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Judgment: approved by the Court for handing down | *Delivered:* **06/05/08**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

MARK CHRISTOPHER BRESLIN AND OTHERS
PLAINTIFFS

-AND-

SEAMUS MCKENNA AND OTHERS
DEFENDANTS

RULING NO 9

MORGAN J

The application

[1] The plaintiffs seek damages against each of the defendants on the basis of their alleged involvement in the bomb explosion at Omagh on 15 August 1998. In respect of the third named defendant (John Michael Henry McKevitt) it is alleged by the plaintiffs that he was a leader at the material time of the Real IRA who were responsible for the bomb and that it can be inferred that he had knowledge of and a role in directing the bomb explosion.

[2] In order to seek to sustain this allegation the plaintiffs have indicated an intention to rely on hearsay evidence consisting of written statements made by David Rupert and e-mails allegedly sent by him describing meetings and activities of various individuals. It is alleged that Mr Rupert was an FBI agent who infiltrated the Real IRA and also collaborated with the British Secret Service.

[3] In respect of the fifth named defendant (Colm Murphy) it is alleged by the plaintiffs that he provided telephones which were used to facilitate the transportation of the bomb to Omagh knowing that the telephones were to be

used for such purpose. The plaintiffs rely upon hearsay evidence of David Rupert in order to support that allegation.

[4] At an earlier stage in the proceedings the plaintiffs had applied to have the evidence of Mr Rupert taken by video link. In that application it was explained that Mr Rupert was receiving the benefit of a witness protection programme provided by the FBI and that it was assessed by PSNI that the risk to his life was severe if he came to give evidence in Northern Ireland. On 29 September 2006 I made an order that he could give evidence by video link in particular against the third and fourth named defendants. On 23 November 2006 I made a further order that he may give video link evidence against the fifth named defendant.

[5] On 9 March 2007 in a skeleton argument dealing with the further conduct of the action the plaintiffs indicated that Mr Rupert was no longer available to give video link evidence. On 19 April 2007 the plaintiffs' solicitor filed an affidavit explaining that the FBI were no longer prepared to make him available because of the threat to his security and his medical condition. I heard evidence about the efforts that the plaintiffs had made to secure the attendance of Mr Rupert to give video link evidence and I made a number of findings.

> 1. I accept that the plaintiff's solicitor contacted the FBI in or about Spring 2007 in order to secure the attendance of DR as a witness in this trial.
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> 2. I accept that the FBI agent, Mr Grant, advised the plaintiff's solicitor that DR would not be available due to his current health and increased concerns for his security at that time.
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> 3. I accept that the plaintiff's solicitor made a number of attempts to cause the FBI agent to alter his view.
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> 4. I accept that in light of the failure of those efforts that plaintiff's solicitor concluded that it was not going to be possible to secure the attendance of DR as a witness at the trial.
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> 5. I accept that the plaintiff's solicitor attempted to obtain some written explanation for the inability of DR to give evidence but was unable to get any such explanation.
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> 6. In the absence of any indication as to the nature of DR's medical difficulties it is impossible to know whether they are such as to make it likely that he would be unable to give evidence.

> 7. I accept that a view was expressed by the FBI agent that the giving of oral evidence by DR would be likely to increase publicity in respect of him and thereby increase the risk to him.
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> 8. I am not aware of any assessment which has been carried out in respect of the risk to DR if he were to give evidence by videolink in this trial although I am aware that PSNI have assessed the risk to him as severe if he were to come to this jurisdiction to give evidence.
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> 9. If an application to take the evidence of DR were made to the relevant judicial authorities in the USA it is likely that it would be opposed by the FBI in light of their conversations with the plaintiff's solicitor.

[6] The third and fifth named defendants submit that the introduction of the hearsay evidence of Mr Rupert would deprive them of the opportunity to cross-examine the witness and thereby enable the court to assess his credibility. It is accepted for the purposes of this application that Mr Rupert is a person in respect of whom issues as to credibility arise. The third named defendant further contends that he is deprived of the opportunity to ask questions of Mr Rupert which might assist in undermining the plaintiffs' case. In those circumstances each of them contends that I should not admit this evidence.

Civil or Criminal

[7] In order to determine that submission it is necessary to look at the statutory background. In particular it is submitted on behalf of the defendants that the proceedings in this case constitute a criminal charge as a result of which the defendants are entitled to the benefit of the rights contained in article 6 (1) of the ECHR as well as those contained in article 6 (3) (d).

> "*ARTICLE 6 RIGHT TO A FAIR TRIAL*
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> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so

> require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 3. Everyone charged with a criminal offence has the following minimum rights: …
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> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;…"

[8] All parties are agreed that the question as to whether the proceedings constitute the determination of a criminal charge is to be determined in accordance with the autonomous jurisprudence of the ECHR. The principal case is Engel v Netherlands (No 1) (1976) 1 EHRR 647. The court indicated that the three factors to be considered were:-

> (i) the nature of the domestic classification;
> (ii) the nature of the offence; and
> (iii) the severity of the penalty.

These principals were then considered by the House of Lords in R (McCann and others) v Crown Court at Manchester [2002] UKHL 39. That was a case in which Antisocial Behaviour Orders were sought in relation to a number of individuals. The allegations involved serious criminal conduct including burglary, dealing in drugs and assaults. The application was primarily based on hearsay evidence contained in records of complaints received by a trust and in crime reports compiled by the police. The material from the records of the trust and the police fell into three categories.

> (i) anonymous complaints where the source was never known;
> (ii) complaints where the source was known but not disclosed; and
> (iii) computerised reports made by police officers in the course of their duties where the source of the complaint was either unknown or not disclosed.

Both Lord Steyn at paragraph 31 and Lord Hope at paragraph 61 drew attention to the fact that where the proceedings did not result in a penalty despite an adverse outcome for the defendant the European jurisprudence did not support the conclusion that the proceedings were criminal. In that case the House held that the purpose of the proceedings was preventative and no penalty arose.

[9] All parties were agreed that the proceedings were classified in domestic law as civil. Of the three criteria this is merely a starting point and cannot be conclusive.

[10] In support of the submission that these proceedings involved the imposition of a penalty the defendants relied on the fact that the plaintiffs allege that the defendants murdered 29 individuals and caused injury to approximately 200 others. The statement of claim alleges that the parking of the car outside a store that sold school uniforms in the last Saturday before school reopened was part of the plan to ensure that as many children as possible were killed. It is further alleged that the manner of the warnings given was a stratagem to maximise casualties. In those circumstances the person found liable will actually be held in odium and contempt.

[11] Secondly the defendants referred to the fact that the plaintiffs seek damages including aggravated and exemplary damages. In particular it is submitted that exemplary damages are not compensatory and that the claim for such damages represents a punitive element in this case. The plaintiffs have opened their case on the basis that such an award should be in the millions of pounds and the consequences for the defendants of such an award are catastrophic.

[12] Thirdly, in a submission on behalf of the fifth named defendant which was adopted by the third named defendant it was contended that the character of the proceedings was to be determined by the expressed statements of those involved in the litigation that the objective was not to obtain compensation but to hold the wrongdoers to account. It was pointed out that the plaintiffs were funded by the state which had a charge on the recovery as a result of which the recovery by each plaintiff might be modest and that members of the government had supported the plaintiffs' entitlement to pursue alleged terrorists in the action.

[13] It is undoubtedly true that these proceedings involve accusations against these defendants that they were involved in serious criminal conduct with the most horrendous consequences. Civil proceedings may involve no allegation of criminal conduct but often do so. Those allegations may range from modest allegations such as careless driving or inadvertent non-compliance with health and safety legislation through to serious offences such as causing death by dangerous driving, wholesale non-compliance with health and safety legislation and in cases such as this murder. In this case the risk to which the defendants are exposed is an award of damages and/or the imposition of an injunction in relation to future conduct. Those remedies are dependent upon the damage proved by the plaintiffs and the need demonstrated by them for injunctive relief. None of these matters constitute any form of penalty imposed by the state for reprehensible conduct. The fact that the plaintiffs must prove serious criminal conduct by the defendants

before they can establish their entitlement to damages does not alter the character of the proceedings (see S v Miller 2001 SC 977).

[14] In relation to the question of damages Mr O'Higgins SC left open the question as to whether aggravated damages were compensatory in nature. In my view such damages are awarded in respect of injury to feelings flowing from consequences such as the indignity, mental suffering, disgrace and humiliation that may be caused by the matters of which complaint is made. Since the assessment of such damages is entirely dependent upon the finding as to injury to feelings I consider that such damages must necessarily be compensatory.

[15] In opening their case on exemplary damages the plaintiffs recognised that there are at present only two categories in which such awards are possible at common law. The first of these concerns oppressive, arbitrary or unconstitutional conduct by government servants. The rationale for such an award is in my view found in Rookes v Barnard [1964] AC 1129 at 1226.

> "The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. I should not extend this category - I say this with particular reference to the facts of this case - to oppressive action by private corporations or individuals. Where one man is more powerful than another, it is inevitable that he will try to use his power to gain his ends; and if his power is much greater than the other's, he might, perhaps, be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful. In the case of the government it is different, for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service. It is true that there is something repugnant about a big man bullying a small man and, very likely, the bullying will be a source of humiliation that makes the case one for aggravated damages, but it is not, in my opinion, punishable by damages."

Insofar as there is any punitive element it his clear that this is directed towards a public authority only and the award is made to represent the abuse of public or state power by such an authority. None of the defendants in this case is a public authority and none of them exercise public power so this line of authority is not of assistance to the plaintiffs.

[16] The second category of exemplary damages recognised by the common law is that arising from conduct calculated to result in profit. It is designed to catch those who may profit to a greater extent than the damage caused or otherwise gain by reason of their unlawful conduct. A substantial aspect of this limb is, therefore, the objective of redistributing to the plaintiff the gains or benefits which the defendant made or hoped to make. So understood the issue is demonstrably one of redistributive justice rather than the imposition of a penalty. The authorities do not support the submission that exemplary damages in principle give rise to the imposition of a penalty on a private defendant.

[17] For the reasons set out above I consider that the first two submissions made by the defendants clearly point towards these proceedings constituting compensatory proceedings. An action to obtain an award of compensatory compensation by a private individual against another private individual may have a significant bearing on the future means of the paying party and any liability for the conduct of which complaint is made is likely to expose any person made liable to public opprobrium but that cannot in my view change the nature of the proceedings from civil to criminal. The nature of the proceedings remains compensatory. It follows that if the nature of the proceedings are compensatory there is no penalty to consider for the third of the Engels criteria. The extent of the damage caused cannot change the character of the proceedings from compensatory to punitive.

[18] The question then arises as to whether the desire of a plaintiff involved in compensatory proceedings to see the wrongdoer held to account might thereby alter the character of the proceedings. It would be a surprising outcome since in cases of this kind it would mean that those plaintiffs primarily seeking compensation would not be engaged in the determination of a criminal charge whereas those whose motivation was primarily the identification of the wrongdoing would be so engaged. I consider that the subjective intention of the plaintiff is of little or any bearing on the question of whether the proceedings are civil or criminal. The critical question for the court is to analyse the nature of such proceedings including the legal remedies available within them. The views of the parties as to what such proceedings achieve are unlikely to bear heavily if at all on that issue. In my view for the reasons set out above these proceedings are essentially compensatory.

[19] The last point on this topic is the submission advanced initially by the fifth named defendant that the expressed support of government for the entitlement of the plaintiffs to advance this claim and the granting of public funding for it somehow changed the character of these proceedings from civil to criminal. This again would be a surprising outcome if correct since at the time of issue of these proceedings the plaintiffs did not have any support from the public purse. When faced with this point Miss Higgins QC for the

fifth named defendant submitted that this issue was to be taken in conjunction with the earlier submissions.

[20] In my view this point is without substance. As I have sought to demonstrate the essence of these proceedings is compensatory in nature. All of the parties before me are publicly funded. The plaintiffs' funding has been obtained under the exceptional funding arrangements and that funding was challenged by the fifth and sixth named defendants in judicial review proceedings. The challenge to that funding was dismissed at first instance although the outcome of the appeal has not yet been delivered. It is not uncommon for any party funded by the public purse to be subject to an obligation to repay in the event of recovery and this is no exception.

[21] Of some importance to this submission is the fact that in the course of a discovery hearing before the Court of Appeal in this case (Breslin v McKenna [2007] NICA 14) the fifth and sixth named defendants submitted that the proceedings conducted in this case were a means of holding the appellants to account in the absence of criminal charges being preferred against them and that accordingly they constituted an action for a penalty within the meaning of article 7 of the ECHR. That submission was rejected by the Court of Appeal at paragraph 42 when it concluded that the essential nature of the proceedings was compensatory.

[22] Miss Higgins did not accept that such a determination by the court of appeal was binding on me and in any event she submitted that the conclusion was per incuriam since the point had not been properly developed in front of the court in the course of argument. I do not accept that submission. The circumstances in which a decision is given per incuriam are set out in Halsbury's Laws of England Volume 37 paragraph 1242.

> "A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covered the case before it, in which case it must decide which case to follow; or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force, or when, in rare and exceptional cases, when it is satisfied that the earlier decision involved a manifest slip or error and there is no real prospect of a further appeal to the House of Lords. A decision should not be treated as given per incuriam, however, simply because of a deficiency of parties, or because the court had not the benefit of the best argument, and, as a general rule, the only cases in

> which decisions should be held to be given per incuriam are those given in ignorance of some inconsistent statute or binding authority. Even if a decision of the Court of Appeal has misinterpreted a previous decision of the House of Lords, the Court of Appeal must follow its previous decision and leave the House of Lords to rectify the mistake"

I am not satisfied that any of these grounds have been made out and in any event for the reasons set out above I consider that the decision of the court on this issue was correct.

[23] I conclude, therefore, that in accordance with the European jurisprudence the proceedings in this case are civil in nature and that the protections contained in article 6 (3) of the ECHR are do not apply as of right.

The Civil Evidence Order

[24] The law governing the admissibility of hearsay evidence in civil proceedings is found in the Civil Evidence (Northern Ireland) Order 1997. By virtue of article 3 (1) evidence shall not be excluded on the ground that it is hearsay. That constituted a substantial change to the previous common law position where hearsay was only admissible in certain confined circumstances. The Order then goes on to provide various safeguards in relation to hearsay evidence. The first of these is a power contained in article 4 for the party who did not introduce the statement to apply for leave of the court to call the person who made the statement as a witness and cross-examine him on it. It appears that it would have been open to either of the defendants to have applied under the procedures for the taking of evidence in other jurisdictions to seek to have this witness available once it became apparent in March and April 2007 that the plaintiffs did not intend to call him. In light of my findings it is likely that the FBI would have opposed any such application.

[25] Article 5 deals with the question of the weight the court should give to hearsay evidence.

> "5. - (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 the 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 any 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 in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight."

It is important to note that article 5 (1) expressly provides for the circumstance where no weight at all is given by the court to the hearsay evidence.

[26] Article 6 (3) of the Order enables the introduction of evidence attacking the credibility of the witness by the opposing party where hearsay evidence is introduced with the leave of the court.

> "(3) Where in civil proceedings hearsay evidence is adduced and the maker of the original statement, or of any statement relied upon to prove another statement, is not called as a witness-
>
> (a) evidence which, if he had been so called, would have been admissible for the purpose of attacking his credibility as a witness is admissible for that purpose in the proceedings;
>
> (b) evidence may, with the leave of the court, be adduced of any matter which, if he had been called as a witness, could have been put to him in cross-examination in relation to his credibility as a witness but of which evidence could not have been adduced by the cross-examining party; and

> (c) evidence tending to prove that, whether before or after he made the statement, he made another statement inconsistent with it is admissible for the purpose of showing that he has contradicted himself; and
>
> (d) evidence which, if he had been so called, would have been admissible for the purpose of supporting his credibility as a witness is admissible for that purpose in the proceedings, but, in the case of evidence of another statement made by that person, only with the leave of the court;
>
> and where evidence of another statement which is admissible by virtue of sub-paragraph (c) or (d) is adduced accordingly, it shall also be admissible as evidence of the matters stated."

[27] It is clear from this review of the Order that the statutory scheme of the legislation is to permit the introduction of hearsay evidence and to require the court in civil proceedings to make an assessment as to the appropriate weight if any to give to that evidence. There is no express exclusionary power in the statute provided to the court in respect of hearsay evidence and in his submissions, adopted by the fifth named defendant, Mr O'Higgins was careful to emphasise that his objection to admissibility was not based upon the fact that the evidence was hearsay but that it was unfair that it should be admitted.

[28] There is no issue taken in this application with the relevance of the material which the plaintiffs seek to introduce. The power of the court to exclude evidence which is relevant is circumscribed. In England and Wales this was addressed in the Civil Procedure Act 1997 which expressly gave the court a power to exclude evidence that would otherwise be admissible. In conjunction with that power the Civil Procedure Rules introduced the overriding objective which is found in Order 1 Rule 1A of the Rules of the Supreme Court (Northern Ireland). In the absence of any legislative reform in this jurisdiction the Rules must be interpreted in light of the substantive common law. Although in Phipson on Evidence (16th edition) at paragraph 38-34 the authors demonstrate that there is a very limited power to exclude relevant evidence I accept that there is an obligation on the court to ensure that where the admission of the evidence would render the trial unfair the court should intervene in order to preserve the fair trial rights under article 6 of the convention of the party affected. Where the reason for exclusion arises by virtue of the need to respect convention rights the obligation to exclude must be the same in both jurisdictions despite the different legislative bases.

[29] The evidence which the plaintiffs propose to call by way of hearsay comes from a number of sources. In 2003 Mr Rupert attended at the Special Criminal Court in Dublin to give evidence against the third named defendant who faced a charge of directing terrorism during the period August 1999 to October 2000. Disclosure in relation to Mr Rupert's background was sought from sources outside the Republic of Ireland and in particular from the British Secret Service. I am aware that substantial disclosure was made but the extent of that disclosure has not been made available to me by the third named defendant or any of the other parties. In that trial Rupert was cross-examined for more than 10 days and the plaintiffs intend to rely on the transcript of that evidence in these proceedings as well as the statements and voluminous e-mails which they say were generated by Rupert and apparently disclosed to the third named defendant in his criminal proceedings.

[30] All of the parties asked me not to read the Rupert material in this case extending to some 2300 pages prior to determining this application. I am aware, however, from the skeleton argument advanced on behalf of the third named defendant that there is substantial material available to that defendant upon which he relies for the purpose of demonstrating that Mr Rupert is a dishonest and unprincipled person whose primary interest is in securing monetary gain.

[31] I immediately recognise that there is force in the submission advanced on behalf of these defendants that I will not have the opportunity to assess the demeanour of Mr Rupert in the witness box and that the transcript may be an unsatisfactory substitute for that. I also accept that there are likely to be questions related to the matters, the subject of this action, which were not posed in the criminal proceedings in Dublin and which it might be advantageous for the third named defendant to pose in these proceedings.

[32] It is clear, however, that the scheme of the 1997 Order contemplates that the court will make a careful assessment of the weight which should be given to any hearsay evidence and will further be careful to ensure that the safeguards contained within the Order are respected. Article 6 of the ECHR does not purport to lay down any rule in relation to the admissibility of evidence but rather requires the court to ensure that the proceedings as a whole are fair. Fairness must apply to all of the parties in this action. In my view it is inconceivable that I could make a fair judgment in relation to the admissibility of all or part of this evidence without sight of it and I have been referred to no case where a court has excluded such evidence without considering its precise content.

[33] Conscious of my obligation to ensure a fair trial for all of the parties I consider that this is properly achieved by permitting the plaintiffs to admit the evidence and applying the appropriate safeguards contained within the 1997 Order. That does not in any way diminish the entitlement of any

defendant to a fair trial in this action nor does it prohibit or predetermine a submission on behalf of the defendants once the evidence is received that I should accord it no weight. I consider that such an approach is indicated by the statutory scheme of the 1997 Order and is consistent with the obligation under article 6 of the ECHR to secure the fair trial rights of all of the parties in this litigation.