998.

[86] All of these assertions were given by him before the Garda had informed him that police had details of the use of phone 585 in the area of Omagh on the day of the Omagh bombing. When it was put to him that phone records showed that phone calls were made from his mobile to 980, whose user was Terence

Morgan, and that calls were made on 585 travelling north from Castleblaney to Omagh town, he asserted that he had never been in Omagh in his life and could give no rational explanation why these calls were made from his mobile to "associates".

[87] When he was interviewed on 22 February 1999 commencing 8.00 am and was asked various questions about the phone calls on 585 on the day of the Omagh bombing and his part in the Omagh bomb, he made no reply to a series of questions. He was waiting to speak to a solicitor and so I find nothing untoward about the negative responses he has given in this interview.

Assessment of these interviews with Murphy

[88] I do not believe Murphy's account as given to the Garda about the whereabouts of his mobile phone 585 on the day of the bombing in Omagh and I considered he was attempting to sedate the Garda with misleading information on this matter. There was incontrovertible evidence that the 585 phone was obviously not in his home on the day of the bombing and was in use between the Republic of Ireland to Omagh and from Omagh to the Republic of Ireland.

[89] It is wholly implausible to speculate that a mobile phone in his home was taken without his knowledge or permission and somehow secreted back into his home at a later date again without him being aware. Clearly if a member of his family or someone else had been surreptitiously travelling to Omagh on the day of the bombing and equally secretly had been using his phone without his knowledge he should have become aware of this either by knowing of their absence or the absence of his phone or later having the opportunity to observe from his billing records that mysteriously his phone had been roaming somewhere in the United Kingdom on 15 August 1998. The evidence of Mr Faughnan on billing records for registered owners such as the first defendant established that Murphy received a bill for the 585 use within a few weeks of 15 August 1998 and that bill would set out roaming charges for calls outside the ROI charged at €1 per minute without details of the calls other than the resulting roaming charges and costs per call. Why would he not have made inquiries about this if he had no idea why the phone was being used in these circumstances? The coincidence would have to be stretched further because the person who had mysteriously secreted this phone without telling him had made calls to a number of people in Murphy's employment e.g. Oliver Traynor, DSB and to Morgan's phone 980.

[90] Unsurprisingly he told police he could give no rational explanation as to why these calls on 15 August 1998 were made from his mobile to associates of his.

[91] Mr Fee, inter alia, speculated that one possibility could be that he had lent his phone to someone for what he thought was a purpose wholly unconnected

with the Omagh bombing but for some nefarious purpose and was not prepared to reveal this. Why, when he discovered he was being interviewed about one of the major bombings in Northern Ireland, then did he not say this to Garda if necessary concealing the identity of the person who had borrowed it or the purpose for which he thought it was being used?

[92] Since I consider he has been telling lies on this matter, albeit this is not in the context of a criminal case, I reminded myself of the principles set out in R v Lucas (1991) 2 All ER 1008. The so-called Lucas principle in criminal cases is that for a lie told by a defendant out of court to provide corroboration against him, that lie must be deliberate (which I am satisfied it is in this instance), it must relate to a material issue (which it clearly does), the motive for it must be a realisation of guilt and a fear of the truth (which I consider is highly likely in this instance given the complete lack of explanation for the presence of the phone at the bombing site) and must be clearly shown to be a lie (which it is in this case by virtue of the incontrovertible phone evidence) by evidence from an independent witness.

[93] I must also remind myself that people sometimes lie out of shame or out of a wish to conceal disgraceful behaviour from the family. There was not the slightest suggestion of this in the present case and there was no evidential basis whatsoever to fuel such a speculation.

[94] As I also concluded in this case, there is evidence that 585 was used by Daly so any suggestion that his family had taken the phone is even more implausible. How likely is it that Daly (or someone else who lent it to Daly) would have been to his house, secretly removed his phone, and then returned it to his house without him knowing? Even had I not been so satisfied about Daly being in possession of 585, it seems to me deeply implausible as I have already observed that a member of his family would have acted in the way he described and made the calls to his associates which were made on that day without him knowing about it?

[95] Murphy knew well that he was being interviewed in the context of a mass murder and I find it inconceivable that he would not have given some explanation or at least a hint of some other explanation if he was aware of how that phone turned up in the Omagh bombing. In the event he hid behind a veil of denial and had rendered no satisfactory explanation by the end of the plaintiffs' case.

[96] I consider his answers to the Garda to be deliberate lies. I am sure he did not lie for an innocent reason and I am satisfied therefore that the evidence of these interviews can be regarded as firm evidence in support of the plaintiffs' case.

[97] As I will set out subsequently in this case, whilst I was satisfied that there was compelling evidence that the 585 phone was used in the course of the Omagh bombing, I have also assigned some modest weight to the presence of the 585 phone at the Banbridge bombing as similar fact evidence. However even without that similar fact evidence I would have found a strong prima facie case against the defendant on the strength of the evidence that I have set out in paragraphs [63] to [97].

The hearsay evidence of Terence Morgan (hereinafter referred to as "TM")

[98] The evidence of TM was introduced by the plaintiffs under the provisions of the 1997 Civil Evidence Order. I have already set out the terms of that Order and I shall apply it shortly to the evidence of TM as per the principles set out in [60] et seq.

[99] Extract from his interviews with the RUC, with a number of police officers interviewing him for almost 26 hours between 21 February 1999 and 25 February 1999, were introduced as part of the hearsay evidence. In addition I heard an oral recording of an occasion when TM admitted to detectives that he had allegedly given the 980 phone to Murphy. I pause to observe that the latter evidence i.e. the recording was of poor quality and was insufficiently distinct to render it of any assistance to me in this matter.

[100] TM was arrested on 21 February 1999 and interviewed over the course of five days. The police believed he was a suspect in the bombing because his telephone had been used and intelligence indicated he was a member of the Real IRA.

[101] I heard evidence from Gerard McLaughlin and Stanley Woods, both members of the RUC at that time. Woods had interviewed TM with Detective Sergeant Cole and Detective Constable McCollum and Constable McLaughlin had interviewed him with Detective Constable Gilmore. Morgan had allegedly said:

- He had worked for the defendant Murphy as a bricklayer. Murphy was a cousin of his mother and eventually he became foreman. He had been working on 15 August 1998 in Dublin at Dublin City University on behalf of Murphy. I saw no reason to disbelieve this part of the evidence.

- He accepted that he was the principal user of mobile number ending 980. His father-in-law was the registered owner having filled in the appropriate form but that TM paid all the bills as they came into the house. He agreed the Eircell application form dealing with these matters. There was thus independent evidence this was correct.

- Murphy owned the Emerald Bar in Dundalk and that he went there from time to time. He met Murphy there if there were problems at work or to cash cheques for workers. Both he and Murphy had mobiles. Murphy brought the wages to the individual jobs they were on. Again I saw no reason to disbelieve this.

- On the day before the bombing i.e. Friday 14 August 1998 he had been working on behalf of Murphy as a foreman at Dublin City University.

- On that day Murphy borrowed his mobile phone 980 because he asserted that Murphy's phone was "on the blink" and he always wanted a mobile with him when carrying money. Murphy had never borrowed it before and he had never lent it to anyone save upon the job when someone wanted to telephone whilst he was there.

- He had told Murphy the pin number and it is likely that he would have written it down on a piece of paper.

- Murphy said he could pick up the phone at the Emerald Bar. He believed that Murphy had taken this phone at about 2.00 pm but he was not sure.

- He had never been in Omagh in his life. On the day of the bombing he was at home in Newry with his wife.

- On Saturday evening 15 August 1998 he had gone to the Emerald Bar. Contradictory accounts were given by him as to whether or not he saw Murphy that night. On 21 February 1999 he said that he did not think he saw him at all that night. Subsequently he indicated that he could have been there. Next he indicated that Murphy was there but he did not approach him and that Daly was there speaking to Colm Murphy. On 23 February 1999 in an interview commencing 22.40 he said that Murphy did say hello to him in the Emerald Bar that evening and was there when Daly spoke to him.

- There were contradictions in his account of receiving the mobile phone from Murphy. He originally he said he was to pick up the phone on that Saturday evening i.e. 15 August 1998 from the Emerald Bar. Curiously he said that despite being in the bar on the Saturday evening he did not however bother to pick it up. Later he told police that Murphy said it might be given to him or sent to him some other time. In the event he said that he did not ask for his telephone that Saturday night and got the telephone back in the van the following Monday or Tuesday. He said he simply did not need the telephone.

- There were similar contradictions with Daly. Initially he said that he did not know Seamus Daly. Subsequently he admitted that he had been

lying, that he did know Daly, that Daly was there in the bar on 15 August 1998 speaking to Murphy although he did not know what Daly had said to him and that Daly had spoken to Morgan to say hello initially.

- During an interview on 23 February 1999 at 21.32 he informed police that in the Emerald Bar on Saturday 15 August 1998, Daly was present with DSB. He was doing "a lot of smart talk" and "slabbered" the following words to Morgan "You were driving the yoke today to Omagh" at a time when Murphy was looking on.

Weaknesses in TM's account to the police

[102] In the course of cross-examination of the police witnesses, Mr Fee established a number of factors which undermined the reliability of the content of these interviews. These included:

- The contradictions already outlined.

- The police were unable to remember anything about the demeanour or presentation of TM during those interviews because of the passage of time.

- A number of pressures were applied to TM during the interviews. These included the fact that he was arrested early in the morning and brought to Strand Road Police Station in Derry, a number of the interviews occurred after midnight and at times in the presence of more than two interviewers (contrary to the Bennett Report recommendations), no solicitors were present, he was isolated and indicated in at least one interview that he had not had much sleep, police suggested on at least one occasion that he would have to prove his innocence given the circumstances, mention was made of his family and children and he was identified as having been working whilst claiming benefits. It was put to him that he was in the Real IRA and a regular feature of the interviews was a strong suggestion by the police that he was not telling the truth about everything in the course of the interviews. Police had also used profane and unseemly language to him at times.

- The court should be conscious that, as Constable Woods accepted but Constable McLaughlin denied, persons accused of crimes may attempt to minimise their own role and pass on their role to somebody. In this context the police suggested to him that he had been schooled prior to the interview as to what he was to say.

- On occasions he agreed with suggestions by the police e.g. when discussing with the police how Murphy had used his mobile, he agreed

with their suggestion that it was likely that he wrote down the pin number on a piece paper.

- He admitted benefit fraud.

Assessment of the evidence of TM

[103] The decision as to what weight, if any that I should give to this hearsay evidence is an exercise of judgment on my part. There is no rule of law prohibiting the court from giving weight to hearsay merely because it is uncorroborated and cannot be tested or contradicted.

[104] Article 5 of the 1997 Order (which I have set out at paragraph [60] above) sets the criteria by which hearsay evidence should be judged in terms of weight. Taking each of the criteria in turn my conclusions are as follows.

[105] Considering Article 5(1) of the 1997 Order there was evidence before me that Morgan had given evidence on this topic in previous trials. In the original trial before Morgan J in 2008, the plaintiffs had relied on the hearsay statements made by Morgan during the interviews by the RUC on 21-22 February 1999. At that trial the defendants required his attendance for cross-examination, a course which they did not follow in this trial. In the course of that cross-examination under oath he claimed that his account to the RUC detectives was wrong. He asserted he could not remember anything about what he had said to the police in the interviews claiming that he was under medication for some months, his memory was poor and he had no recollection of them.

[106] There was also evidence before me that during the course of a criminal trial of Murphy on charges arising out of the Omagh bombing before the Special Criminal Court in Dublin he initially confirmed on oath the truth of the content of those interviews but later in the trial retracted this asserting that he did not make his telephone available to Murphy. Again both of these versions were given under oath.

[107] I was therefore dealing with a man who was prepared to change his evidence fundamentally whilst under oath – in effect to lie – in circumstances where I have been afforded no opportunity to assess him. Whilst his admission of benefit fraud to police pales into insignificance in comparison to the Omagh bombing, nonetheless it adds a further shade to the picture of unreliability and dishonesty of this man. On the face of these matters this was a man who had in the past exhibited a serious lack of probity. In such circumstances it is only on the firmest ground that a court should tread.

[108] I have already drawn attention to the frailties in his account to the RUC which Mr Fee elicited in his cross-examination. I had no difficulty understanding the thread running through the police interviews that they felt this man had a

selective relationship with the truth and was being less than candid with them. I do not accept Lord Brennan's assertion that the police attitude was merely conventional robust scepticism visited on most people interviewed about serious crime. Aspects of his assertions were contradictory and at times smacked of contemporaneous invention.

[109] I am conscious of the circumstances outlined by Lord Brennan which he asserted pointed to his reliability including:

- It was during his first interview on 22 February 1999 that Morgan gave an unsolicited explanation to the effect that the first defendant had taken his telephone on Friday 14 August 1998 and he consistently held on to that assertion during subsequent questioning.

- His descriptions of the scene in the Emerald Bar on the night of the bombing were detailed both in terms of personnel who were there and events that occurred. Lord Brennan asserted that this lent an air of verisimilitude to his account.

[110] I found these circumstances however inadequate to outweigh the concerns that surfaced from his subsequent variations in account.

[111] I pause to comment at this stage on the circumstances in which Mr Morgan claimed that Daly who was "drunk and … slabbering" allegedly said "You're the boy that drove the yoke to Omagh today." Even were I to fully accept that this assertion was made by Daly to Morgan, the circumstances in which it was spoken – a public house, a drunk man obviously speaking in an inebriated fashion and the inherent ambiguity in the colloquialism invoked – would all have been equally consistent with drunken bar-room tittle-tattle and too far removed from the factual sequence upon Morgan relied, namely that he had simply lent his phone to Murphy and the assertion by the plaintiffs that 980 was used in the bombing run. I therefore would have placed no reliance upon that assertion even if I had accepted the general thrust of Morgan's hearsay account.

[112] Turning to Article 5(2) of the 1997 Order, I must pay regard to whether the party by whom the hearsay evidence is adduced gave notice to the other party or parties of the proceedings of his intention to adduce the hearsay evidence and, if so, to the sufficiency of the notice given. I can deal with this matter in brief compass. I am satisfied that sufficient notice was given. Full transcripts of the interviews have been available to the defendants for a considerable period. The interviews were invoked in the original trial, they were part of the trial bundle lodged with the court in October 2012 and the defendants were on notice before the trial commenced that the hearsay legislation was to be applied.

[113] The plaintiffs encountered greater difficulty when I came to consider Article 5(3)(a) namely whether it would have been reasonable and practicable for the party by whom the evidence is adduced to have produced the maker of the original statement as a witness.

[114] I found it noteworthy that the initial list of witnesses to be called provided by the plaintiffs to the defendants (I believe in January 2013) did include Morgan as a named witness albeit I have accepted that the defendants were thereafter put on notice before the trial stated that his evidence would be introduced under the hearsay legislation.

[115] Counsel for the plaintiffs asserted that the reason he had not been called to give evidence before me was because at the original trial he had claimed to have little or no memory of what he had said to the RUC in 1999 and the plaintiffs therefore concluded that there was no additional benefit to the court in seeking to try and produce Morgan as a witness. Why then include him in the list of witnesses at all?

[116] It is not challenged by the plaintiffs that Morgan lives in Northern Ireland and could have been required to attend on subpoena. No assertion of unavailability was tendered before me.

[117] With some force, Mr Fee contended that the plaintiffs could have availed of the provisions of Section 3 of the Criminal Procedure Act 1865 and sought leave to call the plaintiff and thereafter to contradict by other evidence or a previous inconsistent statement any denial of the statements that he would make in the witness box. Had that happened, at least I would have had the opportunity to see Morgan before me, assess his demeanour, consider his credibility and form a more informed view of where the truth lay.

[118] In particular it would have enabled me to have better assessed the assertion by the plaintiffs that the witness's changes and retractions in his evidence in the earlier trials were to be seen, as submitted by counsel for the plaintiffs, "in relation to fear, family or other loyalties". Lord Brennan asserted that in the context of the Omagh bombing, his employment with Murphy and where he lives, it is to be expected that he will be both frightened and reticent to give evidence. He contended that this was borne out graphically in the transcript of the first hearing when Morgan remembered virtually nothing, even when the tape was played to him of his own words. The plaintiffs asserted therefore "It is not difficult to infer that he would have been frightened, not just of the potential consequences of being charged or implicated in the perpetration of a notorious atrocity, but also that any evidence of information that he gave to the RUC could put his life in grave peril."

[119] Lord Brennan expressly drew my attention to R v Kennedy (1993) SCT 1281 where a 13 year old girl made allegations of sexual impropriety by her

father to the police but subsequently retracted those allegations in the witness box. The Extra Division of the Court of Session held that the Sheriff was entitled to reject her retraction and treat her police statement as the truth. Whilst I recognise immediately that in principle I could adopt the same approach in this case, the crucial difference was that the Scottish Court had the opportunity to assess the girl in the witness box whereas I was deprived of such an opportunity notwithstanding my view that it would have been reasonable and practicable to have produced Morgan to enable me to make such an assessment either through cross-examination or questioning from the Bench. I had no evidence at all before me that his motives would be as asserted by Lord Brennan. It is no answer to assert that the defendants could simply have insisted on calling him. Why would they call a witness who made a statement adverse to their case albeit that was what they did on the last trial.

[120] So far as Article 5(3)(b) and (c) of the 1997 Order are concerned, I can deal with them briefly. The original statement was clearly not made contemporaneously with the occurrence or existence of the matter stated but the gap of six months would not have been sufficient to have had any major impact on my consideration. Most of the evidence contained in the police statement did not involve multiple hearsay and again this is not a feature that would have deflected me from relying upon Morgan's account.

[121] Article 5(3)(d) requires me to consider whether "any person involved had any motive to conceal or misrepresent matters". The fact of the matter is that Morgan was arrested on suspicion that he had some role or participation in the Omagh bombing. If the police were correct, his phone had been involved in the bombing. They considered him to be a participant. In such circumstances judicial experience reveals that self-interest alone may cause such persons to attempt to deflect attention away from them, to minimise their roles and at times to transfer a role to other miscreants or indeed even innocent parties. I therefore was unable to dismiss from my mind at least the possibility that Morgan did have a motive to conceal or misrepresent the fact that he knew more about the role of the 980 phone and its involvement in the Omagh bombing than he was disclosing.

[122] Article 5(3)(e) requires me to consider whether the original statement was an edited account or was made in collaboration with another or for a particular purpose. It is clear that the evidence before me was not the totality of the statements made by Morgan to the police in the course of the interviews. However, I consider that had there been any relevant additional material, Mr Fee had ample opportunity to extract that from the other interviews and draw it to my attention. In the absence of this during the course of his cross-examination, I found no material assistance in this Article.

[123] Finally I have to consider whether the circumstances in which the evidence is adduced as hearsay were such as to suggest an attempt to prevent

proper evaluation of its weight. As Mr Fee correctly indicated, the 1997 Order provides a strong and robust safeguard within which the rights of all parties may be properly assessed. The detailed provisions of Article 5 protect the Article 6 rights of the defendants under the European Convention on Human Rights and Fundamental Freedoms. Hence it is important to ascertain whether or not an attempt is being made to prevent proper evaluation of the weight of the evidence by hearsay evidence. I find no such attempt in this case on the part of the plaintiffs. I accept entirely that their invocation of the provisions of the Order to introduce the hearsay evidence of Morgan without him being present was bona fide however ill-judged that may have been and does not conceal any sinister motive or improper attempt to prevent proper evaluation.

[124] Weighing up all these factors, I have come to the conclusion that the circumstances of the hearsay evidence of Morgan are such that I could not be satisfied as to his reliability to the extent that I could place any weight on what he has said. I discern a whiff of deceit about the evidence of this man which I am unable dispel in the absence of him having appeared before me so that I could make a proper assessment of him. I therefore have given no weight whatsoever to the evidence of Morgan either in the case of Murphy or Daly.

The Evidence against Daly

The evidence of Denis O'Connor

[125] The evidence of Denis O'Connor was given before District Judge Connor in Dublin pursuant to the provisions of Council Regulation (EC) No. 1206/2001 of 28 May 2001 on Co-operation between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters (hereinafter called "the Council Regulation"). That evidence was taken strictly in accord with the provisions of the Council Regulation pursuant to the questions furnished by the plaintiffs to the requested court.

[126] O'Connor in the course of his evidence in chief and cross examination made the following points:

- On 15 August 1998 (the day of the Omagh bombing) he had spent the morning shooting, thereafter returning to his parents' house and then going to Urlingford in County Kilkenny about 2.15 pm.

- The mobile number 0862662371 (hereinafter called 371) was his mobile number and was registered in his possession. I was aware of independent evidence of this.

- Shortly after 3.30pm he received a telephone call from a man he knew as Seamus Healey.

- He had met him before. The transcript of the questions from counsel Lord Brennan and his answers at the hearing bear repetition at this point:

"Daniel Brennan: Where had you met him?
Denis O'Connor: I first met him at the Red Cow roundabout.
Daniel Brennan: The Red Cow roundabout.
Denis O'Connor: The hotel at the Red Cow roundabout and after that at Banks.
Daniel Brennan: So your answer was you met him at the Red Cow roundabout, but my question was, had you met the caller before, and you've given the Red Cow.
Denis O'Connor: Before? Yes.
Daniel Brennan: Before this call.
Denis O'Connor: Before this call? Yes I had.
….
Daniel Brennan: Where did you previously meet him?
Denis O'Connor: I first met him at the Red Cow. The hotel the Red Cow. After that then it was at Banks.
….
Daniel Brennan: Describe the meeting at the Red Cow?
Denis O'Connor: My first meeting with him at the Red Cow was to give him the C2, it's a payment card.
Daniel Brennan: Sorry a what?
Denis O'Connor: A payments card that contractors have that when they're going on sites to look for work, they present it to the main contractors to entitle them to get payment off the main contractors for work that goes on.
Daniel Brennan: So describe the meeting.
(Interruption)
What was the purpose of your meeting with the caller that's number 14?
Denis O'Connor: To give him, to hand him the payments card.
Daniel Brennan: Did you reach an agreement with him?
Denis O'Connor: We did reach an agreement.
Daniel Brennan: Did you give him anything at that time?
Denis O'Connor: A photocopy of the C2 and a signed form, the form that goes with the C2 I gave it to him.
Daniel Brennan: Did you subsequently meet him.
Denis O'Connor: Nearly every Friday after that.
Daniel Brennan: On how many further occasions did you meet him personally?
Denis O'Connor: Personally.. 5 times.
….
Daniel Brennan: Where did you meet him on subsequent occasions?
Denis O'Connor: The Bank of Ireland, Blanchardstown.

- He also described them carrying out on 7 or 8 occasions a transaction made up of meeting him, going into the bank, cashing a cheque, coming out and Healey would hand him payment out of it and they would then go their separate ways.

- He described receiving a telephone call on his mobile 371 from this man on 15 August 1998 shortly after 3.30pm. He spoke to him about the C2. "We had arranged to send the C2 to a third party and he was asking me had I heard anything back from it, if I had notification about payment cards going through. I just told him no, I hadn't heard a thing on it". He described the telephone call lasting a few minutes.

- He claimed that he was shown an album of 12 photographs by Detectives in February 1999.

- He described using the phone 371 until July or August 1998. He was only able to receive calls on the phone from January or February 1998.

- He had given evidence on 9 November 2001 at the trial of Colm Murphy in relation to receiving a phone call from Seamus Daly on 15 August 1998.

[127] O'Connor was cross-examined very briefly by Ms Higgins, simply asking him to confirm that the C2 certificate was used to defraud the Income Commissioners and thus he was involved in a C2 fraud.

[128] A further witness was called namely retired Detective Sergeant Sean Grennan of the Garda under the provisions of the Council Regulation. His evidence included the following material:

- On 23 February 1999 at 10.30am he met Eddie Wheelan at Monaghan Garda Station who gave him photographs of a person he knew to be Seamus Daly born 16 September 1970 of Culloville, Co Monaghan. (*I pause to observe that this was the evidence before me of the date of birth of the second-named defendant and that he had been arrested at Cullobille, Co Monaghan*).

- Grennan then drove back to Carrickmacross Garda Station with the photographs where he compiled a photo album of 12 photographs numbered 1-12 placing the photograph of Daly at number 8.

- He attended an interview conducted of Denis O'Connor on that date and showed him the photo album with the 12 photographs.

- The transcript of the evidence thereafter records as follows:

> "Tony McGleenan: Did Mr O'Connor identify any persons from the photographs which you brought to the interview room?
> Sean Grennan: Yes, he identified picture number 8, as the man he met in the Red Cow through Gerry Colman."

Assessment of the evidence of Denis O'Connor

[129] I enjoyed the advantage of assessing the demeanour of O'Connor over the time that he gave his evidence in Dublin. That afforded me a position to review his evidence and to draw relevant inferences from it. I find him to be a competent and convincing witness who gave his evidence in a direct and assured style.

[130] He clearly was the owner of phone 371 not only because he said so but because the phone records before me which were unchallenged show that this was his mobile phone.

[131] Jim Faughnan had been employed by Eircell since November 1994. He was a team leader in the Accounts Dept and thereafter a team leader in the Fraud and Security Section. He was responsible for dealing with requests from the Gardai or the Investigation Branch for details of Eircell accounts which he provided in accordance with the provisions of Section 13(2)(a)(b) of the Interception of Postal Packets and Telecommunications Messages (Regulations) Act 1993. He produced the billing records of phone 585. At 15.30 on 15 August 1998, utilising the Eircell network the Eircell billing system recorded a call at 15.30 on 15 August 1998 to 371. This was not challenged during the trial.

[132] I have already indicated that I consider that 585 was the phone being used by a person involved on a bombing run to and from Omagh on that date. I consider the overwhelming probability is that the person who was on the 585 mobile phone at 15.30 on 15 August 1998 was a person involved in the Omagh bombing.

[133] Ms Higgins contended that the plaintiffs had failed to establish through the evidence of O'Connor given in Dublin and Garda Grennan that the person speaking to O'Connor at that time on that date was Daly. In the course of a close textual analysis of what had been said she made the following points:

- The evidence was that O'Connor first met the man Healey "at" the Red Cow roundabout and "at" the Red Cow hotel. She distinguished this from the evidence of Garda Grennan, that Mr O'Connor identified as Daly the man he met "in" the Red Cow. Ms Higgins therefore contended that there were now two different locations and perhaps two different

men i.e. a location "at" the Red Cow roundabout, at the Red Cow hotel" and a location "in" the Red Cow hotel.

- I found this distinction unconvincing. If the conversation about the C2 had occurred in a setting outside the hotel itself I would have expected this to be specifically mentioned. Why would they arrange to meet at a hotel and not go inside? If for some reason they did not go inside why would O'Connor not do the obvious thing and mention this in evidence? Why would he be identifying to Garda Grennan one man at the Red Cow in whom the Garda clearly had an interest and who I can infer he had been discussing with the Garda and telling the court about a different incident/man in the Red Cow? What would be the chances of him meeting two men, one at the Red Cow and one in the Red Cow, both of whom were of interest to the police and to the court without him mentioning that fact? Listening to and observing O'Connor I was satisfied that he was referring to a meeting in the hotel .He was not weighing his words with a jewellers scales and, like most people, he was not distinguishing contextually between "in" and "at". It does not require an expert in contemporary linguistic analysis to recognise that everyday speech is not a search for unflinching perfectionism in its choice of vocabulary. In terms I find the references of both witnesses to the Red Cow to be wholly consistent one with the other and I believe that a reasonable objective member of a jury sitting hearing this case would have come to such a conclusion on the balance of probabilities. No attempt was made in cross-examination of either of the witnesses to explore this area and I am satisfied that any objective listener would have concluded that precisely the same location was being discussed.

- Ms Higgins cast some doubt over whether the phone had actually been with O'Connor in August 1998 given that he said he had not used his phone from the middle of 1998 and that it could have been July or August. I find nothing in this point which deflects me from concluding that his unequivocal evidence that he received a phone call from 585 on his own 371 as recorded in the records of 15 August 1998 was accurate and the evidence of Mr Faughnan underlined this.

- Counsel contended that since the photo album was never produced to verify that the photograph number 8 was in fact a photograph of Daly, I should have rejected the identification. I find no merit in this point. Garda Grennan, without challenge by counsel in cross examination, asserted that the photograph was that of Daly and Mr O'Connor confirmed that this was the man he met at the hotel. There was therefore sufficient evidence that the photograph was that of Daly.

- Counsel advanced the argument that since I had seen neither the photograph purporting to be Daly nor the other photographs in the

compilation, I could not be satisfied that it was a fair method of identification. I did not find this a compelling argument. It has to be remembered in this instance that this was not an identification case but rather a recognition case. O'Connor claimed to have met this man on a number of occasions in a number of different circumstances and therefore I have no doubt that irrespective of the state or size of the photographs, he would have been readily able to recognise him. It is noteworthy that no attempt was made to cross-examine Grennan or for that matter O'Connor on these identification issues. No suggestion was made to Mr O'Connor in cross-examination that the man he had picked as Daly was not in fact the same man as the Mr Healey that he had met on various occasions. Neither was Garda Grennan asked any questions about the content of the album.

- Ms Higgins challenged the sequence of the evidence from O'Connor and Grennan. In essence she said that there was no evidence from O'Connor that he had received a call that day at the relevant time. I again consider this point as having no merit and that any reading of the evidence of O'Connor and Grennan would indicate symmetry between the two pieces of evidence.

[134] In substance, I was satisfied that O'Connor had met the man describing himself as Healey but whom he identified as Daly from a photograph on a sufficient number of times to be able to recognise him and recognise his voice on a telephone. The subject of conversation between them was another obvious link to satisfy me that this was the same person that he had been dealing with on so many occasions in the past. I emphasise that this was a recognition case rather than a simple identification case.

[135] The evidence of O'Connor himself was underlined by the fact that the 585 phone was shown to have made a telephone call to 04243088 at 17.23 on the same date which just happens to be the Daly family home. The evidence before me which was unchallenged was that 088 was a landline telephone at the Daly household where Daly lived in 1998 and was registered to his father. I was convinced that it was more than a coincidence that the person whom O'Connor identifies as Daly on the 585 phone calling him at 15.30, just happens to make a call to the Daly family home the next time the 585 phone is used. This served to underline my conclusion that it was Daly who had made the telephone call to O'Connor.

[136] I was satisfied that O'Connor had had ample opportunity to identify the voice of the man that he described as Daly. The evidence before me was that phone 213 was registered to Daly. In relation to the ready to go phone 076 the evidence of Garda who had interviewed Daly on 24 September 1998 was introduced by the plaintiffs under the Civil Evidence Order and in any event counsel made clear that they had no objection to its submission although they

would deal with the question of weight at the appropriate time. The statement of Garda Richard concerning the interview with Daly contained the following exchange:

> "Q. - Did you own a mobile phone 087-241076?
> A. - I did one time.
> Q. - Where is that phone now?
> A. - I lost it.
> Q. - When did you lose it?
> A. - I think it was last September some time.
> Q. - So you would have had the phone 087-241076 during last July and August?
> A. - I suppose I did.
> Q. - Did anyone else use the phone other than yourself?
> A. - Not really."

[137] Denise Owens, a police analyst, was asked by Detective Constable Barr to analyse calls made by 213 and 076 and to highlight any numbers called by those phones. 213 was analysed between 20 February 1998 and 21 August 1998 and 076 between 11 July 1998 and 31 August 1998. She had an Excel spreadsheet containing the phone records from both phones. The 213 phone called O'Connor's 371 phone 43 times over six days between 1 May and 29 May 1998. 20 of these calls occurred on 21 May 1998. 076 called 371 on two occasions during August 1998.

[138] Ms Higgins properly drew my attention to a number of issues about the analysis of Ms Owens which included the fact that the 076 phone called 36 numbers that the 213 did not and the 213 phoned 55 numbers that the 076 did not which meant that there were 91 numbers that the two phones did not have in common as compared to 20 numbers which they did. Hence Ms Higgins argued that Denise Owens had failed to establish that the 076 phone was used by the same person as a 213 phone.

[139] However the fact of the matter is that I am satisfied Daly admitted to Garda Richard that the 076 phone was his and that two calls were made from 076 to O'Connor's phone 371 during the relevant period which raises an inference that it was he who made the call particularly in light of the 213 evidence that he regularly called 371. Moreover, more importantly, the 213 phone called O'Connor's 371 phone 43 times over six days between 1 May and 29 May 1998. 20 of these calls occurred on 21 May 1998. Whilst of course it is correct as Ms Higgins indicated that a number of these calls lasted a very short time it does shows a continuing relationship between O'Connor and Daly which when coupled with the evidence O'Connor gave in Dublin about their personal meetings, satisfied me that on the balance of probabilities he would have not the slightest difficulty recognising Daly's voice albeit that he had thought he was

called Healey. Undoubtedly Daly had been contacting him on a number of occasions. I was satisfied on the balance of probabilities that the user of 585 on the day of the Omagh bombing at 3.30pm was Daly

Interviews of Daly

[140] Daly was interviewed by the Garda as indicated above on a number of occasions. Relevant extracts from those interviews which were put before me included the following:

- On 27 May 1999, interviewed by Garda Dillon, about the Banbridge bombing, and asked to account for his movements between 31 July 1998 and 6.00 pm on 1 August 1998, he said he was never in Banbridge.

- He admitted knowing Murphy through work.

- With Garda Reidy on 22 September 1998 he was offered an opportunity to account for his movements between 9.00 pm on 12 August 1998 and 15 August 1998. He gave a detailed account namely that he had been in Cullaville in the morning and early afternoon, returning home about 3.00 pm and that he was at home when he heard about the bombing on TV.
- I pause to observe that I have not taken into account at all the statements by Daly during that interview that he would support military bombings in the north and England "to get the Brits out and that he didn't' mind if British soldiers and the RUC men were killed" because it was counter-balanced by him saying that his father was furious over the Omagh bombing, that he himself felt sick over the carnage and that since the Omagh bombings he would not agree with anymore bombings. I found this rather neutral in terms and not of sufficient assistance to me in this case.

[141] Ms Higgins, whilst not objecting to the admission of the evidence of the Garda and therefore not requiring them to attend, nonetheless then boldly mounted a detailed attack upon these interviews in the course of her submissions suggesting there was evidence they had been concocted by the Garda. These points included:

- The interview where Daly accepted he had the 076 telephone in July and August was not signed by him.

- In the early part of the interview he had been hostile to the Garda who told them they were investigating Banbridge, to which he had answered "I know what you are at, it is all lies" and yet within a short time admits he owns the 076 phone even though he was aware that in September 1998

it had been put to him that the phone was implicated in calls organising the theft of the bomb car.

- The Garda failed to exploit this answer about 076 and ask him any questions about its use to incriminate him in the theft of the bomb car.

- After admitting the 076 phone, Daly then indicated he was not answering any more questions on the advice of his solicitor. Why was there the apparent change of attitude? This led Ms Higgins to suggest that I should draw an inference that this part of the interview was concocted especially since subsequent interviews were met by silence on his part even when asked about the 076 phone.

- Garda Reidy could have been called to prove this statement but no explanation was given by the plaintiffs as to why they did not call him to be cross-examined and therefore the weight is questionable.
- Counsel reminded me that in the interviews of Murphy Garda officers had altered notes of what Murphy allegedly said and I should therefore have a concern about Garda interviews in this matter.

[142] Ms Higgins raised this whole allegation of concoction in a speaking note in reply to the plaintiffs' submissions. They found no place in the original submission of no case to answer on behalf of the second defendant. I found no basis whatsoever for the allegation of concoction. When this evidence was introduced by the plaintiffs of Garda interviews on 16 January 2013, counsel on behalf of the defendants made it clear that they were not objecting to the admission of the evidence but reserved the right to challenge the weight to be accorded to it. Hence in that context I found it curious that belatedly Ms Higgins now asserted that Garda Reidy could have been put on the witness list and called to prove a statement contending that no explanation had been given by the plaintiffs as to why they did not call him to be cross-examined. The obvious answer of course is that the plaintiffs were properly taking steps to cut down the cost and expense of this trial and if there was a matter of contention for e.g. allegations of concoction, the defendants could have invoked their right to have the witness called to give evidence for cross-examination. I consider these interviews were admissible as previous statements of a party which are relevant and admissible as statements made against interest by Daly. However even applying the criteria of Article 5 of the 1997 Order to these witnesses, I find nothing about the circumstances of the evidence from which I could draw an inference as to concoction. The fact that a person being interviewed about serious crime chooses to remain silent and intermittently answers in a damaging manner is a matter that is a regular occurrence in the judicial experience. Those who are involved in serious crime are often bereft of logic or indeed common sense and hence miscreants are often arrested and convicted.

[143] I am satisfied that sufficient notice was given to the defendants of the calling of these witnesses from the Garda. Whilst it may have been practicable to have produced the Garda, it did not seem to me to be unreasonable not to bring them when no serious challenge to the content of their evidence by way of concoction had been raised prior to the final submissions. The statement of Daly in the interview was not made contemporaneously with the occurrence of the matters about which he was being questioned. The evidence did not involve multiple hearsay, there is no evidence before me that the Garda had any motive to conceal or misrepresent matters (they could have concocted much more damaging admissions than this), any editing of the amount of the interview introduced by counsel was reasonable in the circumstances where the rest of the interviews were irrelevant and I found no evidence of any attempt to prevent proper evaluation of the weight of the evidence. I therefore have no reason not to give full weight to the contents of the interview and accordingly I do so.

[144] One final matter falls for consideration. Ms Higgins asked why the defendant Daly would not have used his own phone in Omagh if, as alleged by the plaintiffs, he had used phones belonging to him in Lisburn and at Banbridge**.** This mirrored to some extent the question raised by the Court of Appeal at [120(c)] where the court posed the question as to why the judge had not asked himself why Daly "would have used the mobile phone registered to himself, and therefore easily traceable to him, in the course of both scouting for and assisting in the delivery of the Lisburn bomb but a completely different mobile, one that was officially registered to, and therefore easily traceable to Murphy on the day of the Omagh explosion". The court also queried, as did Ms Higgins, why no research had been made (presumably by Ms Denise Owens) as to whether there were any records of calls made by or to mobile 213 on the day of the Omagh bombing on 15 August 1998.

[145] This apparent dilemma does not deflect me from the strength of the evidence that I am satisfied was before me to the effect that Daly was the voice that O'Connor heard on the day of the Omagh bombing. In any event, as I have earlier indicated, the verdict of experience is that logic is often not a component in the makeup of criminals. Were they to be infused with common sense and logic they would probably not be criminals? Moreover information and suggestions by other criminals can come to such people at different times. This was the early days of mobile phones and of course in between the various bombing incidents, further information or rumour about the traceability of phones may have come to the miscreants in these escapades. Murphy was not going to be present in Omagh on the day of the bombing and, armed perhaps with an alibi, this may have provided some degree of reassurance that the use of his phone would not involve him being connected to the bombing. This is all pure speculation as to the possible mind-sets of terrorists which are usually unfathomable in any event. None of it deflects from the strength of the evidence to which I have earlier adverted. Evidence that 213 had been silent that day might have been useful to the plaintiffs' case just as evidence of its use at the

relevant time might have been useful to the defendants. However I heard no such evidence in the event from either side or the strength of O'Connor's evidence is sufficient to persuade me that the absence of such material does not introduce any doubt in to my mind.

[146] This interview evidence satisfied me that Daly was lying to Garda about his movements on the day of the Omagh bombing and that he was the owner of phone 076 both at the time of the Lisburn and Omagh bombings.

Subsequent conviction of Daly

[147] From the CA judgment I have derived the following principles. I am still bound by the authority of Hollington v Hewthorne (1943) KB 587 and accordingly convictions cannot be admitted as evidence that the person concerned had committed the acts which grounded the conviction. That rule remains in place but is subject to a statutory exception in the Civil Evidence Act (Northern Ireland) 1971 in relation to the use of UK convictions and civil proceedings.

[148] Foreign convictions are not admissible in a civil action. Accordingly they are not relevant information in relation to bad character or propensity because that inference would inevitably derive from the inadmissible opinion of the foreign court that the person committed the offence. Accordingly I have paid no attention whatsoever to the convictions of Murphy mentioned by the plaintiffs in this case.

[149] There is an exception to that principle however where the person has pleaded guilty in the foreign court and in those circumstances the conviction can be taken into account.

[150] The second-named defendant pleaded guilty on 26 February 2004 to a charge of membership of a terrorist organisation namely Oglaigh Na hEeirean on 4 November 2000 some 2 years after the Omagh explosion. The plaintiffs contended that this conviction, resulting from a plea of guilty, was admissible as an admission on his part of membership of the terrorist organisation at the relevant time. The question I have to determine is whether the conviction was of such a nature that in the circumstances it provided credible evidence of disposition at the relevant time to be involved in the Omagh bombing and was logically probative of his involvement in the terrorist bomb run.

[151] Ms Higgins argued that since the case against Daly depended entirely upon the O'Connor evidence that Daly had telephoned him from 585 on his return from Omagh, the conviction cannot be relied upon to make an unreliable witness more reliable or a dishonest witness more honest. For reasons that I have set out above I found the evidence of O'Connor to be credible and having

accorded to it the weight that I have outlined, I am satisfied that it is appropriate to consider the conviction of Daly as adding some further weight.

[152] Counsel argued that there was a clear distinction between a conviction based on events shortly before or shortly after an index event and one long after so that the passage of time between the conviction in this case and the earlier bombing in Omagh rendered it of little or no weight.

[153] Further in the course of a particularly creative submission Ms Higgins argued that since membership of an unlawful organisation can be proved in the ROI by Garda evidence not below the rank of Chief Superintendent stating his belief to that effect, there is never any defence to the charge and consequently Daly's conviction cannot be relied on .I found that submission unfathomable and I trust I do not do an injustice to Ms Higgins' argument when I say that there probably is very good reason why that point never seems to have been raised before and certainly has not been the subject of any authoritative approval.

[154] In my view an allegation of being involved in a bombing on behalf of a terrorist organisation is more likely to be true when made against a man with a conviction for membership of the same or similar terrorist organisation, even 2 years later, than made against a man with no such provable disposition. This is no mere glancing insight into a terrorist disposition. It is an unequivocal public confession of membership. I must of course concentrate on Daly's propensity at the time he is alleged to have been involved in the Omagh bombing run but I can see no justification for saying that as a matter of law one is not entitled to determine propensity at the time of committing the offences by reference to offences committed shortly thereafter, into which category I include an offence committed on 4 November 2000. (See R v Adenusi [2006] EWCA Crim 1059 at (13), R v Alec Edward [2009] EWCA Crim 513 at (20) and (21) and Robert James Shaw Rogers (Unreported) HOR8737 at 48). Obviously the passage of time will serve to dilute that effect to some extent. I have therefore given some modest weight to the conviction of Daly in this instance given the nature of the conviction whilst bearing in mind that it did occur 2 years after the index event. It therefore gave some indication of a disposition to carry out the type of crime outlined in the plaintiffs' case. I do not consider 2 years to be a sufficiently long period to dilute or reduce the weight to an insignificant degree. I make it clear however that even had I not taken it into account it would not have altered the conclusion I came to in this case either at the no case to answer stage or my final determination.

Similar fact evidence of Lisburn, Banbridge and Omagh bombings

[155] It was the plaintiffs' contention that evidential analysis of phone calls and related data for two other bombings namely at Banbridge on the afternoon of 1 August 1998 and at Lisburn on the morning of 30 April 1998 demonstrated facts similar to those of the Omagh bombing. Counsel contended that the telephone

evidence involving Omagh, Banbridge and Lisburn indicated a consistent bombing and terrorist campaign manifesting similar bombing techniques, bomb runs by cars and use of telephones. It was argued that such events must have involved concerted planning and execution together with a close-knit command and control system involving in particular the acquisition of explosive materials and timing and ignition equipment, car thefts and preparation of cars as bomb cars and the use of personnel with telephones before, during and after the placing of the bombs including warning calls.

[156] In the case of the Banbridge bombing the use of phone 585 registered to Murphy was similar to that of the use in the Omagh bombing of 585/980 and in the Lisburn case, use of the registered 213 phone of Daly was also similar to that of the use of 585/980 in the Omagh bombing. In short the plaintiffs contended that the coincidence of similar facts of phone participation in these bombings of 585 and 213 had an evidential force even beyond the facts of the Omagh case alone.

Legal principles governing similar fact evidence

[157] It was common case that the leading authority in this matter is O'Brien v Chief Constable of South Wales Police [2005] UKHL 26. In that case the primary issues concerned how particular police officers had behaved when conducting an investigation in 1987/1988 and the evidence which the House of Lords held to be admissible as similar fact evidence related to bad behaviour by the same police officers in the course of investigations in 1982-1983 and 1990. The leading judgment was that of Lord Phillips who set out the two-stage process for considering similar fact evidence. In essence there is a rule stage and a discretionary stage.

[158] At [53] Lord Phillips, dismissing the concept of enhanced relevance or substantial probative value, said:

> "I can see no warrant for the automatic application of either of these tests as a rule of law in a civil suit. To do so would build into our civil procedures an inflexibility which is inappropriate and undesirable. I would simply apply the test of relevance as the test of admissibility of similar fact evidence in a civil suit. Such evidence is admissible if it is potentially probative of an issue in the action."

[159] The second stage is whether or not the court should, as a matter of discretion, refuse to allow it to be admitted. Lord Bingham said at [5]:

> "The second stage of the inquiry requires the case management judge or the trial judge to make what

> will often be a very difficult and sometimes a finely balanced judgment: whether evidence or some of it (and if so which parts of it), which ex hypothesi is legally admissible, should be admitted. For the parties seeking admission, the argument will always be that justice requires the evidence to be admitted; if it is excluded, a wrong result may be reached. .... The importance of doing justice in the particular case is a factor the judge will always respect. The strength of the argument for admitting the evidence will always depend primarily on the judge's assessment of the potential significance of the evidence, assuming it to be true, in the context of the case as a whole.
>
> (6) While the argument against admitting evidence found to be legally admissible will normally depend on the particular case, some objections are likely to recur. First, it is likely to be said that admission of the evidence will distort the trial and distract the attention of the decision-maker by focusing attention on issues collateral to the issues to be decided. … Secondly and again particularly when the trial is by jury, it will be necessary to weigh the potential probative value of the evidence against its potential for causing unfair prejudice: unless the former is judged to outweigh the latter by a considerable margin, the evidence is likely to be excluded. Thirdly, stress will be laid on the burden which admission would lay on the resisting party: the burden in time, cost and personnel resources, …, the lengthening of the trial, with the increased cost and stress inevitably involved; the potential prejudice to witnesses called upon to recall matters long closed or thought to be closed; the loss of documentation; the fading of recollection."

[160] I pause to observe that the observations of Lord Phillips at [46] and Lord Carswell at [71] have persuaded me that evidence of collateral facts should not be admitted unless the evidence was likely to be reasonably conclusive *of the collateral facts.* The collateral facts themselves had merely to raise a "reasonable presumption or inference" as to the matter in dispute to which they were said to be relevant.

[161] In short, I have approached this matter with three criteria in mind:

- Is the evidence of the collateral facts reasonably conclusive of the collateral facts?
- If so, is that evidence potentially probative of the issue before the court i.e. were these defendants involved or assisting in the Omagh bombing?
- If so, should I exercise my discretion in favour of its admission?

Similar facts

[162] It was the plaintiff's contention that there were a number of essential features common to the three bombings namely:

- Car bombs involving similar explosive material and timer power units.
- Use of at least two cars: a bomb car and a scout car.
- Travel of at least two cars from the ROI into the north and then returning to the ROI.
- Mobile telephone communication by roaming in the north via cell sites both north and south.
- Warnings were given not identifying the bomb car or where it was placed.
- The pattern of telephone calls prior to and subsequent to the bombing which included warnings into the media. There was evidence of communication between two cars which of course would have been necessary in order to allow the bomb car miscreants to escape. There was also a pattern of messages to those who had to contact the media and the presence of mobile phones with roaming features.
- Convictions of those to whom phones were attributable as probative of terrorist involvement because they were likely to have a disposition to such conduct.
- Banbridge and Omagh were both Saturday afternoon bombings.
- The bombings were all in shopping streets.
- In the Lisburn bombing, the same phone box in Newry was used to make calls to the Irish News as has been used for the Omagh bombing warnings.

[163] The defendants contested the similarity submitting as follows:

  - There was no evidence of any pattern of communication between the mobile phones alleged to be used in the events of 30 April 1998 or 1 August 1998 similar to the pattern of use of phones in the Omagh bomb runs on 15 August 1998 e.g. of the second defendant holding one of two phones which were moving up to the target town in two different cars and making calls to each other with continued contact on the return journey.
  - The same phones were not used in the three incidents e.g. the phones alleged to be used on 30 April 1998 are not the same phones allegedly used on 15 August 1998 and those used on 1

August 1998 are not the same phones alleged to have been used on 15 August 1998.

- Different phone numbers and different numbers of phones featured in the three events particularly with reference to the number of phones in Northern Ireland relevant to the bombings.
- The patterns of these car bombs are common to car bombs left in towns or cities over the course of the troubles long before the Omagh bombing or the Good Friday Agreement which the plaintiffs suggested was the trigger for these three bombings. No distinctive markers are established about the pattern of events in Omagh, Lisburn or Banbridge apart from the general pattern of events in relation to any car bomb.
- The car bombs were placed on different days e.g. Lisburn was on a Thursday morning.
- There was no admission by the IRA of involvement in the Lisburn bombing
- The warnings do not establish a distinctive pattern e.g. Lisburn had five calls to the Irish News from two people giving 45-60 minutes' notice, Banbridge had a call to Banbridge RUC Station and 999 calls giving 20 minutes' notice whereas Omagh had 3 calls to Omagh/Coleraine Samaritans/UTV and police.

Evidence of the phone traffic in the area of Banbridge on 1 August 1998

[164] LKP5 revealed calls from 585 on the day of the Banbridge bombing together with various cell sites through which calls were traced.

[165] The billing records in the ROI as evidenced by Mr Faughnan and the evidence of calls and the relevant cell sites set out by Mr Dowling revealed that phone 585 was engaged that day in 19 incoming and outgoing calls until 14.48, 9 calls between 13.05 and 14.48 all being via various cell sites in the Dundalk area. Amongst those calls were those at 13.05 and 13.38 to phone 088 being the Daly family home. 585 was therefore in the ROI at least until 1448

[166] According to billing records before me between 15.25 and 16.18, there were 8 calls in Northern Ireland i.e the user of 585 had moved into Northern Ireland. The map of Mr Telford which depicts the cell site analysis indicating movement in and out of the Banbridge cell mast area on 1 August 1998, and which has relied on the location map prepared by Civilian Mapping Officer Moutray who placed information about cell site locations as supplied to him by Vodafone on an ordnance survey map, (contained in exhibits 7, 8, 9 and 10 in this case) and the entries in LKP5 reveal:

- At 15.25 mobile 965 contacts 585 in the Banbridge cell site area indicating that the person with 585 had travelled from the Republic of Ireland into the Banbridge area at the time this call was received.

- At 15.39 phone number 809 calls 585 using the same cell site with a further call at 15.42 again using the same cell site.
- At 15.48 mobile 965 phones 585 when the latter is at the Millennium Mast cell site area at Loughbrickland south of Banbridge.
- At 15.50 585 calls mobile 630 from the cell site of the Millennium Mast south of Loughbrickland.
- At 16.18 585 receives a call from 975 in the Ashgrove Road, Newry cell site area i.e. 585 is now south of the Millennium Mast.

[167] In terms therefore this map and LKP5 illustrates 585 in calls from an area in the cell site at Banbridge between 15.25 and 15.42 and then further calls going south out of Banbridge from 15.48 to 16.18.

[168] There were warning calls about the Banbridge bomb from a public call box at Armagh Road at 16.03, 16.05 and 16.07, from a public call box at Parkview, Newry at 16.02 and 16.05 and thirdly from a public call box at O'Reilly Park, Newry at 16.15.

[169] The last outgoing call from 585 recorded on LKP5 is at 16.48 i.e. shortly after the bomb had gone off and is made from a cell site at Dundalk in the Republic of Ireland. 585 had now travelled back into the ROI.

[170] The plaintiffs suggested that this evidence establishes the use of the 585 phone in the same type of bomb run as in the case of Omagh i.e. moving from the Republic of Ireland to the bomb site (in this case Banbridge) and then moving south again thereafter. It was contended that this was further probative evidence of Murphy's involvement in the Omagh bombing.

Evidence of the phone traffic in the area of Lisburn on 30 April 1998

[171] The plaintiffs submitted that the sequence of phone calls including the warning calls demonstrated the use of the phone of Daly in a bombing run to Lisburn similar to that of Omagh. It was submitted that this was further probative evidence of Daly's involvement in the Omagh bombing. I remind myself that 213 is a phone registered to Daly.

[172] Between 07.58 and 08.30 on the morning of the bombing in Lisburn 213 made three calls in the Republic of Ireland. The calls thereafter were submitted to have the following relevance:

- 213 received a call from 689, a phone registered to Murphy's wife, the latter phone being in the Republic of Ireland and 213 being in the area of a site at Dromore.
- At 09.23, 213 at a cell site in the environs of a cell site at Linenhall Street in Lisburn sent a call to 387.
- At 10.02, 213 received a call from 387 using the Lisburn cell site.

- At 10.30, phone 689,from a cell site in the environs of Loughbrickland, sent a call to 213 which was also at the Loughbrickland cell site.
- It is significant, submitted the plaintiffs, that shortly thereafter between 10.30 and 11.00 warning calls were made in the following circumstances:

    - To the Irish News at 10.38, 10.49, 10.57 and 11.09 using the code word Martha Pope indicating that there was a bomb outside the Bank of Ireland in St John's Street, Lisburn.
    - A similar call at 10.42 made to the Belfast City Hospital with the same code word.
    - To UTV at 10.43 again using the similar code word.
    - Between 10.30am and 10.40am to the Bank of Ireland in Lisburn.

[173] Finally at 11.57, LKP5 records a call from 213 which was back in the Republic of Ireland.

[174] The plaintiffs contend that the following inferences can be drawn from this phone traffic:

- 213 was clearly in Lisburn at the material time with calls through cell sites going north at 8.58 near Dromore, later in Lisburn and then at 10.30 south near Loughbrickland. With calls out from the Republic of Ireland at 7.58 and 8.29 by 213 this demonstrates a movement north to Lisburn from the ROI and then going south again to the ROI at the relevant time to the bombing.
- There was relevance, submitted the plaintiffs, in the fact that there was a close connection of calls between 213 (Daly) and 689 (a phone which belonged to the first defendant's wife AM).
- Between 8.57 and 10.30 the 689 mobile phone of AM was involved in 7 calls starting in the ROI and then 5 calls whilst roaming in the north between 9.31 and 10.30 via cell sites on the way to Lisburn, in Lisburn and going back south from Lisburn. At 8.58, 689 calls in the ROI to 213 near Dromore and again calls 213 at 10.30 when both are in the north near Loughbrickland and south of Lisburn.
- In the north, whilst roaming there are connected calls at 9.21 and 9.35 and 10.02 involving 213, 689 and 387.

[175] Apart from the attack upon LKP5 to which I shall turn shortly, Ms Higgins, relying upon her submission that only evidence which was reasonably conclusive proof could be admitted in relation to collateral facts, argued that:

- There was no evidence of any pattern of communication between the mobile phones allegedly used on 30 April 1998 similar to the pattern of use of phones in the Omagh bomb runs on 15 August 1998. These were different phones from those used allegedly used in the Omagh bomb run

and for that matter the Banbridge bomb run. Different phone numbers and different numbers of phones featured in the three events.

- There is no distinctive pattern between Lisburn, Banbridge and Omagh bombings. Even the warnings do not establish a distinctive pattern.

LKP5

[176] In order to introduce what they contended was the factual evidence surrounding the use of telephones in the Banbridge and Lisburn bombings, the plaintiffs relied upon the document LKP5 prepared by LP where it referred not only to Omagh but also to Banbridge and Lisburn.

[177] Although it is complex, it is worth setting out the genesis of LKP5 again in some detail largely because it became the subject robust attack from the defendants particularly in the context of these two bombings. It may be helpful to set out the contention by the plaintiffs as to how LKP5 was constructed as follows;

[178] After 15 August 1998 records were interrogated and downloaded for phone numbers 585, 980, 430 and 259 from Vodafone Northern Ireland in the form of toll ticket analysis which gave call details and cell sites for Eircell phones when roaming in Northern Ireland. I heard evidence in this matter from Mr Green who was the Vodaphone Fraud and Investigations Manager.

[179] This information was given to Detective Sergeant Stevenson and became known as document TRS1. He passed it to LP who was the Senior Research Analyst for the PSNI. She then made a report on this which was under the name LKP1 on 20 November 1998 and returned the TRS1 document back to Stevenson.

[180] On 23/24 March 1999 Green was asked by the police to investigate records of Republican Dissidents suspected of carrying out bombings in Northern Ireland during 1998 culminating in the Omagh bomb and did so using mobile phones that were roaming in Northern Ireland.

[181] Vodafone then interrogated and downloaded data pertaining to Eircell/Digifone mobile phones roaming in the Vodafone network between January and November 1998. All resulting data with call details and cell sites involved were put onto a CD-ROM computer disc and supplied to LP. The Vodafone data was supplied on discs. One disc is part of LKP1 and two discs were part of LKP2 according to the evidence of Mr Green.

[182] There was also evidence from Mr Griffiths of BT Cellnet who listed the Eircell/Digifone numbers which included 585, 980, 430, 259, 076, 213 and 615 along with others. As in the case of Vodafone, BT then produced data and

downloaded it onto two CD-ROMs and six floppy discs which again were given to LP and turned into document LKP3.

[183] Detective Stevenson then provided LP with LKP1, i.e. Vodafone Eire Roamer January-November 1998, LKP2 – two floppy discs from Vodafone found at LKP3, and LKP3 – two CD-ROMs and 24 floppy discs from BT Cellnet. On the basis of this, LP then prepared LKP4 in April 2002 and returned LKP1-LKP3 to the police along with a report which was now LKP4.

[184] In March 2003 the police returned to LP the discs LKP1, 2 and 3. The evidence of LP was that she also took possession of other charts, timelines and materials from the Gardai. She analysed all this material and produced LKP5 on a computer disc.

[185] Statements with reference to telephone evidence and records in the Republic of Ireland from a variety of witnesses and in some cases read statements were introduced before me. These included the following:

- Jim Faughnan (JF) an employee of Vodafone, who was responsible for dealing with requests from Gardai for details of Vodafone accounts. Thus for example he produced a floppy disc containing calls from mobile numbers of interest including 213 (Brady), 076 (allegedly Brady), and 585 (Murphy). He dealt with outgoing calls for such phones on the date of the Omagh bombing with calls incoming and outgoing and the cell sites relevant to those calls. He also produced bills issued to for example 585 for such calls made and received on 15 August 1998 including roaming billing. He confirmed that prepaid phones known as ready to go phones were not able to roam. This data was all put onto disc and provided to LP.
- Kevin Dowling was a manager with Eircell and he provided analysis for example of specific calls received by 585 on 15 August 1998 and identified all the cell sites, taking a Garda officer to these sites to identify them. These were the sites which for example Mr Telford inserted on the map giving the cell site analysis indicating movement in and out of the Omagh town set out at PD1.
- Mr Samuel Telford, a police telephone analyst in Northern Ireland assisted LP with some analysis and produced 3 maps based on the telephone data illustrating a cell site analysis indicating the movement of the relevant telephones in relation to the incidents at Omagh (see PD1 at [68]), Banbridge and Lisburn. Thus for example his map on Lisburn dealt specifically with calls made and received by (together with the movement) of the 213 phone registered to Daly on the day of the Lisburn bomb. Unlike PD1 re the Omagh map which was agreed, the maps re Lisburn and Banbridge were not agreed by the defendants.
- Laura O'Donovan, a Government Liaison Officer with O2 Ireland responsible for dealing with requests from Gardai with reference to O2

Ireland customer accounts identified Denis O'Connor as being the registered owner of 371 and Oliver Traynor as 430. She was able to provide details of outgoing calls from mobile phone 371 including 15 August 1998.

- Thomas Corbett was the Senior Investigation Manager with Eircom dealing with incoming and outgoing calls also for 371.
- Joe O'Reilly, Billing Consultant with Eircom confirmed that Patrick Daly, father of the second defendant, was a customer with telephone number 088 and other numbers.
- Eugene O'Reilly, Technical Team Leader with Eircom dealt with incoming and outgoing calls to such telephone numbers as 088, 259, 076, and 371 between 1 July 1998 and 7 December 1998.

[186] I make reference to these witnesses and some of the material they provided to illustrate the extent of the data analysis and investigations that clearly were made in this instance. The effort invested has been enormous. An important issue in the context of Lisburn and Banbridge was whether the amount of data presented in evidence for LKP5 was sufficient to suggest that gaps that now existed in some of the evidential data were likely to be met by the reliability of the data that was presented and thus underscored the overall authenticity of that document.

[187] LKP5 therefore was prepared by LP and represented a synthesis of a series of reports developing from her original four page report LKP1 and was based on a computerised analysis by her as a research analyst of an enormous quantity of raw data supplied by these various relevant telephone companies. Further requests and inquiries raised by her with the companies and other research analysts were added to her background data. The document itself was heavily redacted before me and I only listened to those parts of the evidence about LKP5 which were drawn to my attention ignoring all other comments or contents thereon. As a judge sitting alone without a jury I was well able to do this.

[188] I was informed that at the earlier trial before Morgan J, the plaintiffs' telephone expert Mr Uglow and Mr Brown on behalf of the defendants had examined all the CD-ROM and floppy discs held by the PSNI as background for LKP5. Lord Brennen drew my attention to the conclusion about this document from the Court of Appeal decision at paragraph 118 where Higgins LJ said:

> "… We are satisfied that the evidence established that LKP5 was derived from a vast amount of original data produced by the relevant telephone companies. The nature and provenance of that data was described in detail in evidence, although it may well be that a significant proportion of that data was no longer available for examination by the experts. However,

> the authenticity of that original material was described by those by whom it was supplied and we see no reason for rejection of the matter in which the evidence relating to the movements of the relevant mobiles, including LKP5, was considered and analysed by the judge between paragraphs [36] and [67] of his judgment. In any event it appears to have been common case that, whoever possessed it at the material time, mobile 585 was used in the course of the Omagh bomb and the reports of both experts confirmed that a call was made from that mobile to O'Connor's mobile 371 at 3.30pm on the day of the explosion."

The attitude of the defendants to LKP5

[189] Mr Fee in the course of his skeleton argument and argument (e.g. paragraph 28 of his final skeleton argument) made no significant challenge to the Omagh phone matrix although he asserted there was no evidence as to the actual user of the phone etc. as indicated above.

[190] As regards Banbridge, the thrust of his argument was that the only evidence adduced by the plaintiffs was that the 585 phone made calls to and received calls from 8 numbers in total which included 088 registered to the father of the defendant Daly, but that there was no further evidence connecting any of these people to terrorism. He contended that the evidence in relation to Banbridge was that the 585 phone calls were using masts in the Banbridge area but given that those masts can cover an area of 34km, he did not agree that it referred to any indication of movement. He suggested that, as indicated by Mr Faughnan, a light movement can cause the phone to move from one mast to another, the serving mast can change without movement depending on demand and topography, there is no evidence of the service footprint of any of the Banbridge or Newry masts (unlike in the case of the Omagh masts), there was no evidence that any of the public callboxes alleged used for bomb warnings were ever in contact with the 585 and at its height he argued that the plaintiff's case suggested that the 585 phone was in the South Down area and made connection with various people against whom there is no evidence of any wrongdoing.

[191] Mr Fee made a general point that all phone evidence in the case relied purely on hearsay and the plaintiffs had failed to explain to the court why the audit trail relating to the 585 phone was read into the evidence under the hearsay provisions of the Civil Evidence Order 1997 or what steps they had taken to try to secure the attendance of relevant witnesses. He also complained that no explanation had been given as to why LP had been given selected numbers of interest or explanation as to why investigation was not made as to

what other calls may have been made from other phones in the localities on the days in question.

[192] In terms Mr Fee's argument was that LKP5 was a purely illustrated representation of calls made by and to certain numbers providing no further information on which the court could infer further facts or make further findings.

[193] Ms Higgins made a more detailed root and branch attack on LKP5 and in particular on the suggestion that it showed that the 213 phone (belonging to Daly) was in Lisburn on 30 April 1998. These points included the following:

- Mr Uglow and Mr Brown, expert phone analysts called in the previous trial were not called to give evidence in this case. Thus the court did not have the benefit of that expert evidence to make it aware of any inherent limitations or reliability of the derivative evidence and no sufficient explanation has been given to enable the court to evaluate that evidence properly.
- The underlying source data for Lisburn or Banbridge (in contrast to Omagh) has never been examined and verified. The plaintiffs may have produced all of the relevant information for experts to examine in relation to the Omagh cell site matrix, but in relation to Lisburn and Banbridge they produced numerous call data records or billing records in relation to calls made in the Republic of Ireland mobile phone or landline networks but none of the relevant Vodafone UK data records which would establish that the second defendant's 213 phone, or other phones of interest, had made any calls through Northern Ireland cell sites in Lisburn on 30 April 1998. She asserted there was not a single phone record to substantiate the plaintiff's case that the 213 phone was in Northern Ireland on 30 April 1998. She contended that the plaintiffs had been put on notice in the first week of the retrial that this defendant would be arguing that this significant evidence was missing.
- LP did not seek to verify any of the phone data that was given to her and the whole document LKP5 was an interpretation of information she had been given. She is an intelligence analyst whose expertise lies in presenting visually in a diagrammatic format, intelligence and other information in criminal investigations. Ms Higgins contended she was not an expert as such. In short the contention was that LP did not prove the cell site matrix in Lisburn by reference to a series of calls made by Daly.
- LKP5 was a hearsay document based on other source documents. Applying the provisions of the 1997 Order, in order to estimate the weight to be given to it, she contended that the document was not made contemporaneously with the occurrence, it did involve multiple hearsay, it was made in collaboration with police officers and others working in her office for a particular purpose, all the information may not have been

provided and the original source data and the witnesses from the relevant mobile company that created it could have been produced by the plaintiffs.

- Ms Higgins challenged the evidence of Mr Telford who had prepared maps on the basis of information contained in LKP5. The maps themselves are hearsay evidence based on LKP5 which is based on other information which has not been produced to the court or to the second defendant for examination.

[194] Lord Brennan on behalf of the plaintiffs, whilst acknowledging that Mr Uglow and Mr Brown had not been called in this case because they were deemed unnecessary having given evidence in the previous trial, stoutly asserted that:

- A full audit trail had been laid out for LKP5. This was precisely the same exercise as that which had appeared before the Court of Appeal and in paragraphs 113-119 of the judgment of the Court of Appeal, having examined the audit trail, had accepted LKP5 as an adequate evidential basis. Lord Brennan thus contended that LKP5 had received the imprimatur of the Court of Appeal in the earlier case. There has to be a sense of proportion and proper use of resources and expense in recalling all evidence previously heard or which might have been obtained to again prove such a document. In short a process which enabled rather than overwhelmed was introduced in evidence.
- There was no evidence produced by the defendants to further challenge LKP5.
- The basic data with reference to Lisburn and for that matter Banbridge were also telephone records which were all put before LP in drawing up LKP5.
- The same Vodafone records etc. were being used in the case of Banbridge and Lisburn as had been used in Omagh. Detective Constable Stevenson had received all the relevant telephone data and passed it all to LP for analysis and she had returned it all with LKP5. LKP5, as to telephone numbers, dates, calls, and duration and cell sites is entirely a product of this telephone data.
- The cell sites in the Banbridge and Lisburn areas and between Omagh and Aughnacloy had all been exhibited in maps produced by Civilian Mapping Officer Christopher Moutray. Accordingly when Telford produced his maps showing the cell site analysis, the same type of data was being relied on for Banbridge, Lisburn and Omagh. It had been recorded in the same way and derived from a mapping expert.
- Compelling corroboration of the authenticity of LKP5 could be made of LKP5 from independent sources. Lord Brennan drew attention to comparison of the Vodafone Ireland (Eircell) evidence of Kevin Dowling, the manager with Eircell Network Engineering and Technology who had made an analysis of specific calls received by Eircell for phone 585 in relation to calls made in the Republic of Ireland by that phone between

01.45 and 14.48 on the day of the Banbridge bombing. A comparison between the calls that he has recorded and those recorded by LP in LKP5 and recorded on the Banbridge map show accuracy on her part indicative of the truth and authenticity of that document. A similar exercise can be carried out by comparing calls recorded by Mr Dowling for 585 on the day of the Omagh bombing and they are precisely the same as LP recorded in LKP5. Similarly a cross check with the evidence of Mr Faughnan dealing with billing records again revealed precisely the same information as those recorded by LP in LKP5 for the Omagh bombing.

- The computer disc from Eircell setting out the billing records for the 8 calls in Northern Ireland between 15.25 and 16.18 in Banbridge all coincide with the entries in LKP5 as to timing and duration except for a minor matter namely that the call made at 15.39 was put at 5 seconds duration whereas it was 65 seconds in LKP5. A similar comparison can be made between the computer disc from Eircell for the Omagh bombing on 15 August 1998 billing records and LKP5.
- LP used similar data in analysing Lisburn i.e. 213 and 689 phones etc. as she did with Omagh and Banbridge when making LKP5.
- In other words wherever cross checks are carried out they all prove the reliability of LKP5.

Assessment of LKP5

[195] LKP5 is clearly a document based on hearsay material. Applying Article 5 of the 1997 Order and the considerations relevant to the weighing of the hearsay evidence, I have concluded that:

- The circumstances to which I should have regard are those drawn to my attention by counsel and outlined above. I am satisfied that the provenance of LKP5 and its authenticity have been established to a sufficient standard i.e. reasonably conclusive by virtue of the various spot checks that were made as indicated above notwithstanding the absence of a comprehensive expert analysis of the entire data. Thus I am satisfied I can be confident to a sufficient degree that the individual entries have been accurately transcribed or downloaded having regard for example to the competence of Vodafone as a whole. In short I see no reason why I should not acknowledge that the existence of individual calls were made to and from certain phones using those masts that have been identified on LKP5 is acceptable evidence that calls were made sent from or accepted by those phones using those masts.
- I find no attraction in the submission that the evidence is weak because LP was given only selected phone numbers by police. In the event it turned out that these did reveal a discernible pattern and therefore the selection process seemed justified. The idea that there might have been a wholly separate gang of terrorists who would have a similar pattern of calls at the same time is fanciful.

- This is a retrial and therefore despite the imprimatur of the Court of Appeal, this is a factual matter to be determined anew in the context of a retrial. I am not bound by factual findings of the Court of Appeal.
- Notice was given to the defendants of the intention to adduce this hearsay evidence.
- It would have been possible to call yet more witnesses re the Lisburn and Banbridge data. Whilst therefore I recognise the point made by Lord Brennan that expert evidence and further data was not introduced in light of the comments of the Court of Appeal and in an attempt to save costs and time, nonetheless there is some merit in the counterpoint made by Ms Higgins that this is a question of fact for me to determine in the retrial. The totality of the evidence upon which the information in LKP5 was based, with reference to Lisburn and Banbridge was less than that relied upon to establish the Omagh cell site matrix in the original trial by virtue of experts being called to give evidence as to its authenticity. Indeed in the original trial the judgments of both Morgan J and the Court of Appeal appear to indicate that the experts did not verify the Lisburn and Banbridge cell matrix. I consider therefore that whilst the evidence in LKP5 re Lisburn and Banbridge was reasonably conclusive it was not as conclusive as in the case of Omagh.
- Obviously the original statement by LP setting up LKP5 was not made contemporaneously with the occurrence of the matters stated, and the evidence does involve multiple hearsay on occasions.
- However I am satisfied that the persons involved had no motive to conceal or misrepresent matters, editing is a relevant consideration and I find no attempt to prevent any proper evaluation of the weight of the evidence.

[196] I have come to the conclusion therefore that I can place some weight upon the LKP5 documentation in reference to the Banbridge and Lisburn bombings as well as that of Omagh. However in the case of Lisburn and Banbridge the weight that I place upon that evidence is somewhat diluted by virtue of the omissions in strict proofs mentioned above. I adopt this approach in circumstances where the defendants made it clear from an early stage that they were putting the plaintiffs on strict proof of the Lisburn and Banbridge data. Whilst I am able to rely upon all of LKP5 by virtue of the spot checks to which I have already referred and which convinced me that the document is authentic and reliable as a whole, I have placed less weight upon the Lisburn and Banbridge telephone evidence than I do in the case of the telephone evidence of Omagh. For that reason and ex abundanti cautela, I have been careful to set out that even without the similar fact findings that I have made about these Lisburn and Banbridge bombings and the modest weight I have lent to it, I would have found both the defendants liable to the plaintiffs on the basis of the other evidence in the case.

Assessment of the submission of similar fact evidence in the Lisburn and Banbridge bombings

[197] I commence by asserting that:

- I do not consider that the references in LKP5 to telephone 076 (the ready to go phone of Daly) on 15 August 1998 were sufficiently connected to the bombing to be of any probative value.
- The calls recorded in LKP5 on 1 August of 076 were also insufficiently connected to the bombing to persuade me that I should pay any attention to those calls.
- In so far as the plaintiffs relied upon a call on 29 April 1998 (the evening before the Lisburn bombing) from SG's landline received by 213 using a Lisburn cell site, at 19.22, other than to establish that the phone 213 was in Lisburn on the night before the bombing, I find no probative value in that call. I give no weight to it.
- In the case of the Lisburn bombing, the plaintiffs sought to rely upon the identities and numbers of certain third parties with whom 213 had made telephone calls on that date other than those to which I have made reference. Save for the significantly large number of calls passing between Daly's 213 phone and M's phone at mobile 689 in Northern Ireland, I did not find this evidence of assistance to me in coming to my conclusions mainly because I had no idea what the contents of the calls were and the participation of those third parties in this matter was too remote to allow me to draw any conclusions about their presence.
- Similarly for the same reasons, save where I have specifically mentioned that I am relying on it, I have not taken into account any of the evidence of other telephone usage in Omagh or Banbridge which the plaintiffs drew to my attention.
- Mr Fee was right to draw my attention to the fact that phone masts can cover an area of 34KM and that light movements etc. can cause the phone to move from one mast to the other. However the general direction of movement and the timing of 585 and 213 respectively in relation to the Banbridge and Lisburn bomb are sufficiently compelling to dilute the effect of the theoretical possibility that the footprint of service of these masts is much wider than that suggested by the plaintiffs.
- I recognise, as Ms Higgins has said, that the hallmarks of all three of these bombings are probably replicated in a number of other bombings e.g. car bomb used, more than one car involved, warnings, use of mobile phones by people coming from the Republic of Ireland into the North etc. However that does not deflect me from my conclusion that the number of similarities of these bombings is so great as to suggest a factual similarity and common participation.

The Banbridge bombing

[198] Despite my conclusion that LKP5 and the attendant evidence on the telephone traffic in the case of Banbridge and Lisburn are less compelling than in the case of Omagh because there is a greater hearsay element involved which has not been individually tested as in the case of the Omagh evidence, nonetheless I am satisfied that the integrity and authenticity of LKP5 are sufficient to persuade me that the evidence was likely to be reasonably conclusive of the collateral facts contained therein. In addition the evidence before me of the collateral facts concerning the nature of the three bombings set out by Lord Brennen in [162] above e.g. their location, the time of the explosions, warnings etc. are also reasonably conclusive of those collateral facts.

[199] Being so satisfied, I have further come to the conclusion that this evidence in each instance is potentially probative of the issue involved in this case namely whether or not Murphy was involved in the Omagh bombing.

[200] In the first place the similarities between the circumstances of the three bombings as set out by Lord Brennan , albeit not identical in several respects as set out by Ms Higgins ,are such as to be potentially probative of involvement by the same people in the Omagh bombing. Secondly in the case of the Banbridge bombing, I am satisfied that the timing of the 585 calls in the Republic of Ireland up to 14.48 and thereafter the calls in Northern Ireland at the various cell sites leading up to Banbridge and then, after an unexplained brief sojourn there, moving south from Banbridge between 15.25 and 16.18, are so contiguous to the times of the warnings and the bombing itself and sufficiently similar to the participation of that 585 phone in the Omagh bombing that it is probative of involvement of that phone in the latter bombing. The similar facts demand an explanation from the owner of the phone 585 as to how it came about that his phone was so used.

[201] Given the strength of the evidence that Murphy's phone was involved in the Omagh bombing, this coincidence of unexplained use by the same phone in Banbridge in similar circumstances is further probative evidence of his involvement in Omagh.

The Lisburn bombing

[202] Turning to the Lisburn bombing, I am also satisfied that the evidence in this case is sufficiently similar to be probative of the involvement of Daly in the Omagh bombing.

[203] Whilst once again I recognise the dissimilarities between the Omagh bombing, the Lisburn bombing and the Banbridge bombing drawn to my attention by Ms Higgins, nonetheless there is sufficient broad similarity to set a context for the likelihood that the use of a phone registered to Daly, namely 213,

was used in Lisburn as well as the Omagh bombing. The direction of movement of the phone from the ROI via cell sites moving north near Dromore at 8.58 into the Lisburn cell site area at or about the time the bomb was probably placed and then, after a brief unexplained sojourn there, moving south from 10.30 via Loughbrickland, coincidental with the timings when bomb warnings were being given, with a return to the Republic of Ireland by 11.59 when a call was made to 387 all mirror the modus operandi of the Omagh and Banbridge bombing. The warning calls at Lisburn from 10.30 to 11.00am all fit in with this directional flow.

[204] Given the strength of the evidence that Daly was involved in the Omagh bombing, this coincidence of similar use by a phone registered to him in Lisburn is further probative evidence of his involvement in Omagh.

[206] I have reread the passage from Lord Bingham's judgment in O'Brien concerning the exercise of my discretion. In neither the Banbridge nor the Lisburn bombing similar fact evidence do I find any basis for exercising my discretion to exclude the evidence on any of the grounds set out by Lord Bingham.

[207] Finally on this matter I indicate that it will be clear from my conclusions in this judgment that I would have found a case to answer (and in the final analysis the defendants liable) even without invoking the evidence of the similar fact material in the Lisburn and Banbridge bombings. In the event it has added some additional, albeit modest, weight to my conclusion but less weight than I afforded to the Omagh bombings evidence.

Submission of no case to answer on behalf of the defendants

[208] At the close of the plaintiffs' case, both defendants in this matter submitted that there was no case to answer.

[209] There was no dispute between the parties as to the legal principles to be applied namely:

- At this stage the evidence must be viewed in the light most favourable to the plaintiff (see McIlveen v Charlesworth Developments [1973] NI 26).
- The evidence must be viewed as a whole rather than cherry-picked to highlight the most favourable R v Shippey [1988] Crim LR 767.
- The issue is whether there is any evidence upon which a reasonable jury, consisting of persons of ordinary reason and firmness, could if properly directed, find in favour of the plaintiffs (see Carswell LJ in O'Neill v Dept of Health and Social Services [1986] NI 290 at 292A).

[210] After the submissions had been made I indicated that I considered this to be an application that by its very nature interrupts the trial and requires the

judge to make up his mind as to the facts, albeit within the confines described in the authorities set out above , having heard one side's evidence only. A different test has to be applied than if the court was deciding the matter finally. Hence any comments at this stage might prove misplaced and I considered it inappropriate that if a judge is refusing such an application he should set out his reasons at that time. On the other hand, if a judge accedes to the application, full reasoning should be given because that is the end of the case.

[211] In the case of Murphy on the basis of the evidence of the presence of his phone 585 on the day of the Omagh bombing (see paras [63]-[81] above) and his interviews with Garda officers (see paras [82]-[97] above) I considered there was evidence, taken at its height , on which I could make a finding in favour of the plaintiffs and accordingly I rejected the defendant's application. As indicated above I was content to arrive at this conclusion on this evidence alone but the similar fact evidence of the Banbridge bombing and the presence of 585 there added an additional measure of weight.

[212] In the case of Daly on the basis of the evidence of O'Connor (see paras [125]-[139]), his interviews (see paras [140]-[146]) and his conviction (see paras [147]-[154]) I considered there was evidence, taken at its height, on which I could make a finding in favour of the plaintiffs and accordingly I rejected the defendant's application. As indicated above I was content to arrive at this conclusion on this evidence alone but the similar fact evidence of the Lisburn bombing and the presence of 213 there added an additional measure of weight.

Election

[213] One other matter arose at the stage where a submission of no case to answer was made. Lord Brennan on behalf of the plaintiffs contended that the defendants should be put to their election. For reasons that I have set out in a separate judgment on this issue I refused his application and accordingly I did not put the defendants to their election.

Inference from silence

[214] Neither defendant gave evidence in this case. In considering the legal principles to be applied, I can do no better than to cite paragraph [53] and [54] of the CA where Higgins LJ said:

> "[53] The judge (Morgan J) referred to the proper approach to the silence of the party as being that set out by Lord Lowry in R v IRP ex parte T C Coombs & Co [1991] 2 AC 283:
>
> > 'In our legal system generally the silence of one party in the face of the

> other party's evidence may convert that evidence into proof in relation to matters which are or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances a prima facie case may become a strong or even overwhelming case. But if the silent party's failure to give evidence or the necessary evidence can be credibly explained even if not entirely justified the effect of his silence in favour of the other party may be either reduced or nullified.'
>
> [54] …… What is clear is that the defendant must have a case to answer before any inference can be drawn. A plaintiffs' case must be such that it has a real prospect of success. This is a different and lower test than the test of proof on a balance of probabilities. The possibility of drawing adverse inferences only arises where a defendant has material evidence to give on the issue in question. There will be cases where a defendant is simply not in a position to call any evidence (e.g. in proceedings against the estate of a deceased person the person's representatives may have no evidence to call and the deceased is obviously unavailable). In such a case the fact that no evidence is called cannot give rise to an adverse inference. The plaintiff must establish the case on a balance of probabilities without reliance on any added weight arising from any inference. In such a case a weak plaintiffs' case based on a scintilla of evidence calling for an answer may very well fail because the silence of a party with knowledge of facts cannot be put in the scales."

[215] Counsel on both sides helpfully drew my attention to a number of additional authorities including Benham Ltd v Kythira Investments Ltd (2003) EWCA Civ 1794 Gayle v Gayle [2001] EWCA Civ 1910, Francisco v Diedrick (24 March 1998), Halford v Brookes & Brookes [1992] PIQR 175, O'Donnell v Reichard [1975] VIC Rp 89 and Morton (as liquidator of Bermuda Dell Pty Ltd v Cook VC 9602684. I found all of these cases to be fact specific and, whilst

interesting, I find nothing in them which added to the summary of the law set out in paragraph 213 above.

Adverse inference from the silence of Murphy

[216] At the end of the plaintiffs' case I concluded that the defendant Murphy had a case to answer and the plaintiffs' case against him had a real prospect of success.

[217] I was satisfied that Murphy was in possession of material to give on the issues that had arisen and that he was in a position to call evidence. There was unassailable evidence that his phone 585 i.e. the phone registered to his name had been used in the bomb run on the day of the Omagh bombing which was clearly a terrorist attack carried out by the RIRA. His interviews with the Garda were in my view less than forthcoming or candid about the 585 phone which he said was in his possession at all times.

[218] This alone constitutes strong prima facie evidence which provides a real prospect of success on the part of the plaintiffs. Murphy clearly has material in his possession which he could give on these issues and is in a position to call evidence namely:

- He can provide evidence to explain why it was that his 585 phone was located to and from Omagh on the day of the bombing. He would be expected to explain why 585 was used in and around Omagh according to the billing records on the day of the bombings at a time when apparently it was not in his possession despite his assertion to the Garda that it was not out of his possession.

- If it was out of his possession then he is in a position to call evidence as to the person in whose possession it was or to whom did he loan it or who could have been in possession of it.

- If it was not loaned and for example it had been lost, how then did it come back into his possession and use after the Omagh bombing?

[219] In so far as I concluded that this evidence was sufficient to create a strong prima facie case, I also indicated that I would give some weight albeit in a diluted form, to the evidence concerning the use of his mobile phone in Banbridge on the day of that bombing. Similar questions arise as to how it was that that phone was in use at the time of that bombing in or around Banbridge with the same questions as to his whereabouts and the person into whose possession it had fallen.

[220] Mr Fee contended on behalf of Murphy that his absence from the witness box could be credibly explained in light of the following information specific to him:

- He had been publicly connected with being involved in the Omagh bombing since early 1999.
- In 2002 he was sentenced to 14 years' imprisonment for conspiracy charges linked to the Omagh bombing.
- Throughout he protested his innocence and believed that the Garda and the State were fitting the facts of the bombing around him to secure his imprisonment.
- He continually denied having made admissions as alleged by the Garda during their interviews with him before he was charged.
- Despite his protestations of collusion by the Garda, the Criminal Court in Dublin sentenced him to prison in any event.
- His fears and concerns proved well-founded when two of the Garda who were part of his interviewing team were found, on foot of ESDA tests, to have inserted untrue information into the notes and had rewritten the notes.
- In 2005 the Court of Criminal Appeal in Dublin ordered a retrial of Murphy in light of the dishonesty of the interviewing Garda officers notwithstanding he had already served 3 years in jail.
- Two of the detectives who interviewed Murphy were acquitted of charges of forging notes and committing perjury because of a breakdown in the forensic trial of the falsified notes in court and the failure by the Garda to the documentation for evidential purposes.
- A judicial review brought by him to prevent his retrial on the grounds of abuse of process was refused and he faced a retrial in 2008 which resulted in him being acquitted on all charges.
- Mr Fee contended that as a result of these matters, he had no desire to engage in any further court proceedings which would only serve to attract more adverse publicity to him.

[221] Mr Fee also relied upon the fact that during the course of the instant trial, notwithstanding that the plaintiffs had sought to rely on an alleged terrorist conviction in the name of "Anne Murphy" and attributed it to the first defendant's wife, it emerged towards the end of the trial that the conviction had been wrongly ascribed to his wife and that it was a wholly different Anne Murphy who had been the subject of conviction. Consequently he believed, given his experience of the State system since 1999, that this was another instance of the authorities wishing to wrongly place him in the frame for the Omagh bomb. Counsel contended that this was an instance where his absence from the witness box could be credibly explained even if not entirely justified.

[222] I reject the argument of Mr Fee for the following reasons:

- No credibility can be attached to Mr Murphy's failure to give evidence. It is a silence that cannot be repaired and is entirely without credible justification. He has been represented by solicitor and junior and senior counsel throughout this trial who have discharged their responsibilities on his behalf to the highest standards with careful and well-ordered skeleton arguments, legal submissions and cross-examination. He has received a completely conscientious and skilful professional service on his behalf during the entirety of the trial. This case has been robustly presented on his behalf in both this and the previous trial. The integrity of the system is well demonstrated by the fact that a retrial was ordered on his behalf in light of errors detected in the original reasoning. Similarly in the Republic of Ireland, he was granted a retrial and subsequently acquitted. His alleged fears about the judicial system and process are demonstrably incorrect. This is not an instance merely of an explanation not being entirely justified – it is a wholly implausible explanation. For someone who has had sufficient confidence in the process to participate through counsel and solicitors as he has in this instance, it is bordering on the risible to now argue that he has insufficient confidence to give evidence.
- I find no evidence that the wrongful assignation of Anne Murphy's conviction amounted to anything other than a simple error which has been readily accepted by the plaintiffs and should be recognised as such by the defendant. Given the common name, it is not difficult to see how confusion can have arisen. There was no evidence before me of fabrication.
- As is evident from [93] in the CA judgment, in the earlier trial he had not given evidence on the basis that he was facing a pending criminal trial. Having been successful in that retrial, I find no basis for the different reasoning which he now deploys in the present case.

[223] Accordingly I have directed myself that in light of the fact that the plaintiffs had established a prima facie case, it was open to me to draw an adverse inference from his failure to give evidence before me and in the circumstances that I have outlined, I have come to the conclusion that I can and should properly do so. This failure to give evidence strikes a false note. It has probative value and serves to strengthen my conviction that the plaintiffs have succeeded in establishing liability on the part of the defendant Murphy in this instance. It makes the prima facie case even stronger and renders it now overwhelming.

Adverse inference from the silence of Daly

[224] The same legal principles precisely apply in this instance. In order to take into account his failure to give evidence, I have to be satisfied that the plaintiffs have made out a sufficient case of liability calling for an answer. Otherwise it is

not open to me to draw an adverse inference from his absence from the witness box.

[225] It was the plaintiffs' contention that O'Connor had now given evidence to identify Seamus Daly as having called him on mobile phone 585 at 15.30 on 15 August 1998 the day of the Omagh bombing. Counsel also relied on the conviction of Daly, the interviews with Garda and the evidence relating to the Lisburn bombing with the involvement of Daly's 213 phones. Lord Brennan advanced the argument that these matters were sufficient to establish that the plaintiffs' case had a real prospect of success, that the defendant must have had the material to give evidence on these issues and is in a position to call that evidence namely himself.

[226] Ms Higgins on behalf of the second defendant contended that there were inherent weaknesses in the evidence of O'Connor, that it was not clear and decisive in any way, and the plaintiffs were attempting to convert an inherently weak case with no real prospect of success into a strong case simply because Daly was not giving evidence. Counsel borrowed the reference of the CA judgment at [54] to a weak plaintiff's case (see [214] above)

[227] I was satisfied that the plaintiffs had established a real prospect of success given the evidence of O'Connor. That identification of Daly by O'Connor, given the frequency of earlier contact with him and the telephone contact between the two in the past, his interview with Garda and his conviction would have been sufficient to establish a real prospect of success. Its strength was underlined to some degree by the similar fact evidence of the Lisburn bombing although I would have come to the same conclusion even without that evidence.

[228] Daly was in a position to deal with the assertion that he was connected to the 585 phone on the day of the Omagh bombing either by way of an alibi or a denial that he was the man speaking to O'Connor at 3.30pm that day or on the previous occasions outlined by O'Connor.

[229] In all the circumstances I am satisfied that it is appropriate for this court to draw an adverse inference against Daly in light of his failure to give evidence in this case. It has probative value and serves to strengthen my conviction that the plaintiffs have succeeded in establishing liability on the part of the defendant Daly in this instance. It makes the prima facie case even stronger and renders it now overwhelming.

Conclusions

[230] Throughout my considerations I have reminded myself of the contents of [43]-[45] of this judgment re the standard of proof. I have been conscious of the very serious nature of the allegations and I have given a more critical and anxious assessment of the evidence than in less serious cases. Where, as in the

case of much of the telephone evidence, the plaintiffs have relied on circumstantial evidence I have considered all the evidence and the need for the court:

- To guard against distorting the facts or the significance of the facts to fit the proposition that Murphy or Daly were involved and to ensure I do not approach this matter with blinkered certainty or instinctive responses without studying closely the evidence.

- To be satisfied that no explanation other than guilt is reasonably compatible with the circumstances of these telephone calls.

- To remember that any fact proved that is inconsistent with the conclusion that they were not involved in this bombing is more important than all the other facts put together.
-

[231] However given the strength and quality of the evidence I have determined that both defendants were involved in assisting the preparation, planting and detonation of the bomb in circumstances where those involved in assisting in those acts would be joint tortfeasors. As indicated earlier in this judgment at [55] I find it unnecessary to proceed to consider the case of conspiracy to trespass.

First named defendant Murphy

[232] I am satisfied that on the balance of probabilities the plaintiffs have proved the case of trespass to the person against the first-named defendant Colm Murphy to the requisite standard for the following reasons.

[233] There is compelling circumstantial evidence that phones 585 and 980 were used in the Omagh bombing. Anyone operating on a plane of reason could not fail to discern the pattern and structure of the use of these two phones on the day in question. A study of LKP5 reveals a picture of phone movement, which infers movement in vehicles, in the same direction, from the Republic of Ireland roaming into the Vodafone UK area. The bomb was clearly delivered to Omagh sometime after 2.00pm and the movement and timing of the calls emanating from these two phones lead me to the irresistible inference that the sequence of events set out by me in [63]-[80] are wholly consistent with a bomb car and probably a scout car participating in this bombing.

[234] There is therefore a reasonable inference that this bombing was carried out by people who set a pattern of telephone calls both prior to and subsequent to the bombings including telephone warnings wholly consistent with the pattern of telephone calls made by 585 and 980. I am satisfied that those who

provided or who used these mobile phones played a central role in the tort of trespass to the person. They have been joint tortfeasors. Having examined this evidence critically and anxiously I am satisfied that the strength and quality of the information contained in LKP5 and the map of the Omagh cell sites by Mr Telford are of sufficient quality and strength to justify the inferences I have drawn. For the removal of doubt I reiterate that I have determined that anyone such as Murphy who knowingly lent his phone to those involved in the bombing played a vital role in this joint enterprise, assisted in the bombing and was a joint tortfeasor.

[235] This pattern of movement demands explanation from Murphy who clearly is in a position to provide information as to how it came about that his mobile phone was located to and from Omagh on the day of the bombing, and in whose possession it was or to provide a rational explanation as to how that phone came to be there.

[236] Secondly, the interview with the Garda on 21 and 22 February 1999 as set out by me at paragraphs [82]-[97] of this judgment, underline the inferences I have drawn. He denies lending his 585 phone to anyone on that occasion, making any 585 calls to 980 on 15 August, ever being in Omagh, and he has no rational explanation for how the 585 phone came to be used without his knowledge on the day in question.

[237] I agree entirely with the submission of the plaintiffs that it is fanciful to contemplate that the phone was mysteriously stolen and equally mysteriously returned without his knowledge. He certainly knew the identity of the people who were contacted on that date by his 585 phone because they worked for him. Indeed if I am right in my conclusion that the person who was using his phone on that day was his associate Daly it becomes all the more unlikely that the phone was somehow spirited away without his knowledge. His explanation in the Garda interviews are therefore wholly implausible and in my view amount to lies. I have searched for innocent reasons as to why those lies might have been given based on Lucas principles but it seems to me that there is no innocent explanation that can be found.

[238] Mr Fee contended that there was no evidence that Murphy knew the purpose for which his phone was to be used. I disagree. His failure to provide any rational explanation whatsoever as to the presence of that phone on the day of the bombing and the untruths which he told to the police about this matter in the context of the enormity of the crime about which he was being questioned all serve to convince me that there was a strong prima facie case that he was fully aware of the use to which that phone which he had provided was to be put.

[239] As I have determined in paragraph[198] et seq, this coincidence of a similar unexplained use by the same phone 585 in the Banbridge bombing in similar circumstances is further probative evidence of his involvement in the

Omagh bombing. To suggest that for a second time his phone had been mysteriously used without his knowledge moves one in to the realm of fantasy. I pause to repeat that even without the modest weight of the Banbridge similar evidence I would have come to exactly the same decision on liability.

[240] On the basis of these matters, I decided that there was a strong prima facie case to be answered and I refused the application of no case to answer.

[241] Thereafter, as indicated in paragraph [216] et seq Murphy failed to give evidence or call any witnesses on his behalf and for the reasons therein set out I was satisfied that I should draw an adverse inference against him in light of this failure to explain the presence of his 585 phone in Omagh or for that matter in Banbridge on the day of that bombing. That strengthened the overall evidence against him in this case and satisfied me, taking all the factors cumulatively, that I should now make a finding in the favour of the plaintiffs against Murphy on the grounds of trespass to the person.

The second-named defendant Daly

[242] I am satisfied that on the balance of probabilities the plaintiffs have proved the case of trespass to the person against the second-named defendant Seamus Daly to the requisite standard on the basis that he was directly involved in the Omagh bombing on the 15 August 1998. As in the case of Murphy I therefore find it unnecessary to proceed to consider the case of conspiracy to trespass.

[243] My reasons for so concluding are as follows. First, I am satisfied that he spoke to O'Connor at 3.30pm on the day of the bombing using phone 585. For the reasons I have already given I am satisfied that 585 was used in connection with this bombing. A clear recognition of his voice by O'Connor based on O'Connor's knowledge of him by virtue of the previous telephone calls between them together with personal meetings and his identification to Garda Grennan all satisfy me on the balance of probabilities that it was Daly who made the call to O'Connor on the day of the Omagh bombing using phone 585.

[244] Secondly, he readily admitted the dealings with Murphy through work for a number of years and that highlights the coincidence of him being in possession of Murphy's phone 585.

[245] Whilst the conversation with O'Connor would have been sufficient to have established a case against him, I have also taken into account his plea of guilty in 2004 to an offence of membership of a terrorist organisation on 20 November 2000. I was satisfied that the plea of guilty amounted to a public confession of his involvement with IRA terrorist activity. This was relevant not just to propensity but was logically probative in determining the issue of liability in this case.

[246] He has given no explanation at any time to Garda or anyone else for his possession of 585 on the day of the bombing even though the circumstances of his possession of it cry out for an explanation.

[247] As I have determined in paragraph [202] et seq, this coincidence of a similar unexplained use of his phone 213 in the Lisburn bombing in similar circumstances is further probative evidence of his involvement in the Omagh bombing. I pause to repeat that even without the modest weight of the Lisburn similar fact evidence I would have come to exactly the same decision on liability
[248] That evidence was sufficient to satisfy me at the conclusion of the plaintiffs' case that there was a strong prima facie against him and accordingly I refused the application of no case to answer.

[249] The second-named defendant failed to give evidence or call witnesses in this case. I was satisfied that it was open to me to draw an adverse inference from the defendant's absence from the witness box. I am satisfied he was in possession of evidence within his own knowledge about which he would have been expected to give evidence. I find no credible explanation for him failing to do so. He could have provided an explanation why it was that he was in possession of the 585 phone on the day of the Omagh bombing or for that matter why his 213 phone was present in Lisburn on the date of the Lisburn bombing. Alternatively he could have called evidence as to what he was doing on that day i.e. to strengthen the alibi which he outlined to police.

[250] On the basis of this evidence therefore I was satisfied on the balance of probabilities that Daly was liable in this action to the plaintiffs on the grounds of trespass to person.