Neutral Citation No.: [2008] NIQB 120 | *Ref:* **MOR7304**

Judgment: approved by the Court for handing down | *Delivered:* **28/10/08**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

MARK CHRISTOPHER BRESLIN AND OTHERS

PLAINTIFFS

-AND-

SEAMUS MCKENNA AND OTHERS

DEFENDANTS

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RULING NO 13

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MORGAN J

[1] In this action the plaintiffs claim that the defendants in various ways were responsible for the death and personal injury caused by the explosion of a bomb in Omagh on 15 August 1998. In particular it is alleged against the fifth named defendant that he provided his phone to the sixth named defendant prior to the planting of the bomb realising that the phone was likely to be used for that or a similar purpose. In respect of the sixth named defendant it is alleged that the use of a phone attributable to him suggests that he was one of those who took part in the planting of the bomb.

[2] The plaintiffs now wish to call Det Sgt Barr to give hearsay evidence about the discovery of an improvised explosive device in a vehicle at Market Square Lisburn on 30 April 1998 and a bomb at Banbridge Town Centre on 1 August 1998. In respect of the incident in Lisburn they want to adduce evidence that a phone allegedly attributable to the sixth named defendant was active in Lisburn town centre on the evening before and on the morning of the finding of the device. They further wish to introduce hearsay evidence that the said phone was in contact with other phones and that there were further telephone calls involving all of these phones some of which phones were attributable to persons with criminal records for terrorist offences. At least some of those convictions occurred in the republic of Ireland.

[3] In respect of the bomb explosion at Banbridge on 1 August 1998 the plaintiffs seek to introduce through Det Sgt Barr evidence that a phone attributable to the fifth named defendant was active in Banbridge town centre shortly before the explosion and also active in the Republic of Ireland earlier that afternoon. Evidence has already been introduced alleging that the fifth named defendant admitted that he had provided his phone on 1 August 1998 to Joe Fee. The plaintiffs further seek to establish the terrorist criminal background of some of those whose phones were in use on the day in question.

[4] The plaintiffs contended that the pattern of use of the phones allegedly attributable to each of the defendants in the Lisburn and Banbridge incidents is similar to the use of phones allegedly attributable to these defendants in the delivery of the Omagh bomb. In each case it is contended that the explosive devices were prepared and delivered by republican terrorist organisations and that the pattern of phone use is indicative of the participation of such an organisation. In support of that proposition the plaintiffs say that the convictions for terrorist offences of some of those to whom the plaintiffs say the phones were attributable is probative of terrorist involvement because those with such convictions are likely to have a disposition to such conduct and contact by phone with such persons in the circumstances is evidence supporting the participation by the user of the phone in such terrorist activity.

[5] The fifth and sixth named defendants draw a distinction between criminal convictions in a court in Northern Ireland, criminal convictions in a foreign court following an admission of guilt and criminal convictions in a foreign court following a judicial determination. It is, I understand, common case that convictions in the first category constitute evidence of the commission of the acts upon which the convictions were based as a result of the Civil Evidence Act (Northern Ireland) 1971 and those in the second category are similarly admissible as confessions. These defendants submit, however, that criminal convictions in a foreign jurisdiction amount only to opinion evidence and are not, therefore, admissible.

[6] These defendants also say that the evidence of phone calls to and from third parties should not be admitted on the basis that they are of no probative value. It is contended that where as here a party seeks to rely on similar fact evidence it is necessary to demonstrate an enhanced relevance or substantial probative value before the evidence can be admitted. It is further submitted that the introduction of the criminal backgrounds of those to and from whom phone calls were made and received is likely to be extremely prejudicial but of very limited probative value and on that account also should not be admitted. Finally it is submitted that any conviction which postdates 15 August 1998 is irrelevant to the issue of propensity.

[7] I will look first at the question of the introduction of convictions from a foreign jurisdiction. I accept that the rule in Hollington v Hewthorn [1943] KB 587 applies to such convictions and that the convictions are not, therefore, evidence that the person convicted has committed the acts upon which the conviction was based. The decision has been noted without adverse comment by the Court of Appeal in Sherard v Jacob [1965] NI 151 and approved by the Court of Appeal in R v McIntyre (6 February 1979). Although the plaintiffs have advanced arguments challenging the validity of the rule I consider that in light of the decision of the Court of Appeal in McIntyre it is binding on me.

[8] Such a conviction is, however, like any other conviction evidence of bad character at common law and can be admitted where probative and relevant. In particular a conviction can be introduced as evidence of a disposition. In R v Murray [1995] RTR 239 the accused was charged with driving recklessly. His case was that the driver of another car had driven recklessly as a result of which he was forced to protect himself. The driver of the other car had a substantial criminal record which the defendant wished to place before the jury to establish his disposition. The trial judge refused permission to do so and the defendant was convicted. The Court of Appeal recognised that the evidence of the non-party's convictions was admissible only as evidence of disposition but held that it was relevant material which ought to have been put before the jury. In R v Krachner [1995] Crim LR 819 a similar decision was reached in relation to the admissibility of evidence of a non-party's criminal record for violence. This is an area in which there have been cases suggesting a different approach notably R v Edwards [1991] 1 WLR 207 but in my view the authority of that case must now be seen in light of the criticisms made by Lord Phillips in O'Brien v Chief Constable [2005] UKHL 26 at paragraph 41. In particular that passage supports the view that such convictions do not necessarily go to credit alone. I consider, therefore, that a conviction or series of convictions in a foreign jurisdiction can be admissible as evidence of bad character for the purpose of proving disposition.

[9] Whether or not such a conviction goes to disposition and the weight to be given to it must inevitably depend upon the circumstances. A single recent conviction for membership of an unlawful association or the causing of an explosion may be significant evidence of disposition. It seems to me that there is no distinction between a conviction based on events shortly before the index event and a conviction based on events shortly after the index event. In each case the question is whether the conviction is of a nature which in the circumstances provides credible evidence of disposition at the relevant time. Such a conviction is also in my view admissible for the purpose of proving that the individual in question had a reputation for disposition at the relevant time and in that instance it must follow that a conviction after the event cannot be indicative of a reputation for disposition at the time of the event. Clearly where the convictions relate to a period either a very long time before

the index event or a very long time after it the weight of the inference that it constitutes evidence of disposition is accordingly reduced.

[10] I now want to turn to the approach that I should take in relation to the question of whether the phone evidence and the conviction evidence are legally admissible. I consider that the most helpful approach is that set out by Lord Bingham in O'Brien.

> "4 That evidence of what happened on an earlier occasion may make the occurrence of what happened on the occasion in question more or less probable can scarcely be denied. If an accident investigator, an insurance assessor, a doctor or a consulting engineer were called in to ascertain the cause of a disputed recent event, any of them would, as a matter of course, inquire into the background history so far as it appeared to be relevant. And if those engaged in the recent event had in the past been involved in events of an apparently similar character, attention would be paid to those earlier events as perhaps throwing light on and helping to explain the event which is the subject of the current inquiry. To regard evidence of such earlier events as potentially probative is a process of thought which an entirely rational, objective and fair-minded person might, depending on the facts, follow. If such a person would, or might, attach importance to evidence such as this, it would require good reasons to deny a judicial decision-maker the opportunity to consider it. For while there is a need for some special rules to protect the integrity of judicial decision-making on matters of fact, such as the burden and standard of proof, it is on the whole undesirable that the process of judicial decision-making on issues of fact should diverge more than it need from the process followed by rational, objective and fair-minded people called upon to decide questions of fact in other contexts where reaching the right answer matters. Thus in a civil case such as this the question of admissibility turns, and turns only, on whether the evidence which it is sought to adduce, assuming it (provisionally) to be true, is in Lord Simon's sense probative. If so, the evidence is legally admissible. That is the first stage of the inquiry."

Applying that approach I consider that the fact that a phone attributed to a defendant was active at or about the site of a bomb or improvised explosive

device at a place in Northern Ireland far removed from the residence of either of the defendants and being used in a manner similar to the use of phones by those allegedly connected to the planting of the Omagh bomb is relevant to the issue of whether the same phones or other phones were so used in Omagh. Secondly I consider that any evidence that the phones were in contact with those in respect of whom there is evidence that they had a terrorist disposition is evidence tending to support the view that the holders of the phones were using them for terrorist purposes. Thirdly although it might be argued that the making of calls by those who had been in contact with the relevant phones to others who had terrorist dispositions is evidence of involvement in a terrorist operation it is clear that the connection is more remote and the extent of inquiry required to test the evidence much wider.

[11] That takes me to the second stage of the inquiry propounded by Lord Bingham.

> "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 party 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. In some cases, as in the present, the argument will be fortified by reference to wider considerations: the public interest in exposing official misfeasance and protecting the integrity of the criminal trial process; vindication of reputation; the public righting of public wrongs. These are important considerations to which weight must be given. But even without them, 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."

In this case I consider that the material relating to calls made and received by phones attributable to either the fifth or sixth named defendant upon which the plaintiffs rely in respect of either of the incidents at Lisburn or Banbridge should be admitted. In each case the defendants are in a position to deal with the issue of attributability and if attributable to deal with the background to the calls. I further consider that evidence of criminal convictions, whether in this jurisdiction or otherwise, such as membership of an unlawful association

or possession of explosives or causing explosions of those to whom calls were made or from whom calls were received by phones attributable to either the fifth or sixth named defendant should be admitted having regard to the fact that each defendant will be in a position to deal with those calls as above. If the plaintiffs rely on these convictions as evidence of disposition it will be necessary to take into account their date when determining the weight if any to be attributed to them and I leave open any submission that a conviction is so old that it should not be admitted. I consider that any wider evidence concerning the extent of telephone traffic is likely to be of limited significance in the context of the trial as a whole and potentially may lead to significant additional investigation at trial which would be of very limited value. Accordingly as a matter of discretion I will not permit the introduction of this wider evidence.