# Miscarriages of Justice in Ireland: A Survey of the Jurisprudence with Suggestions for the Future

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This article will examine the legislative scheme under the *Criminal Procedure Act 1993* and the case law thereon dealing with miscarriages of justice in Ireland. The article will suggest deficiencies in the jurisprudence and potential areas of expansion and will conclude by also suggesting legislative and constitutional reforms that would better aid the unearthing of miscarriages of justice.

> It is better that ten guilty persons escape, than that one innocent suffer.[1]

## I - Introduction

The purpose of this article is to summarise the core cases and principles in Ireland flowing from the miscarriage of justice provisions under the *Criminal Procedure Act 1993* (*Criminal Procedure Act*) and to weave together the *dicta* and observations of the respective courts into a coherent fabric. This is primarily a black letter law article but it also includes critical reflection and comment. In Parts II and III of the article I propose to go through the relevant statutory framework and case law on miscarriages of justice and to collate the essential principles that derive from said case law. It is also proposed to append to the analysis of each important case in Part III a summary of the advance it makes in the jurisprudence. It might be noted that the principles evolve in a discrete and self contained way often in the case law and thus many separate insights in diverse cases will be examined. After the black letter approach in Parts II and III, it is proposed to deal more generally in Part IV with such issues as D.N.A. testing and advances in same which affect miscarriages of justice applications, often at the behest of Innocence projects. The purpose of Part IV is alternately to discuss flaws in the procedure as approached by the courts and to suggest new issues that may emerge as well as general scientific advances which impact on the

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[1] W. Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765-1769) Book IV Chapter 27.

miscarriage of justice procedures. This Part will also canvass how we can reform our laws and practices to more easily detect miscarriages of justice.

## II - Miscarriages of Justice in Ireland: The Statutory Landscape

Miscarriages of justice are a far too familiar part of all legal landscapes from Sacco and Vanzetti in the United States[2] to the Guildford Four.[3] There has even been a suggestion in recent times that the notorious Dr. Crippen was a victim of a miscarriage of justice.[4] However, for present purposes, I am not undertaking a historical survey but am confining my analysis to the present position in relation to miscarriages of justice in Ireland. Thus the starting point is the *Criminal Procedure Act* and in particular section 2 thereof. Section 2 (a) states that a person:

> who has been convicted of an offence either
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> (i) on indictment, or
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> (ii) after signing a plea of guilty and being sent forward for sentence under section 13 (2) (*b*) of the Criminal Procedure Act, 1967 , and
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> who, after appeal to the Court including an application for leave to appeal, and any subsequent re-trial, stands convicted of an offence to which this paragraph applies, and
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> ( *b* ) who alleges that a new or newly-discovered fact shows that there has been a miscarriage of justice in relation to the conviction or that the sentence imposed is excessive,
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> may, if no further proceedings are pending in relation to the appeal, apply to the Court for an order quashing the conviction or reviewing the sentence.

From this it can be appreciated that the engine which motors the *Criminal Procedure Act* and triggers its application is that a new or newly discovered fact is produced which demonstrates that there has been a miscarriage of justice.

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[2] Sacco and Vanzetti were avowed Italian anarchists who were convicted of murdering two men during a 1920 armed robbery. After a hugely controversial trial and a series of ultimately unsuccessful appeals, they were both executed on 23 August, 1927

[3] They were falsely convicted on 5 October 1974. The ultimate exoneration and release stems from the judgment of the Court of Appeal in *R v. Richardson, Conlon, Armstrong, Hill, The Times* (20 October 1989).

[4] It was suggested in *The Guardian* that Crippen, who was executed in 1910 for killing his wife, may have been innocent, as the body found at his house –originally believed to be that of his spouse was not that of his wife, M. Hodgson, "100 years on DNA casts doubt on the Crippen case" *The Guardian* (17 October 2007).

Further, it is pellucid from the defined terms of the *Criminal Procedure Act* that a new fact is a fact known to the convicted person at the time of the trial or appeal proceedings, the significance of which was appreciated by him, where he alleges that there is a reasonable explanation for his failure to adduce evidence of that fact.[5] In contrast, a newly discovered fact is a fact discovered by or coming to the notice of the convicted person after the relevant appeal proceedings have been finally determined or a fact whose significance was not appreciated by the convicted person or his advisors during the trial or appeal proceedings.[6] Thus, the lynchpin and motor of the legislation is that the person claiming to be a victim of a miscarriage of justice has to adduce (and the burden of proof on the balance of probabilities is firmly on the alleged victim of the miscarriage of justice) that a new or newly discovered fact shows that there has been a miscarriage.

Section 3(1) of the *Criminal Procedure Act* is also of relevance and it provides that on the hearing of an appeal against conviction of an offence, the Court of Criminal Appeal (C.C.A.) may:

> (a) affirm the conviction (and may do so, notwithstanding that it is of opinion that a point raised in the appeal might be decided in favour of the appellant, if it considers that no miscarriage of justice has actually occurred), or
> (b) quash the conviction and make no further order, or
> (c) quash the conviction and order the applicant to be re-tried for the offence, or
> (d) quash the conviction and, if it appears to the Court that the appellant could have been found guilty of some other offence[, substitute a conviction for the lesser offence and sentence accordingly].

Further, section 7 of the *Criminal Procedure Act* concerns a petition to the Minister for Justice for a pardon under Article 13.6 of the Constitution and again invokes the motor of section 2 in that the applicant has to adduce a new or newly discovered fact to demonstrate that a miscarriage of justice has occurred in relation to the conviction. If the Minister then is of the opinion, after making inquiries, that either no miscarriage has been shown and no useful purpose would be served by further investigation or disjunctively that the matters dealt with by petition could be more appropriately dealt with by way of application to the Court pursuant to section 2, then the Minister is obligated to inform the petitioner and take no further action. If, however, he/she thinks differently to the above, he/she shall recommend to the government that either the President grant a pardon or,

[5] *Criminal Procedure Act*, s. 2(3).
[6] *Criminal Procedure Act*, s. 2(4).

pursuant to section 8 of the *Criminal Procedure Act*, a Committee should be ordered to inquire into and report on the case.

Section 9 is also relevant and it was recently considered in the case of *People (D.P.P.) v. Hannon.*[7] The crux of section 9 is the payment of compensation. The section stipulates that where a conviction has been quashed or where someone has been acquitted on re-trial and the court has certified that a newly discovered fact shows there has been a miscarriage of justice or lastly where there has been a pardon and the Minister is satisfied there has been a miscarriage of justice, the Minister shall pay compensation to the convicted person, or if dead to his legal personal representatives, unless the non-disclosure of the fact in time is wholly or partly attributable to the convicted person. It might be noted that a person has the alternative option of suing for damages. The quantum of compensation ordered by the Minister can be appealed to the High Court.

Finally, it might be noted that one other statutory provision is particularly important flowing from the case law and that is section 29 of the *Courts of Justice Act 1924* which regulates the right of appeal from the C.C.A. to the Supreme Court. It states in essence that in order for there to be an appeal from the C.C.A. to the Supreme Court, the C.C.A. or the Attorney General have to certify that a case involves "a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court, in which case an appeal may be brought to the Supreme Court, the decision of which shall be final and conclusive."

## III - Miscarriages of Justice In Ireland: The Case Law

In this Part I will demonstrate how the matrices of statutory provisions provided in the previous Part interact in the factual strata of the various leading cases to which I now turn. I propose to analyse this case law as it evolves organically and, largely sequentially. I will not deal with every case or with every aspect of a case, but seek to glean the general principles from the salient case law. The purpose of the enterprise is to illustrate from the mesh of authorities the guiding principles that illuminate the case law. The case law often

[7] [2009] 2 I.L.R.M. 235 [hereinafter *Hannon*]. This case will be discussed further below. See Part III E. Many of the cases involve a myriad of different applications to the C.C.A. and Supreme Court. For *Hannon*, the crucial hearing is 27 April 2009.

displays discrete additions to the previous corpus of authority and does not necessarily restate general principles. Moreover, the cases often have multiple hearings in the C.C.A. or Supreme Court. For convenience purposes I am generally referring to them as composite litigation and will highlight the various separate hearings where appropriate. The early case of *People (D.P.P.) v. Pringle*[8] is an important milestone in the jurisprudence and illustrates the interaction between the various statutes and is perhaps a convenient point of departure.[9]

### A. *People (D.P.P.) v. Pringle*: 1995 -1997

The *Pringle* case has a complicated procedural and factual pedigree.[10] In November 1980, the plaintiff was convicted of capital murder and robbery. In May 1995 the C.C.A. quashed the conviction on the grounds that the plaintiff had established a newly discovered fact which rendered his conviction unsafe and unsatisfactory. The Court ordered a re-trial but the Director of Public Prosecutions entered a *nolle prosequi*. The C.C.A. subsequently refused the plaintiff's application for a certificate that the newly discovered fact showed that there had been a miscarriage of justice. This decision was upheld by the Supreme Court on the grounds that quashing of the plaintiff's conviction because it was unsafe and unsatisfactory did not, on its own, entitle him to a certificate that there had been a miscarriage of justice.[11] However, the matter was referred back to the C.C.A. to allow the plaintiff to renew his application. The plaintiff then instituted proceedings seeking damages.

In the Supreme Court hearing, the Court determined in points of general seminal guidance on miscarriages of justice applications as follows:

> (i) Crucially for the question of the burden of proof under section 9 of the *Criminal Procedure Act*, that an inquiry as to whether a certificate should be given is not a criminal trial but an inquiry as to whether there has been a miscarriage of justice, the onus being on the appellant to prove that there has been a miscarriage of justice on the balance of probabilities. It is not a situation, the Court indicated, that

[8] [1995] 2 I.R. 547. This was followed by *People (D.P.P.) v. Pringle (No.2)* [1997] 2 I.R. 225 [hereinafter collectively referred to as *Pringle* unless otherwise specified].
[9] As mentioned *supra* note 7, cases often have many hearings: a C.C.A. hearing under section 2, a hearing on whether a point of law of exceptional public importance is involved in the C.C.A., a Supreme Court hearing, further applications if the matter is referred back to the C.C.A. I am dealing with the cases globally and with the principles they establish and where necessary I will highlight where they fit into the process.
[10] It also illustrates the point made *supra* notes 7 and 9 of the number of separate hearings that can take place.
[11] *People (D.P.P.) v. Pringle (No. 2)* [1997] 2 I.R. 225

involves the presumption of innocence;[12]

(ii) The Court also indicated that a newly discovered fact either on its own or in tandem with other facts can demonstrate a miscarriage of justice but that a miscarriage certificate can only issue where the miscarriage has been demonstrated on the balance of probabilities.[13]

(iii) Further, as aforementioned, the court determined that the mere fact of the appellant's conviction having been quashed as being unsafe and unsatisfactory, could not on its own entitle the appellant to a certificate that there has been a miscarriage of justice;[14] and

(iv) Finally, the primary meaning of miscarriage of justice is that the applicant for a certificate is, on the balance of probabilities, as established by relevant and admissible evidence, innocent of the offence for which he was convicted. It might be noted that O' Flaherty J. in the C.C.A. also determined that the grant of a certificate is of wider import than a claim of factual innocence:

> [f]or example, if in a given case the courts were to reach the conclusion that a conviction had resulted in a case where a prosecution should never have been brought in the sense that there was no credible evidence implicating the applicant, that would be a case where a certificate most likely should issue.[15]

Thus in substance *Pringle* establishes where the burden of proof in a miscarriage of justice application lies (on the applicant) and it establishes which standard is applicable (on the balance of probabilities). It also provides that the new or newly discovered fact must in itself or in combination with other facts link to a miscarriage of justice in order for a certificate to issue.

### B. *People (D.P.P.) v. Gannon*:[16] 1996 -1997

In this matter the applicant was convicted of rape and assault. A key issue in his defence was as to the identity of the perpetrator of the crime. Following conviction various

[12] *Ibid.* at 237.
[13] *Ibid.* at 237.
[14] *Ibid.*
[15] *People (D.P.P.) v. Pringle* [1995] 2 I.R. 547 at 552.
[16] [1997] 1 I.R. 40 [hereinafter *Gannon*].

documents came to light, in particular notes from a guidance counsellor to whom the complainant had first reported the rape and a report of a Garda containing details of description. The C.C.A. found that the newly discovered fact did not render the conviction unsafe and unsatisfactory and thus dismissed the application. The Supreme Court found that the discrepancies between the description of the assailant in the newly discovered material and the description given in the complainant's statement in the book of evidence and in her testimony were minimal and there was nothing in the newly discovered material which could have assisted the applicant in any way or enabled the defence to present the case to the jury in any different light.[17]

In reaching its conclusions the C.C.A. noted that they were required to carry out an objective evaluation of the newly discovered fact with a view to determining in the light of it whether the conviction was unsafe and unsatisfactory and that they could not conclude for certain that the advent of a newly discovered fact would have had no effect on the manner in which the defence was conducted at the trial.[18] The C.C.A. also indicated that whether a conviction is unsafe and unsatisfactory cannot be determined by having regard solely to the course taken by the defence at trial. Blayney J. opined that:

> [t]he court could not conclude for certain that the advent of the newly-discovered material would have no effect on the manner in which the defence was conducted. The furthest one could go would be to say that it is possible that it might not have had any effect and this would not relieve the court from examining what the position would have been if the defence had availed of the newly-discovered material and altered its strategy accordingly.[19]

The C.C.A. also accepted that non-disclosure of evidence which would probably affect the manner in which the defence might meet the case might lead to a quashing of a conviction.[20] However, the facts in this case do not support such a conclusion. In the light of all the considerations canvassed the conclusion was reached that there was nothing in the new material to indicate that the conviction of the appellant was unsafe and unsatisfactory.

*Gannon* adds to *Pringle* in two material respects. First, it stresses that the court will conduct an independent and objective evaluation of a new or newly discovered fact that it is alleged would render a conviction unsafe or unsatisfactory. Second it stresses that the

[17] *Ibid.* at 47.
[18] *Ibid.*
[19] *Ibid.*
[20] *Ibid.*

court should seek to reconstruct what the position would have been in terms of defence strategy if they had been armed with the newly discovered material at the time of the trial.

### C. *People (D.P.P.) v. Meleady & Grogan*:[21] 1995 -2001

In *Meleady* the "newly discovered fact" was evidence of a fingerprint found on the inside of a front passenger door window in a car. However, the C.C.A. considered that it could not give a certificate on the fingerprint evidence due to the absence of a decision by a jury in a trial in which the non-disclosed material had been available to the accused. An appeal to the Supreme Court was taken on a point of law of exceptional public importance asking whether the Court erred in its reason for refusing the certificate. The Supreme Court concluded that there did not seem to be any provision in the *Criminal Procedure Act* which would support the conclusion of the C.C.A. Thus, the C.C.A. erred in law in refusing to grant a certificate by reason only of the fact that the guilt or innocence of the appellants had not been determined by a jury at a trial where the non-disclosed material had been available to the accused.[22]

The matter was then referred back to the C.C.A. and the C.C.A. in granting a certificate held, as Geoghegan J. put it, that:

> [t]he mere possibility, however reasonable, that had the matter gone to a retrial a jury would have had a reasonable doubt on foot of the newly discovered facts is not a ground for granting the certificate under s. 9. One simple reason for this is that in that situation the applicants would not have established, as a matter of probability as distinct from possibility, that the newly discovered facts would have led to an acquittal.[23]

He continued:

> ... a miscarriage of justice need not necessarily be certified in every case where, had the possibility of a new trial been open, it would not have been appropriate to apply the proviso leading to a dismissal of the appeal and refusal of a new trial, as to do so would interpret the rights under section 9 far too broadly and conflict with the concept of a civil onus of proving miscarriage of justice as a matter of probability.[24]

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[21] [1995] 2 I.R. 517. This was followed by *People (D.P.P.) v. Meleady & Grogan* (20 March 2001, unreported), Court of Criminal Appeal [hereinafter collectively referred to as *Meleady* unless otherwise specified].
[22] (4 March 1997, unreported), Court of Criminal Appeal.
[23] *People (D.P.P.) v. Meleady & Grogan* (20 March 2001, unreported), Court of Criminal Appeal.
[24] *Ibid.*

*Meleady* builds on both *Pringle* and *Gannon* in intimating that the applicant has the burden of demonstrating as a matter of probability not possibility that there has been a miscarriage in order for a certificate to issue.

### D. *D.P.P. v. Callan*[25] 2002-2003

In *Callan* the applicant was convicted of murder in the course of a robbery and sought to have his conviction quashed on basis that he had been under pressure at his original trial. The Court found that this was not a fact which would have in any way affected the result of his trial, had it been known to the Court at the time. In this context, the C.C.A. considered what constitutes a "fact" and indicated that for a fact to come within the provision it must be relevant to the trial and to the trial court's decision and have been admissible at trial. The Court also concluded that even if they were wrong, they were satisfied that, as required by statute, there was no reasonable explanation for the applicant's failure to adduce evidence of the fact at the time.[26]

Callan made an application to the C.C.A. pursuant to section 29 of the *Criminal Justice Act 1924* seeking leave to appeal to the Supreme Court. He submitted that due to coercion he was unable to advance the defence of a lack of common design. Interestingly, in denying the application for leave to appeal, the C.C.A. found that the coercion was submitted as a new fact, and not as a reasonable explanation for failing to adduce a fact at the original trial. In any event they held in totality that the matters raised in the application related to matters peculiar to the case at hand and these were not of exceptional public importance, and an appeal was not seen as being in the public interest.[27] *Callan* adds to the corpus of jurisprudence by clarifying what is meant by fact. For a fact to be a fact for the purposes of the *Criminal Procedure Act*, it must be relevant and admissible.

### E. *Hannon*[28] (with reference to *People (D.P.P.) v. Wall*[29])

In *Hannon* the applicant was convicted of sexual assault and assault against a ten year old girl in a context where there was a history of animosity between families. Nine

[25] [2003] 2 I.C.L.M.D. 39 [hereinafter *Callan*].
[26] *Ibid.* at 52.
[27] *Ibid.*
[28] See *supra* note 7.
[29] [2005] I.E.C.C.A. 140 [hereinafter *Wall*].

years later, the complainant retracted these statements and admitted that they had been fabricated because of the family animus. In his conclusion Hardiman J. got quickly to the essence of the matter:

> [i]t is … difficult to know how a person could more clearly and obviously be in the position where a new or newly discovered fact 'shows conclusively that there has been a miscarriage of justice' … than a person whose accuser has, almost a decade after the event, confessed that her allegation was wholly false and contrived.[30]

The Court concluded that the applicant was entitled to a certificate since a fact which is both new and newly discovered - the complainant's confession of having fabricated the allegation - shows that his conviction was a miscarriage of justice.[31] However, the learned judge, after citing various dictionary definitions, indicated that the meaning of a miscarriage of justice was broader than the primary meaning of factual innocence. Hardiman J. thus indicates that factual innocence does not encompass all circumstances that might amount to a miscarriage of justice.[32]

It might be noted that in the earlier case of *Wall* the Court indicated that an exhaustive definition of the term "miscarriage of justice" has not been attempted by the C.C.A. or by the Supreme Court which had indicated that courts should not attempt such a definition and that examples of circumstances which may constitute a miscarriage of justice include, but are not limited to the following:

> (i) Where it is established that the applicant was innocent of the crime alleged.
> (ii) Where a prosecution should never have been brought in the sense that there was never any credible evidence implicating the applicant.
> (iii) Where there has been such a departure from the rules which permeate all judicial procedures as to make that which happened altogether irreconcilable with judicial or constitutional procedure.
> (iv) Where there has been a grave defect in the administration of justice, brought about by agents of the State.[33]

It might be noted that the Court in *Wall* also indicated that, in determining whether the newly discovered facts show that a miscarriage of justice occurred, their inquiry was not confined to the question of actual innocence but extended to the administration in a given case of the justice system itself. The combined effect of *Hannon* and *Wall* is to clarify that

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[30] *Hannon*, *supra* note 7 at 249.
[31] *Ibid.*
[32] *Ibid.*
[33] *Wall*, *supra* note 29 at 142.

what constitutes a miscarriage of justice is an evolving standard and is not confined to factual innocence.

### F. *People (D.P.P.) v. Kelly*[34]

In *Kelly* which consisted of two applications before the C.C.A. Kearns J. had this to say about the term 'miscarriage of justice' in the second application which largely dealt with how an appellate court should evaluate new evidence presented:

> [w]hile that term has acquired a particular meaning for the purpose of applications of this nature, one which does not require detailed consideration here, it must also be taken as meaning that the material or fact newly discovered must be such as would have genuinely enabled the defence to raise a doubt in the minds of a jury. It does not contemplate remote, hypothetical or fanciful possibilities.[35]

In *Kelly*, the Court was very anxious to stress its role in the evaluation of the new evidence presented. The Court also stressed the linkage of fresh evidence on appeal with fresh evidence under a miscarriage of justice application.

Kearns J. further indicated, in a crucial set of findings, that it is up to the Court to conduct an objective evaluation of a newly discovered fact to determine *inter alia* whether there has been a miscarriage of justice. In *Kelly*, Kearns J. blends the criteria for the reception of fresh evidence on appeal with the criteria for the reception of new or newly discovered evidence on a miscarriage of justice application. In essence, the learned judge indicates that the Court must engage with and evaluate the new evidence to determine whether it would materially affect the decision reached. Was the evidence credible, material and important and would it influence the outcome of the case? The judge indicates that the concept of materiality is read in reference to evidence adduced at the trial and not in isolation and such evidence has to show that it would genuinely enable the defence to raise a doubt such as to render the conviction unsafe.[36]

The learned judge also indicated that the Court must focus on how the defence would have utilised the fresh evidence had they had it:

the court's role is not to enquire whether the new material renders the conviction of

[34] [2009] I.E.C.C.A. 56 [hereinafter *Kelly*].
[35] *Ibid.* at 66
[36] *Ibid.* at 65.

> the appellant unsafe and unsatisfactory having regard to the course actually taken by the defence at trial, but rather to ascertain whether the defence could have used the material in such a way as to raise a doubt about a significant element in the prosecution case and the possibility that a different approach by the defence may have led to an acquittal.[37]

In the earlier C.C.A. judgment in *Kelly*, which primarily concerned whether new expert evidence could constitute a new or newly discovered fact, the Court drew a distinction between new factual evidence and opinion evidence and indicated that opinion evidence should not constitute a newly discovered fact within the terms of the *Criminal Procedure Act*. The Court did however also conclude that:

> [t]here might be cases where a state of scientific knowledge as of the date of trial might be invalidated or thrown into significant uncertainty by newly developed science. There might also be cases where the opinion of an expert at trial might be shown to have been tainted by dishonesty, incompetence or bias to such a degree as to render his evidence worthless or unreliable. Once such 'facts' were established, expert opinion evidence must be admissible so that such new 'facts' could be properly interpreted.[38]

*Kelly* is an important case in two material respects. First, it determines that is up to the court to conduct an objective evaluation of a newly discovered fact to determine *inter alia* whether there has been a miscarriage of justice. The court will engage with and evaluate the new evidence to determine in essence whether it would materially affect the decision reached. In so engaging, the court will determine whether the new evidence is credible, material and important and whether it would it influence the outcome of the case. Further, such new evidence has to show that it would genuinely enable the defence to raise a doubt such as to render the conviction unsafe.

I shall return to the second important aspect of the *Kelly* case in Part IV, namely the distinction between new factual evidence and opinion evidence, but it is worth mentioning a criticism at this juncture. In my view there is a timidity and a caution about opinion evidence and only where there is new science or unreliable expert evidence will the court countenance the admission of such evidence as a new or newly discovered fact. This could pose significant difficulties in the area of forensic re-testing of physical or biological evidence, the interpretation of which does rely on the opinions of forensic experts.

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[37] *Ibid.*
[38] [2008] 2 I.L.R.M. 217 at 232.

### G. *D.P.P. v. Nevin*[39]

In the recent *Nevin* case, Hardiman J., in interpreting section 2 and pre-existing case law on what needs to be established to invoke its jurisdiction, stated as follows:

> (1) That the applicant need not establish that a miscarriage of justice has actually occurred before proceeding to quash the conviction.
> (2) That the Act operates to provide redress in cases where facts come to light for the first time after an appeal, which show that there may have been a miscarriage of justice.
> (3) That section 2 provides redress to an applicant who can point to material which, if it had been available at the trial might - not necessarily would - have raised a reasonable doubt in the minds of the jury.[40]

With respect to the disclosure of facts and the conduct of the defence the learned judge indicated:

> [f]inally, the question of significance as opposed to triviality of an undisclosed fact or document cannot be determined, or at least cannot be determined solely, by a consideration of the course actually taken by the defence at the trial. It would be a dangerously hypothetical exercise to speculate, having regard to that course, what approach the defence might have taken if they had known a fact which was actually concealed from them at the relevant time. But in an appropriate case it might be proper to consider the defence's attitude at the trial if, for example, a newly discovered fact arose which however might only have supported a defence which the conduct of the accused's defence had specifically disavowed at the trial, or had not pursued in cross-examination or otherwise.[41]

In *Nevin*, Hardiman J. clarified two points. First, he indicated that an accused does not have to show a miscarriage of justice in order to be successful. S/he need only prove on the balance of probabilities that there may have been one. He also the judge reiterated that in certain circumstances a court has to engage in reconstruction of what a defence team might have done if they had been armed with the new evidence. In this respect Hardiman J. reiterated though slightly amplified the sentiments in *Gannon*.

### H. *D.P.P. v.Conmey*[42]

In the particularly egregious recent case of *Conmey*, the nub of the matter was that the State had failed to disclose original statements from witnesses who only implicated the

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[39] [2010] I.E.C.C.A. 106 [hereinafter *Nevin*].
[40] *Ibid.* at 109
[41] *Ibid.* at 110..
[42] [2010] I.E.C.C.A. 105 [hereinafter *Conmey*].

accused in later altered statements. One of the witnesses then said that the subsequent statement was a result of coercion. There is not much development of existing principle in the case but the following points need to be noted. Hardiman J. opined:

> if material, due to concealment or otherwise, was unavailable to the defence at the trial, it follows that it cannot have influenced the course taken by the defence at that time. Nor is it realistically possible to reconstruct with any degree of certainty what course the defence would have taken if they had had available to them material which was in fact unavailable.[43]

On the facts the learned judge, in granting a certificate, noted that:

> ... the task of the Court on an application such as this is not to attempt the fruitless task of achieving certainty about a hypothetical change in the evidence in a trial that took place more than thirty years ago. It is instead to resolve the question whether this is a case … where facts came to light for the first time after the appeal which showed that there might have been a miscarriage of justice.[44]

## IV - Critical Observations[45]

The above constitutes a survey of the principles from the case law and the conclusions and insights from the jurisprudence of the appellate courts. In this Part of the article I want to highlight first some potential problems about the approach of the appellate courts and some potential issues that might dominate future jurisprudence. Finally, I shall conclude with some perspectives on how overall practices may be improved to assist in exonerating those imprisoned falsely who claim to be victims of injustice.

First, the jurisprudence of the appellate courts in *Kelly* in particular in the area of opinion evidence would seem to shy away from embracing these opinions as new or newly discovered facts.[46] This could pose significant difficulties in the area of forensic retesting of physical or biological evidence, the interpretation of which does rely on the opinions of forensic experts. For example, the use of D.N.A. to exonerate convicted individuals has been crucial in the investigation of miscarriages of justice, especially in the U.S.A. In particular, exonerations have occurred as a result of more advanced D.N.A. testing.

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[43] *Ibid.* at 127.
[44] *Ibid.* at 131.
[45] I am indebted to Edward Mathews and Steve Donoghue Ph.D caseworkers on the Irish Innocence Project for their assistance on these points.
[46] In particular the judgment in *Kelly* previously dealt with, where the Court asserted that "for expert opinions to be admissible as newly discovered facts, the state of scientific knowledge as of the date of the trial must be invalidated or thrown into significant uncertainty by newly developed science." *Kelly*, *supra* note 34 at 232.

In Northern Ireland the more sensitive low copy number D.N.A. profiling was originally rejected as evidence in *R. v. Hoey*;[47] however, it was recently accepted under certain conditions in England in *R. v. Reed and Reed*.[48] Another sensitive and specialised D.N.A. profiling technique, Y.-S.T.R. profiling, has also been readily accepted in American courts.[49] In Ireland we currently use the standard S.G.M. test; however, our State Forensic Laboratory does not carry out other more advanced and sensitive techniques. Indeed, given the reluctance to embrace expert evidence as new or newly discovered facts in the light of *Kelly*, it remains to be seen how our appellate courts would accept expert opinion presenting more sensitive D.N.A. profiling that casts doubt on the safety of a conviction.

Second, the area of ineffective legal counsel has been brought up in the C.C.A. in *People (D.P.P.) v. McDongah*[50] and *D.P.P. v. Murray*.[51] Although the applicants in these cases were unsuccessful on the facts of their cases, the principle that ineffective legal counsel could be grounds for granting a miscarriage of justice certificate has been accepted. In *McDonagh* the C.C.A. indicated that, in exceptional circumstances, the conduct of a trial and steps taken preliminary to the trial by the legal advisors of an accused would give rise to an appeal, consistent with the requirement of the Constitution that no person was to be tried on any criminal charge "save in due course of law" and that the conduct of the defence may in certain circumstances either at the trial or in the steps preparatory thereto, be such as to create a serious risk of a miscarriage of justice.[52] In *Murray* Geoghegan J. indicated as follows:

> [t]here is no doubt that as a matter of law and in exceptional circumstances a conviction may be quashed by the Court of Criminal Appeal on the grounds that a miscarriage of justice may have arisen from incompetent handling of the defence at the trial. Cases in support of that proposition have been cited but it is not necessary to review them. It is well known that that is the legal position.[53]

Accordingly the issue of ineffective legal counsel may in future become a more prevalent feature of miscarriage of justice cases. Indeed, it is one of the major issues leading to findings of a miscarriage of justice in the United States and is frequently invoked by Innocence projects where, of course, there is also a claim of factual innocence. The *dicta* in *Murray* and *McDonagh* are tentative in nature and do not address what the rather opaque

[47] [2007] N.I.C.C. 49.
[48] [2009] E.W.C.A. Crim. 2698.
[49] See *Shabazz v. State* 592 S.E.2d 876, 3 .F.C.D.R. 276 (Court of Appeals of Georgia).
[50] [2001] 3 I.R. 201 [hereinafter *McDonagh*].
[51] [2005] I.E.C.C.A. 34 [hereinafter *Murray*].
[52] *McDonagh*, *supra* note 50 .
[53] *Murray*, *supra* note 51.

phrase exceptional circumstances entails.

It might be noted that the U.S. courts have evolved in a series of cases a test for ineffective assistance of counsel. In the leading case of *Strickland v. Washington* The Supreme Court indicated that a lawyers assistance is ineffective if it "so undermined the functioning of the adversary process that the trial cannot be relied upon as having produced a just result." [54] The Court also indicated that the burden of proof is on the defendant to show his lawyer was ineffective and the Court will presume absence proof to the contrary that the lawyer was effective. In order to demonstrate ineffective assistance, a defendant must show that his lawyer's performance fell below the required standard and was ineffective due to serious mistakes and that said mistakes prejudiced the defendant's case. In this context prejudice means that the result of the trial would have been different but for those mistakes. It is to be hoped that as the Irish case law progresses, our courts will evolve such comprehensive and sophisticated standards.

Third, an area which appears not to have been canvassed before the Irish Courts is wrongful conviction as a result of false confessions. The International Innocence Network has long since recognised not only the possibility, but propensity, of false confessions giving rise to wrongful conviction and as such this is as yet an inadequately explored area in our jurisprudence.[55]

In general several reforms could be introduced to assist in unearthing miscarriages of justice. In this context there is the *Criminal Justice (Forensic Evidence and D.N.A. Database System) Bill 2010* (*D.N.A. Bill*) which is now lapsed and up to the present government to revive. Although the *D.N.A. Bill* is to be welcomed, there are nonetheless flaws in it as drafted. Although a majority of the provisions in the *D.N.A. Bill* have been drafted upon the recommendations of a Law Reform Commission (L.R.C.) Report on the establishment of the D.N.A. database, some do not fully accord with the recommendations in that Report. Most importantly, it should be noted that this Report recommended the indefinite retention of biological material from a crime scene: "the retention is principally as a safeguard in the event that an individual convicted of the offence to which the sample relates alleges that a miscarriage of justice has occurred and wishes to challenge the veracity of the original

[54] 466 U.S. 668 (1984).
[55] R.P. Conti, "Psychology of False Confessions" (1999) 2 Journal of Credibility Assessment and Witness Psychology 14.

evidence."[56] However, the *D.N.A. Bill* is silent on this issue. In this context, it is urged that the *D.N.A. Bill* reflect the need to indefinitely preserve biological material found at the crime scene.

Further, it is tolerably clear that the preservation of evidence remains problematic and the procedures in place by the authorities are piecemeal at best.[57] Thus on the facts of the aforementioned *Conmey* it is evident that the authorities may not retain documentary evidence in a manner which one would expect, and indeed they may be retained in a manner which makes them inaccessible, or in the case of physical or biological evidence might render further testing impossible, or irrevocably tainted. This is an area which begs regulation and reform. Thus, documentary, physical, and other evidential materials must be retained in an appropriate manner, and failure to regulate in this area may well negate any possibility of exonerating a wrongly convicted person. This is a potentially burgeoning area of jurisprudence.

One final point of particular concern to Innocence projects is the need for the Irish courts to evolve a right to post-conviction testing as is the practice in many states in the U.S.,[58] though it is not sanctioned as a federal right. This issue of post-conviction testing is indeed highly contentious in the American courts. Recently in *District Attorney's Office for the Third Judicial Circuit v. Osborne* the appellant was attempting to establish a constitutional right to post-conviction testing under the Due Process clause.[59] This putative right was rejected in a highly contentious 5-4 decision but on March 7th 2011 in *Skinner v. Switzer, District Attorney for 31st Judicial District of Texas*[60] the Supreme Court did establish that a prisoner could challenge as a constitutional matter the adequacy of an individual State's provision for post conviction testing.

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[56] Law Reform Commission, L.R.C. 78-2005, *Report on the Establishment of a D.N.A. Database* (Dublin: Law Reform Commission, 2005) at para 3.05 [hereinafter L.R.C. Report].

[57] To the best of my knowledge the Garda preserve as a matter of practice all relevant evidence until a prisoner is released but there is no compulsion on them to do so and practices may vary. This is in direct contrast to both the U.S. and the U.K. In the latter, the preservation of material evidence is governed by the *Criminal and Procedure Act 1996* where all material may be relevant must be retained at least until the convicted individual is released from custody. In the U.S. there is the *Justice for All Act 2004* which allows for greater federal funding for post-conviction D.N.A. testing and hence has promoted the preservation of material evidence by the State for post-conviction testing.

[58] It is recognised in 46 states.

[59] (18 June 2009, unreported), U.S. Supreme Court, (557 U.S. forthcoming).

[60] (7 March 2011, unreported) U.S. Supreme Court.

Such a right, in my view, goes hand in glove with an obligation on the Garda to preserve and retain evidence at least whilst a prisoner is still serving time. In this context the Irish courts could extend the principles in *Braddish v. D.P.P.* where the Irish Supreme Court held that the failure to preserve such vital evidence violated the guarantee to fair procedures to a right to preserve post conviction at least as far as a serving prisoner is concerned. The courts could then link such a right to a right to post conviction testing. [61] All of this could be accomplished within the rubric of Article 38.1 and the trial in due course of law clause. Thus as far as Irish due process law is concerned a challenge, in my view, is imminent to establish as emanations of due process:

(1) the right to post conviction preservation of evidence; and

(2) the right to post conviction testing of evidence.

Whether such prospective challenges will succeed is another matter entirely.

## V - Conclusion

All of these issues suggest that rather than the jurisprudence having reached a settled quality, more issues and types of miscarriages of justice as well as the ramifications of expert evidence need to be addressed canvassed by the courts. Further, it is suggested that Garda practices and indeed legislative reform are needed for the preservation of evidence and the detention and proof of miscarriages. Finally, there is a need for constitutional argument to establish some sort of right to post-conviction testing. Nonetheless, it must be stressed that our courts in general display a factual sensitivity and heightened awareness of these issues and have evolved guidelines that, weaved together, are tolerably clear in dealing with miscarriages of justice applications. Doubtless the next few years should be interesting.

[61] [2001] 3 I.R. 127.