Neutral Citation No. [2013] NICA 75

Ref: **GIR9074**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **19/12/13**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION

BETWEEN:

MARTIN AND 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 ANN McCOMBE)
MARIAN 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 ANN 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/Respondents

AND

MICHAEL COLM MURPHY
SEAMUS DALY

Appellants/Defendants

Before: HIGGINS LJ, GIRVAN LJ, COGHLIN LJ

GIRVAN LJ (delivering the judgment of the Court)

Introduction

[1] This is an appeal brought by the appellants who challenge the judgment of Gillen J ("the trial judge") delivered on 20 March 2013 whereby the trial judge found each of the appellants jointly and severally liable in the action brought by the plaintiffs, the respondents to the appeal ("the plaintiffs"), in which they claimed damages for trespass to the person. The plaintiffs' claims arose out of the bomb explosion in Omagh County Tyrone which occurred on 15 August 1998. The claim includes damages for personal injuries sustained as a result of the explosion and claims for damages under the Fatal Accidents (Northern Ireland) Order 1977 and the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1937 in respect of the deaths of members of their families.

[2] In both the appeal and the trial Mr Fee QC appeared with Ms McMahon on behalf of the first-named defendant ("Murphy"). Ms Higgins QC appeared with Mr Sharp on behalf of the second defendant ("Daly") and likewise appeared at the trial. Mr Lockhart QC and Dr McGleenan QC appeared for the plaintiffs on the appeal, having appeared with Lord Brennan at the trial. The court is grateful to counsel for their helpful written and oral submissions.

[3] The proceedings were originally tried by Morgan J who concluded that the plaintiffs were entitled to succeed in their claims against a number of defendants, including Murphy and Daly. Murphy and Daly succeeded in their appeal from Morgan J's judgment. In its judgment reported at [2011] NICA 33 in the first appeal ("the first appeal") this Court ordered a retrial of the claims against Murphy and Daly. The Court did make clear that it was not ordering a retrial on the issue of quantum of damages. Leave to appeal to the Supreme Court having been refused by the Court of Appeal petitions were presented to the Supreme Court on behalf of the plaintiffs and Daly on various points of law arising from the judgment in the first appeal. The Supreme Court refused leave to appeal. No leave was sought to challenge the Court of Appeal's ruling in its judgment on the issue of the pleaded cause of action, trespass to the person.

[4] As the trial judge clearly stated, a retrial is conceptually wholly independent of the first trial. The rulings of the judge at the first trial were not res judicata and were not binding at the fresh trial which was in substance a trial de novo (see paragraph [4] of the trial judge's judgment). In paragraph [5] the trial judge stated that full recognition had to be given to the fact that the retrial was a de novo hearing. As appears later in this judgment, Ms Higgins argued that, notwithstanding those statements made by the trial judge, in fact the judge failed to follow his own criterion of ensuring that this was treated entirely as a fresh de novo hearing of the action as far as it affected Daly.

Cause of Action

[5] The plaintiffs relied on the tort of trespass to the person (in this case battery) and conspiracy to trespass. In the appeal arising out of the first trial the appellants argued that the trial judge was in error in concluding that the appellants were liable in trespass. One of the questions which arose in that appeal was whether a person who plants a bomb with the intention that it should explode and when it explodes it kills or injures another is liable for a battery when he did not intend that any person be killed or injured but was reckless as to whether death or injury would ensue. In paragraphs [15]-[20] of the judgment in the first appeal this Court set out the reasons for concluding that he is. The trial judge concluded that he was bound by the Court of Appeal decision on the point. The question which he considered he had to decide was whether the evidence proved that the appellants, individually or together, were involved in the preparation, planting and detonation of the bomb (see paragraph [20] of his judgment). He concluded that it was not necessary to come to a concluded view on the question whether the appellants were liable as tortfeasors in respect of a conspiracy to cause trespass to the person.

[6] Mr Fee and Ms Higgins sought to reopen the point previously decided by this Court on the cause of action. The point had, however, been raised and fully argued in the previous appeal. It was not the subject of any appeal to the Supreme Court and, as noted, was not raised as a point in Daly's petition for leave. This Court is bound by its previous decision unless it can be shown that the previous decision was per incuriam. We see no reason to reach a different conclusion from that reached in our previous decision. Accordingly that ground of appeal must be rejected.

Standard of Proof

[7] The judge in paragraphs [57] and [58] set out the approach he was to adopt on the standard of proof by reference to what this Court said in paragraph [22] of its decision in the first appeal and by reference to Lord Carswell's exposition of the law in Re D [2008] UKHL at [27]-[28]. In paragraph [2] of our previous judgment we pointed out that in civil proceedings the seriousness of an allegation and the seriousness of the consequences for a defendant will be factors which underline the intrinsic unlikelihood 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.

The appellants contend that the trial judge reached erroneous decisions in finding liability because the evidence properly analysed could not support the conclusions he reached. This is not because the trial judge failed to understand what the proper test was but rather because if he had properly applied the law which he thought he was applying he should have reached the contrary conclusion that liability was not

proved. We are satisfied that the judge understood and sought to apply the proper standard of proof.

The appellate principles

[8] In this Court's decision in the first appeal we set out at paragraphs [6]-[10] the relevant appellate principles, referring to both the Northern Ireland and English authorities. These can be found in Northern Ireland Railways v Tweed [1982] NIJB, Murray v Royal County Down Golf Club [2005] NICA 2, McClurg v Chief Constable [2009] NICA, Stewart v Wright [2006] NICA, Smith New Court Securities v Citibank NA [1997] AC 259, Lofthouse v Leicester Corporation [1948] 64 TLR 604. The principles may be summarised briefly as follows:

(a) Time and language do not permit exact expression of judicial findings and are surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (see Lord Hoffman in Brogan v Medeva plc [1996] 38 BMLR).

(b) Where there is no misdirection by the judge on an issue of fact conclusions on issues of fact are to be presumed correct and will only be reversed if the Court of Appeal is "convinced his view is wrong".

(c) It must be clearly shown that the judge did not take all the circumstances and evidence into account, misapplied evidence or drew an inference which there was no evidence to support.

(d) A judge's judgment must be read in bonam partem.

(e) Provided he deals with the substantial issues in the case and reaches supportable factual conclusions and does not neglect to take account of matters that might affect those conclusions his findings on disputed facts cannot be disturbed.

Factual background to the bombing

[9] In paragraph [6]-[20] of his judgment the trial judge set out his narrative of the events on the day of the bombing. These may be stated briefly for the purposes of this judgment. A 500lb bomb was planted in a car which exploded in the centre of Omagh, it had been parked at the lower end of Market Street at Kells Shop. That car had been stolen two days previously in Carrickmacross in the Republic of Ireland. Three bomb warnings were given. One was at 2.30pm inaccurately stating that the bomb was at the Courthouse in Omagh in Main Street and was due to go off in 30 minutes. There is no Main Street in Omagh. There was one at 2.32pm to Police Communications at Omagh stating that the bomb was in Omagh town and was due to go off in 15 minutes. Another call was made around the same time to the

Samaritans. It said that the bomb was in Main Street about 20 yards from the Courthouse and was going to go off in 30 minutes. A recognised code word was used. This code word had been used 2 weeks earlier when a bomb was planted in Banbridge. The police began to move people away from the main shopping area. The bomb exploded at 3.00pm. It was positioned some 375 yards from the Courthouse and the police had unknowingly been directing people into the path of the bomb. 29 people and 2 unborn children were killed. Hundreds of people were injured. Considerable physical damage to buildings was caused. The bomb comprised 150-200kg of fertiliser, sugar and Semtex detonated by the use of a Coupatan time device, a device used in a number of terrorist devices. On 17 August a person purporting to speak on behalf Óglaigh na hÉireann falsely claimed that a 45 minute warning had been given and it had been made clear that the bomb had been 300-400 yards from the Courthouse. The next day a caller using the same recognised code word rang a newsagency 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. As the trial judge stated, the barrier of time has not served to disguise the enormity of this crime, the wickedness of the perpetrators and the grief of those who must bear the consequences.

The relevant evidential areas

[10] The plaintiffs' case against Murphy was a circumstantial case involving four strands of evidence. The first related to telephone evidence which the plaintiffs allege closely connected Murphy to the events in Omagh. The second strand related to interviews of Murphy by members of the Garda Síochána. The third related to evidence relating to Terence Morgan ("the Morgan evidence"). The fourth related to similar fact evidence which the plaintiffs claimed constituted relevant similar fact evidence establishing a connection between Murphy and one other terrorist bombing in Banbridge. The Morgan evidence was carefully scrutinised by the trial judge in paragraphs [98]-[124] of his judgment. He concluded that he should give no weight whatsoever to the evidence of Morgan either in the case of Murphy or Daly. The plaintiffs do not challenge the trial judge's conclusion on that evidence and accordingly it can be disregarded for present purposes.

[11] The plaintiffs' case against Daly was likewise a circumstantial case. It involved five strands of evidence. The first related to telephone evidence which the plaintiffs allege closely connected Daly to the use of phone 585 in the events in Omagh. The second strand of the case related to the evidence of Denis O'Connor which the plaintiffs alleged closely connected Daly to the events in Omagh. The third related to Garda evidence of interviews with Daly. The fourth related the subsequent convictions of Daly as a result of a plea of guilty to membership of Óglaigh na hÉireann on 4 November 2000. Fifthly, the plaintiffs sought to rely on telephone evidence connecting Daly to a bombing in Lisburn.

The evidence in relation to Murphy

Telephone evidence relating to Omagh

[12] In paragraphs [21]-[35] the judge set out the key telephone evidence relating to telephone communications which had occurred at material times in the vicinity of Omagh from which the plaintiffs sought to establish that Murphy and Daly had a demonstrable involvement in the planting of the bomb. In paragraphs [22]-[35] he set out the content of the Schedule of Agreed Facts in this connection.

[13] Shortly after the bomb exploded it was established that two warning calls had been made in South Armagh at 2.29pm and 2.31pm from a public call box at McGeough's Crossroads and Loyes Crossroads respectively. The police then focussed on mobile phone traffic between 2.00 and 2.30pm in the Omagh and South Armagh areas. Six sheets of data were provided by Vodafone Ltd. This contained an analysis of the printout of the original computer file (a "toll ticket analysis") relating to four phones ending in digits 430, 980, 585 and 259. This is marked TRS1 and was provided to Lisa Purnell (LP), a senior research analyst, whose report was given the identification number LKP1. She gave evidence in the trial. The information before the court underpinning the Omagh cell site matrix comprised TRS1, evidence of cell site identifications, location coverages and antenna orientation of relevant masts and the international mobile subscriber's identity number ("IMSI"). This is a unique identification number programmed into the SIM card of each mobile phone.

[14] Raymond Greer of Vodafone gave evidence. The trial judge found that he established a clear documented and verifiable chain of evidence in relation to TRS1.

[15] The judge in paragraphs [27]-[34] traced the way in which the mobile phone networks operate through masts known as cell sites acting as transmitters and receivers. A mobile phone scans the signals to seek the best quality signal. Mobile networks identify phones by the IMSI programmed into the Sim cards in each mobile phone. Each call creates a cell data record, the toll ticket, which records the date and time of the start and end of a call so as to identify the cost. The data also records information about the cell site identification and antenna orientation of the cell site through which the call was directed. To interpret call 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 on a map. Cell site coverage distances depends on a number of factors coverage is over a wider area in rural areas compared to urbanised areas. If, during the course of calls, the mobile phone moves location (eg where the cell is overburdened with other callers) it may transfer from one mast to another.

[16] The four relevant phones were identified thus:

(a) Phone 585, was an Eircell contract phone, being a Nokia phone, capable of roaming, registered to Murphy. This phone was found in his house at Ravensdale during a search by the Garda in February 1999. Murphy admitted that he owned it. A Motorola phone belonging to his wife Ann Murphy was also found.

(b) Phone 980 was a BT Cellnet phone capable of roaming and was proved to be registered in the name of the father-in-law of Patrick Terence Morgan. Morgan was shown by the relevant notification to be the principle user. He was employed by Murphy at the time of the bomb as a foreman in Murphy's construction business.

(c) Phone 259 was a ready-to-go phone attributable to a man identified as DSB who admitted ownership to the Gardai. The number was recorded in a telephone book seized from EM a man in Dublin. DSB had convictions in 2004 for possession of explosives with intent to endanger life.

(d) Phone 430 belonging to Oliver Trainor, since deceased.

[17] The records of calls from these phones were set out in LKP5 drawn up by LP for 15 August 1998 the date of the Omagh bomb, for 30 April 1998 (the date of the bomb in Lisburn) and 1 August 1998 (the date of a bomb in Banbridge). Mr Telford produced a diagrammatic map (PD1). It set out a Schedule of Agreed Facts. Red text showed outgoing and blue text incoming calls in relation to Omagh in respect of phones 585 and 980 on 15 August. The trial judge sets out the relevant calls, times and phones at paragraphs [67] and [68] of his judgment and we do not repeat them here. PD1 also showed the phone booths from which the warning calls came. Calls at 1.57pm and 2.19pm were handled by Sector 1 at Pigeon Top mast and by Sectors 2 and 3 antennae at the cell site in Omagh.

[18] The judge discounted as too remote from the key issues other telephone evidence set out in paragraphs [69] and [70] of his judgment.

The judgment's assessment of the telephone traffic

[19] The judge concluded that:

(a) It was highly likely that the Omagh bomb involved the use of cars and mobile phones and that mobile phones were used to enable the warning calls to be made.

(b) The evidence established that the 585 phone was at Castleblaney at 12.41pm, Emyvale at 1.13pm, Aughnacloy at 1.29pm and Omagh at 1.57pm. 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 one and

the vicinity of Omagh for the fourth. 980 then used the Bridge Street cell at 2.09pm to phone 585 which was received using Pigeon Top. This indicated a direction of travel for the 585 phone from Castleblaney to Omagh and then away. Castleblaney was not far from Carrickmacross which was not far from the location from which the bomb car was stolen. The 980 phone in contact with 585 was obviously travelling in the same direction at that time. 980 during that time was also in contact with 259 registered to DSB a convicted terrorist. The timings of the calls were consistent with the bomb arriving in the centre of Omagh shortly after 2.00pm. This is consistent with the evidence of witnesses at the scene. Thereafter their return to the Republic is plotted by the subsequent calls.

(c) The phones travelled in the same direction. Both roamed into the Vodafone UK sites in Northern Ireland from the Republic. The coincidental timings of the calls of the two phones with the events in Omagh was so striking as to compel in the judge's mind a belief that they had been involved in the bombing run. The phone movements demanded an explanation set in the context of the Omagh bombing.

(d) The directional flow of the phone calls was too coincidental with an arrival at Omagh to be overlooked. The users stayed a short time before setting off back to the Republic at a time coincidental with the material time for the bombing. The most likely and obvious route taken by the vehicles used for whoever was involved in planting the bomb was between Castleblaney and Omagh and back and would have been along the A5 road rather than some illogical corkscrew route. The cell sites identified were close to that road. The cell site analysis indicated movement in and out of Omagh town. Common sense demanded an explanation.

(e) The compelling circumstantial evidence that the uses of the phones played a role in the bombing, absent some explanation, led to the conclusion that those who knowingly provided or used the phones in the circumstances played a central role in assisting the bombing and were thus joint tort feasors.

The Judge's treatment of the Murphy interviews

[20] Murphy was interviewed at Monaghan Garda station on 21 February and 22 February 1999. Interviews with the Gardai other than Garda King and Garda Reedy were discounted in an earlier criminal trial. The trial judge took account only of what was said by Murphy on 21 and 22 February to Garda Officers. Murphy was asked to account for his movements from 10.00pm on 12 August 1998 to 10.00pm on 15 August 1998. He alleged that he was at home on 12 August and that on 13 August he was engaged in his building business meeting two of his foremen John McCoy and Patrick Morgan. He said that on 14 August he spoke to people on a building site in Dundalk and then went to Dublin and returned to the Emerald Bar

in Dundalk between 8.00 and 9.00pm. On 15 August he said he and his 12 year old son collected a quad bike and drove out into the mountains. He went to the Emerald Bar between 1.00 and 2.00pm and claimed that he was there until closing time. The only time he had been in County Tyrone was 30 years previously.

[21] Murphy said that his mobile 585 should have been at home on 15 August 1998 and that he did not give it to anyone else that day. He recalled no call from his mobile or landline that day. He was adamant he did not lend the phone to anyone on 15 August. The only time he would have lent the phone to anyone would have been on site and he would have been present when calls were made. To his knowledge he did not receive or transmit calls on his mobile phone 585 to Terence Morgan or Oliver Trainor. He could give no rational explanation why the phone records showed communication between phone 585 and phone 980 whose user was Terence Morgan, one of his foremen. He asserted that he had never been in Omagh and could give no explanation why calls were made to associates of his.

[22] The trial judge rejected as implausible the possibility that, unknown to Murphy, his phone was first taken from his home and then returned at a later time by an unknown person or persons. His phone bill showed roaming charges for 585 within a few weeks of 15 August 1998 at €1 per minute. Coincidence would have been stretched further because the person secretly removing and returning the phone had made calls to employees of Murphy, Oliver Trainor, DSD and to phone 980.

[23] Murphy provided no rational explanation as to why the calls were made from phone 585 on 15 August 1998. The judge could not understand how, when interviewed about the major bombings in Northern Ireland, he would not identify the person who borrowed the phone and for what purpose.

[24] The trial judge concluded that Murphy told lies to the Gardai and that he hid behind a veil of denial. He reminded himself of the approach set out in criminal cases in R v Lucas [1991] 2 All ER 1008 and that people sometimes lie out of shame or out of a wish to conceal disgraceful behaviour or to protect members of their family. He considered that there was no evidential basis to suggest that he was lying to protect members of his family. The trial judge concluded that Murphy's answers to the Gardai were deliberate lies and that he did not lie for an innocent reason. We consider that the judge was fully justified in so concluding.

[25] The trial judge found that these pieces of evidence establish what he considered to be a prima facie case against Murphy. He considered that he could assign some additional modest weight to the presence of the 585 phone at the Banbridge bombing as similar fact evidence. We will refer later to the telephone evidence relating to Lisburn and Banbridge. For reasons set out later we consider the trial judge was correct in finding a prima facie case.

Evidence in relation to Daly

[26] Evidence was adduced from Denis O'Connor which the plaintiffs/respondents alleged established that it was Daly who used the 585 on the day of the Omagh bomb and clearly connected him to the bombing. The evidence of Denis O'Connor was given before District Judge Gibbons ("the District Judge") in Dublin on 28 May 2001 under Council Regulation (EC) No 1206-2001 of 28 May 2001 ("the relevant European Regulation"). O'Connor in the course of his evidence said that he was the owner of phone 371, a point established also by other evidence. He averred that he received a telephone call from Seamus Healey whom he met at the Red Cow Roundabout saying "I first met him at the Red Cow, the hotel at the Red Cow after that it was at banks". His evidence was to the effect that he was cooperating with this man in relation to a tax scam by use of a C2 payment card. He met this man every Friday after the first meeting 5 times and on 7 or 8 occasions at the bank. O'Connor averred that he received a call from this man whose voice he recognised on his mobile phone 371 shortly after 3.30pm on 15 August 1998. O'Connor was cross-examined very briefly by Ms Higgins who elicited a confirmation that the C2 certificate was being used to defraud the Income Commissioners.

[27] Detective Sgt Sean Grennan ("Mr Grennan"), a Garda Officer gave evidence that on 23 February 1999 he met Garda Whelan who gave him photographs of a person whom he knew to be Seamus Daly born on 16 September 1970 of Cullaville, Co Monaghan. Mr Grennan returned to Carrickmacross Garda Station with the photos. He compiled a photograph album of 12 photos placing as number 8 the photograph of the person he knew to be Seamus Daly. When Denis O'Connor was interviewed he identified picture number 8 as being the man he met in the Red Cow through Mr Colman.

[28] Mr Jim Faughan an employee of Eircell, team leader in the Accounts Department and thereafter team leader and in the Fraud and Security Section, produced the bill records of phone 585. The Eircell billing system recorded a call at 3.30 pm on 15 August 1998 passing between phone 585 and phone 371.

[29] The trial judge was satisfied that O'Connor met the man whom he understood to be Mr Healey but whom he identified as Daly in the photograph. He considered that this was a recognition case rather than an identification case.

[30] Evidence satisfied the judge that phone 585 made a call that day at 5.23pm to the Daly family home. This served to underline the judge's conclusion that it was Daly who made the call to O'Connor. The judge also considered that the evidence of frequent communication between two phones belonging to Daly (213 which was registered to Daly and 076 which Daly admitted he owned) and O'Connor's phone 371 underlined the fact that O'Connor would not have had difficulty in recognising Daly's voice.

[31] Daly was interviewed by the Gardai on a number of occasions. On 27 May 1999 he denied that he was ever in Banbridge between 31 July 1998 and 1 August 1998. He admitted knowing Murphy. On 22 September 1998 he was offered an opportunity to account for his movements between 9.00pm on 12 August and 15 August 1998. He gave a detailed account that he had been at Cullaville in the morning and early afternoon returning home about 3.00pm and being at home when he heard of the Omagh bomb. The trial judge concluded that Daly was lying to Gardai about his movements on the day of the Omagh bombing.

[32] Evidence established that Daly was convicted on a plea of guilty on 26 February 2009 of membership of a terrorist organisation Óglaigh na hÉireann on 4 November 2000 some 2 years after the Omagh bomb. While the conviction was not admissible as evidence in view of the rule in Hollington v Hewthorne [1943] KB 587 his plea of guilty was considered by the judge to be an admission of membership. The judge considered this evidence provided some additional weight to the plaintiffs' case against Daly. In his view the passage of time was not sufficiently long to dilute the weight of the evidence to an insignificant degree.

The alleged similar fact evidence in respect of the Lisburn and Banbridge bombs

[33] It was the plaintiffs' case that evidential analysis of phone calls and related data relevant to two other bombs, one at Banbridge in the afternoon of 1 August 1998 and one at Lisburn on the morning of 30 April 1998, demonstrated facts similar to those of the Omagh bombing. In the case of the Banbridge bomb the use of Murphy's phone 585 and in the Lisburn case the use of Daly's 213 phone was similar to the use of the 585/980 phones in the Omagh bombing. The judge considered that the coincidence of similar phones and of similar phone participation had an evidential force beyond the facts of the Omagh case.

[34] LKP5 showed calls from 585 on the day of the Banbridge bombing. Billing records as evidenced by Mr Faughan and evidence of calls and cell sites set out by Mr Dowling showed that 585 was engaged in 19 calls until 2.48pm. Between 1.05pm and 2.48pm the calls went through cell sites in the Dundalk area. Two of the calls were to the Daly family home. It could be inferred that 585 was in the Republic until at least 2.48pm. Billing records showed that between 3.25pm and 4.18pm there were 8 calls in Northern Ireland. At 3.25pm phone 585 received a call in the Banbridge cell site area thus showing that the phone had travelled into the Banbridge area. Two further calls were received by 585 through the same Banbridge cell site. At 3.48pm phone 585 received a call when it was in the Millennium mast area at Loughbrickland south of Banbridge. At 3.50pm it received another call through the same cell site. By 4.18pm it had moved further south receiving a call through the Ashgrove Road site in Newry. Warning calls were received at 4.03, 4.05, 4.07pm from public phone boxes at Armagh Road at 4.02pm and 4.05pm from a public call box at Parkview, Newry and at 4.15pm from a public call box at O'Reilly's Park,

Newry. The last outgoing call from 585 was at 4.48pm shortly after the bomb had gone off and that went through a cell site in Dundalk.

[35] In relation to events in Lisburn on 30 April 1998 Daly's phone 213 received a call from phone 689, registered to Murphy's wife. The latter phone was in the Republic of Ireland. The call to 213 went through to a cell site in Dromore, County Down. At 9.23am phone 213 made a call through a cell site at Linenhall Street, Lisburn. It received a call at 10.02am through the same cell site. At 10.30am phone 213 received a call through the Loughbrickland site. Between 10.30am and 11.00am warning calls were made using the same recognised code word as that used in the Omagh incident at 10.38am, 10.42am, 10.43am, between 10.30am and 10.40am, 10.49am, 10.57am and 11.09am. LKP5 records a call at 11.57am from 213 when it was back in the Republic.

[36] In order to prove the factual evidence surrounding the use of telephones in Banbridge and Lisburn the plaintiffs/respondents relied on document LKP5 prepared by LP which referred to Omagh, Banbridge and Lisburn. The judge's assessment can be summarised thus:

(a) The provenance of LKP5 and its authenticity had been sufficiently established to enable the trial judge to accept the existence of the individual calls made to and from certain phones using the masts identified.

(b) A discernible pattern was established in relation to the relevant phones.

(c) The plaintiffs/respondents had given notice to the defendants of their intention to rely on the hearsay evidence contained in LKP5.

(d) The persons drawing up the document and inserting the information taken from the reliable source of the phone company's records had no motive to misrepresent matters.

(e) The court was entitled to place some weight on the LKP5 documentation. In contradistinction to Omagh the evidence was somewhat diluted by virtue of the omission of strict proofs.

(f) While phone masts can cover an area of up to 34km and conditions can cause a phone to move from one mast to another the general direction of movement and the timing of the 585 and 213 calls were sufficiently compelling to dilute the effect of the theoretical possibility that the footprint of service of the masts was other than that suggested by the plaintiffs.

(g) In any event the trial judge would have found both defendants Murphy and Daly liable to the plaintiffs on the basis of the other evidence.

[37] The trial judge concluded that the integrity and authenticity of LKP5 was sufficient to persuade him that the evidence was likely to be reasonably conclusive of the collateral facts contained therein. The similarities between the circumstances of the three bombings were such as to be potentially probative of involvement by some people in the Omagh bombing. The timing and sequencing of movements in relation to the 585 calls in the Republic of Ireland, in Northern Ireland and back in the Republic were so contiguous to the warnings and the bombings that it was probative of involvement of the phones in the latter bombing. The similarity demanded an explanation from the owners of phone 585 (Murphy) and 213 (Daly) as to how it came about that those phones were used in the way in which they apparently were according to the billing records. The coincidence of the unexplained use of the phones added weight to the cases against Murphy and Daly.

[38] In the case of Murphy on the basis of the evidence of the presence of the phone 585 in Omagh on the day of the bombing and of the evidence of his interviews with Garda officers the trial judge concluded that there was evidence on which taken at its height a finding in favour of the plaintiffs could be made. The trial judge properly reminded himself that at the direction stage the evidence had to be viewed in the light most favourable to the plaintiff (McIlveen v Charlesworth Developments [1973] NI 216 per Lowry LCJ at 219 lines 34-36). The issue was whether there was 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 McNeill v Department of the Environment [1986] NI 290 at 292A).

[39] In the case of Daly on the basis of O'Connor's evidence, his interviews and his conviction there was in the judge's view an evidential case which taken at its height constituted a prima facie case.

Inferences from silence

[40] Neither Murphy nor Daly gave evidence. Daly provided no explanation for giving no evidence. He adduced no evidence and he had not put in cross-examination to any witness any particular defence case. Mr Fee on behalf of Mr Murphy contended that Murphy's decision not to give any evidence could be credibly explained by reason of the fact that he had justifiably no confidence in the justice system because of the way he had been dealt with in his previous involvement in the Irish justice system which had resulted in his imprisonment for conspiracy linked to the Omagh bomb, a conviction which was set aside leading to a retrial which resulted in his acquittal in 2008. He also relied on the fact that although the plaintiffs had initially sought to rely on an alleged terrorist conviction in respect of Ann Murphy which they wrongly attributed to Murphy's wife it emerged towards the end of the trial that the conviction related to a different person altogether. Murphy through counsel stated that this was another example of the authorities trying to wrongly place him "in the frame" for the Omagh bomb.

Murphy gave no evidence, called no witnesses and at no stage put to any witness any particular defence case.

[41] The trial judge rejected Murphy's alleged reasons for not giving evidence which he considered bordered on the risible. He drew adverse inferences against Murphy and Daly. The failure to give evidence had probative value in his view. It served to strengthen the prima facie case against each of them. Accordingly, he found the plaintiffs' case against each proved. He was satisfied that each was involved in assisting in the preparation, planting and detonation of the bomb in circumstances where those involved were acting as joint tortfeasors.

The judge's conclusions on Murphy and Daly's cases

[42] The judge's reasons in relation to Murphy can be summarised thus:

(a) There was a discernible pattern and structure in the use of phones 585 and 980 in the Omagh bombing. The direction of phone movements inferred vehicle movements from the Republic into Vodafone UK space. The movement and timing of the calls led to the inference that the sequence and events was entirely consistent with a bomb car and probably a scout car participating in the bombing.

(b) There was a reasonable inference that the bombing was carried out by people setting a pattern of telephone communication consistent with the phone calls of 585 and 980. Those who provided and used the mobile phones played a central role in the tort of trespass to the person. Anyone who knowingly lent the phone for use by those involved played a vital role in the joint enterprise.

(c) The pattern of movement of phone 585 called for an explanation from Murphy but none was provided. Murphy denied lending the phone to anyone. He could put forward no rational explanation as to how the phone came to be used without his knowledge.

(d) The suggestion that the phone was mysteriously taken and mysteriously returned to his home without his knowledge was fanciful. His explanation to Gardai was implausible and amounted to lies for which no innocent explanation could be found.

(e) The absence of any evidence by or on behalf of Murphy strengthened the overall case.

(f) The coincidence of similar phone use and movements in relation to Banbridge provided additional supporting probative evidence although the trial judge made it clear that he would have found liability even without the modest evidential weight in respect of Banbridge.

[43] In relation to Daly the trial judge's conclusions can be summarised thus:

(a) The trial judge was satisfied Daly spoke to O'Connor at 3.30pm on 15 August on the 585 phone which was used in connection with the Omagh bombing. A clear recognition of his voice by O'Connor based on previous knowledge of him and previous telephone calls and his identification to Mr Grennan of the identity of the person he called Healey satisfied the trial judge that it was Daly who made the call.

(b) Daly admitted dealing with Murphy over a number of years. This highlighted the coincidence of him being in possession of Murphy's phone 585.

(c) His plea of guilty to a charge of membership of the IRA was relevant as to propensity and was of probative value in determining liability.

(d) Daly provided no explanation of his possession of 585 on the day of the bombing though the circumstances cried out for an explanation.

(e) His failure to give evidence led to the court drawing adverse inferences that he was in possession of evidence within his own knowledge which he could have been expected to have provided to the court.

(f) The coincidence of similar unexplained use of his phone 213 in relation to Lisburn in similar circumstances was of further probative value though the trial judge again made clear that he would have considered the plaintiffs' case proved apart from that evidence.

Murphy's appeal

[44] Mr Fee submitted:

(a) The plaintiffs had produced no evidence, hearsay or otherwise, that the appellant detonated the bomb at Omagh. The Garda interviews had to be assessed and approached with care and viewed in their totality. They were not a full record being a short handwritten note of the interviewing officers. Subsequent interviews had been found to be and were accepted as unreliable.

(b) The telephone evidence in LKP5 served no purpose other than to put in diagrammatic form manually entered data relating to phone usage and locations. There was no evidence that phone 585 was used in the bombing in Banbridge. An analysis of the six numbers that 585 connected with did not provide any links to persons accused of or convicted in respect of terrorist activities. There was no logical basis to conclude that phone 585 was used for

a bomb run in relation to Banbridge. The service footprint of Pigeon Top call site was 30km from the Omagh town centre and the town centre mast had a range of 5km. The 585 phone could have been some distance from Omagh even when using the town centre mast. There was no evidence connecting the 585 phone to the phone boxes used for the warnings. There was no evidence linking the appellant to phone 980. LP had looked at 5 million calls. Only the phones identified in this case were examined and it is not known whether there were other phones following a similar pattern of timing and movement as phone 585.

(c) It was incumbent on the plaintiffs/respondents to prove that Murphy knew the purpose for which it was alleged 585 phone was put. It had to be shown that Murphy had the intention of inflicting harm and applied force to the plaintiffs. The plaintiffs/respondents had disavowed any case that Murphy was with the phone on the day in question. There could be a number of reasons why such a phone would have been used (business, legitimate or otherwise, or social reasons).

(d) The trial judge was not entitled to find that Murphy had lied about his phone. There was no evidence to show that this account of his movements was wrong. What the court was being asked to do was fill in significant evidential gaps by supposition and conjecture. Particularly cogent evidence was required when significant and serious allegations were made. There was in fact no compelling evidence that either of the phones was associated with the Omagh bomb.

(e) Murphy's silence could be credibly explained. Even if the trial judge did not consider the reasons relied on for his silence to be entirely justified this could not turn a prima facie case (if was one established) into a strong or overwhelming case as the judge found.

(f) In relation to the use of the 585 phone in Banbridge the trial judge was wrong to find that case against Murphy was further strengthened by the unexplained use of the appellant's phone in Banbridge. The totality of the evidence adduced by the respondent was that the 585 phone made calls to and received calls from 8 numbers in total around the time of the Banbridge bomb. There was no further evidence connecting any of these people to terrorism. There was no evidence that any of the public phone boxes used for bomb warnings were ever in contact with the 585 phone. The mast in Banbridge covered an area of up to 34km. A slight movement or excess demand could cause a phone to move from one mast to another. This could result in inaccurate signal depiction of where the phone was actually located within the breadth of the footprint. There was no evidence of the specific service footprint of any of the Banbridge and Newry masts unlike in the case of Omagh. At its height the plaintiffs/respondents' case merely suggested that the 585 phone was in

the South Down area and made connections with various people against whom there was no evidence of any wrongdoing.

Conclusions in relation to Murphy's appeal

[45] Both civil and criminal cases can depend on circumstantial evidence. In the context of a civil law tort claim circumstantial evidence involves the plaintiff relying upon evidence of various circumstances relating to the claim which taken together the plaintiff claims establish liability on the part of the defendant because the proper conclusion to be drawn on a balance of probabilities is that the defendant is liable. In the criminal law context the standard direction to the jury includes a direction to the jury that it not necessary that each fact upon which the prosecution relies taken individually proves that the defendant is guilty. The jury must decide whether all of the evidence has proved the case. Pollock CB in the well-known case of R v Exall [1866] 4 F&F used the well-known rope analogy:

> "It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but it is not so, for then if any one link breaks, the chain would fall. It is more like the case of a rope comprised of several cords. One strand of the cord might be insufficient to sustain the weight but three strands together may be quite of sufficient strength. Thus it may be in circumstantial evidence there may be a combination of circumstances no one of which would raise a reasonable conviction or more than a mere suspicion, but the three taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit of."

The standard criminal law direction to juries in criminal cases goes on to point out that circumstantial evidence must be examined with care for a number of reasons. Such evidence can be fabricated. It must be seen whether or not there exists one or more circumstances which are not merely neutral in character but are inconsistent with any other conclusion than that the defendant is guilty. This is particularly important because of the tendency of the human mind to look for and often to slightly distort facts in order to establish a proposition, whereas a single circumstance which is inconsistent with the defendant's guilt is more important than all the others because it destroys the conclusion of guilt on the part of the defendant. The principles there stated apply equally in the context of a civil law claim subject to the modification that whereas the prosecution must prove its case beyond reasonable doubt plaintiffs in a tort claim need only prove the case on a balance of probabilities albeit bearing in mind that in a case such as the present the evidence required must be sufficiently cogent to dispel the inherent unlikelihood of individuals involving themselves in a serious terrorist outrage of this kind.

[46] There are two stages at which the trial judge is alleged to have fallen into error. Firstly, it is contended that the plaintiffs had failed to establish a case to answer. Secondly, even if the judge was right to refuse a direction, it is contended that the evidence taken as a whole falls short of establishing the cogency of evidence appropriate to enable the court to conclude that the appellants were knowing participants in the bombing outrage.

[47] As Lowry LCJ pointed out in McIlveen v Charlesworth Developments [1972] NI 216 it is trite law that for the purpose of judging whether a case is fit to be left to the jury the evidence must be viewed in the light most favourable to the plaintiff.

[48] The English authorities deprecate the practice of entertaining submissions of no case without putting the defendant to his election. In Alexander v Rayson [1936] 1 KB 169 the Court of Appeal said that this was "not only an irregular but most inconvenient procedure." In Lowry v Rogan [1942] 1 KB 152 Lord Greene MR said putting the defendant to his election "must be regarded as the proper practice to follow." Keene LJ in Benhams Ltd v Kythira Investments Ltd [2003] EWCA Civ 1794 said that "only in the most exceptional circumstances should a judge entertain a submission to dismiss an action at the close of the claimant's evidence without putting the defendant to his election". In Boyce v Wyatt Engineering [2001] EWCA Civ 692 Mance LJ pointed out a practical reason why a party should be put to his election. If the application is acceded to and the claim is dismissed there may be a successful appeal against the judge's view on the merits and the matter may have to be remitted for a complete retrial usually before a different judge. That may waste more money than might have been saved by hearing the defendant's evidence or hearing that he is not calling evidence. In Magill v Ulster Independent Clinic [2009] NICA 81 Gillen J reviewed the Northern Ireland authorities and concluded in that case he should put the defendants to their election. However, no criticism was made by the plaintiffs/respondents of the trial judge's decision not to put the appellants to their election in this case which was of its nature an exceptional case. The course which he took was in ease of the appellants who thus can have no complaint on the course adopted by the trial judge.

[49] At direction stage the judge should not judge the merits of the plaintiffs' case on the balance of probabilities but should ask himself whether the plaintiff has advanced a prima facie case to suggest the inference for which the plaintiff contends sufficient to call for an explanation from the defendant. Even if it is a weak case, unlikely to succeed unless assisted rather than contradicted by the defendants' evidence or by adverse inferences being drawn from the defendants calling no evidence it should not be dismissed on a no case submission (see Brooke LJ in Graham v Chorley PC 206 PIQR 241). Simon-Brown LJ in Benhams Ltd v Kythira Investments Ltd [2003] EWCA Civ 1794 stated:

> "Have the claimants advanced a prima facie case, a case to answer, a scintilla of evidence, to support the inference for which they contend sufficient to call for an explanation from the defendants? That it may be a weak case and unlikely to succeed unless assisted rather than contradicted by the defendants' evidence or by adverse inferences to be drawn from the defendants' not calling evidence would not allow it to be dismissed on a no case submission."

[50] In rejecting the submission of no case on behalf of the appellants the trial judge correctly pointed out that a different test has to be applied than if the court was deciding the matter finally. There is nothing to suggest that the judge misdirected himself in deciding that there was a case to answer and applying the test stated by Simon Brown LJ and Brooke LJ there was clearly a sufficient case to call for an answer. At the close of the plaintiffs' case the plaintiffs had comfortably made out a prima facie case of the kind contemplated by the appropriate test.

[51] Once it was clear that the appellants were not going to give or call any evidence the evidence in the case was complete. The absence of any evidence from the appellants and the absence of any challenge to any of the witnesses by way of any particular defence case provided material from which adverse inferences against the appellants could be drawn. In the judgment in the first appeal at paragraphs [53] and [54] we set out the proper approach to inferences from the silence of a party. Depending on the circumstances, a prima facie case may become a strong or even overwhelming case. A failure to give evidence, if credibly explained even if not entirely justified, may reduce or nullify the effect of his silence in favour of the other party. At paragraph [54] we stated:

> "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 (eg 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 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 plaintiff's 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 on the scales. The present case is not one in which reliance can be put on such an argument. The defendant clearly had access

to material facts and declined to put any evidence before the court."

[52] Murphy put forward reasons which the trial judge entirely justifiably regarded as specious and wholly unconvincing. In Re D [2008] UKHL at [27]-[28] Lord Carswell pointed out that in civil proceedings the seriousness of an allegation and the seriousness of the consequence for a defendant will be factors underlining the intrinsic unlikelihood of the party doing the disputed act. When it comes to drawing inferences from a refusal to answer a prima facie case the court must ask itself the question: How likely would it be that an innocent defendant, faced with a case to answer, would provide no answer whatsoever to that prima facie case and the inferences that might reasonably be drawn from the evidence against him? In a case where the charges are as grave and the suspicions are as well established as in this case the less unlikely it would be that the defendant would provide no answer if he has an answer and was innocent. The inferences from silence will be all the greater. While we deal with Daly's appeal later we note here that Daly provided no justification or explanation of his refusal to give evidence to contradict any of the evidence adduced against him in the plaintiffs' case. What we have said in relation to the drawing of inferences from silence applies equally in Daly's case.

[53] We have scrutinised with care Gillen J's chain of reasoning leading to his conclusion in Murphy's case that the plaintiffs had discharged the onus of proof to the proper standard. We detect no error of approach. This was a circumstantial case as the trial judge fully appreciated. The individual strands could not be seen in isolation one from the other. While it is true that the evidence called on behalf of the plaintiffs/respondents did not subject to scrutiny every car and phone movement in the Omagh area on the day in question this does not result in the plaintiffs/respondents' case being undermined, as Mr Fee argued. The presence of the phone in the area at precisely the relevant times; the route of movement of the phone; the wholly unconvincing lack of any explanation as to how the phone came to be where it was; the effective presentation of an implausible case that the phone had simply disappeared from his house to an unknown person for an unknown purpose and then mysteriously reappeared in the house; the fact that such an implausible case was made out which led to the inference that Murphy was lying and doing so for no good reason; the fact that he led no evidence and suggested no case that he was covering up for someone else close to him; the fact that he must have had evidence to give about the matter and refused to do so and then put forward specious grounds to justify his refusal to explain the evidence available to him, all together produce a sufficiently strong case to satisfy the onus of proof, applying the heightened scrutiny test applicable in the light of the grave nature of the plaintiffs' charge. The trial judge was satisfied that even without the Banbridge evidence he would have reached that conclusion. Murphy has failed to convince us that the judge was wrong in so concluding.

[54] It is not strictly necessary to come to any concluded view on the question whether the Banbridge evidence added any weight to the plaintiffs' case. For our own part, we consider that the evidence in relation to Banbridge does provide evidence of a sufficiently suspicious coincidence to call for an explanation as to how phone 585 came to be in the area of the Banbridge bomb at times which chimed with the bomb explosion and the warning calls. As R v Exall demonstrates, circumstances giving rise to mere suspicion can play into the combination of circumstances which have to be taken into account and which, taken together, create a conclusion in favour of liability being established.

Daly's Appeal

[55] Ms Higgins on behalf of Daly relied on a number of grounds of appeal the focus of her submissions being:

(a) that if the judge had properly applied the standard of proof in such a grave case he would have been bound to reject the evidence of Denis O'Connor;

(b) that the evidence could not establish the tort of battery (for reasons set out above we have rejected this ground of appeal);

(c) Daly had not had a fair hearing because the judge's thinking had been tainted by the previous judgments in the case and the evidence adduced in the earlier trial; and

(d) the trial judge had not properly understood and applied the provisions of the relevant European Regulation.

Counsel on a wider front argued that the trial judge's conclusions of fact were unsustainable.

The O'Connor Evidence

[56] Ms Higgins strongly contended that there was no basis for the trial judge's conclusion that Denis O'Connor's evidence read in the light of Mr Grennan's evidence of photographic recognition established that the 585 phone call received by Denis O'Connor at 3.30pm on 15 August 1998 came from Daly. Put simply, her argument was that O'Connor's evidence established that he was in communication with a man called Healey and the plaintiffs had not shown otherwise. O'Connor's evidence did not implicate Daly. Furthermore, he gave evidence of meeting Healey "at the Red Cow roundabout" and Red Cow Hotel and that the word "at" could not be interpreted as the same as "in", the preposition used by O'Connor when he spoke to Mr Grennan. No photographic evidence had been put to Denis O'Connor. The hearsay evidence of Mr Grennan fell short of being acceptable evidence of identification by O'Connor of Daly as the man who called himself Healey. As the

evidence of neither O'Connor nor Mr Grennan implicated Daly, there was no need to cross-examine them. Accordingly, the judge was in error in drawing adverse conclusions arising from the absence of any cross-examination of Grennan or O'Connor on the issue of who the person was that O'Connor met at the Red Cow. No issues of credibility arose because Denis O'Connor's evidence was in fact uncontentious since he did not implicate Daly.

[57] Ms Higgins' arguments on this aspect of Daly's appeal must be rejected. They are entirely unrealistic and fail to engage with the strength of the evidence of Mr O'Connor and Mr Grennan when put together, as they must be. While it is correct that Mr O'Connor named the person he met as Seamus Healey the reality is that one person only knows the nominal identity of another person by the name that other person uses or has ascribed to him by others in society. A person is free to use whatever name he chooses to identify himself to others. The true questions in this case were, firstly, whether the person whom the witness understood to call himself Seamus Healey was in fact the person known to the Gardai as Seamus Daly and, secondly, whether the Seamus Daly in the photograph which O'Connor identified as the man he knew as Seamus Healey was the defendant. Mr Grennan's evidence was to the effect that Denis O'Connor said the person in the photo was the person he met in the Red Cow. That was hearsay evidence but admitted in evidence by the District Judge in the Dublin hearing. We will consider later counsel's criticism of the decisions of the District Judge. Taking Mr Grennan's evidence, unchallenged in cross-examination, with Denis O'Connor's evidence, also unchallenged in cross-examination, there was clear evidence that Daly and Healey were the same person. Ms Higgins' attempt to build a point on the distinction between "at" and "in" was rightly rejected by the trial judge as a point of no substance.

[58] Unless Mr O'Connor's evidence falls to be rejected as not properly before the court the trial judge was fully entitled to conclude that it established that there had been communication between Daly and O'Connor at a relevant time which clearly placed Daly in the vicinity of Omagh close to the relevant events in place and time in circumstances which Daly refused to explain. The evidence of frequent previous telephone communication between them reinforced the strength of the evidence of the likely ability of O'Connor to recognise the voice of Daly on the telephone call.

[59] Ms Higgins faintly argued point that it was not shown that her client was one and the same Seamus Daly as the Daly shown in the photograph referred to by Mr Grennan. It is to be noted that Seamus Daly, the appellant, accepted in his interviews with the Gardai that he lived at Cullaville. Ms Higgins did not suggest to Mr Grennan that her client was born on a different date to that referred to as the date of birth of the Mr Daly in the photograph. The absence of any challenge on the point leads to a clear inference that the Seamus Daly in the photograph referred to by Mr Grennan was none other than the Seamus Daly who is the appellant in the present proceedings.

The issues relating to the relevant European Regulations

[60] Ms Higgins relied on a number of very technical points to support her argument that the O'Connor evidence was in fact inadmissible, should not have gone before the trial judge at the trial and should accordingly have been left out of account. If her points have substance then the O'Connor evidence, which is a central plank in the plaintiffs' case, would have to be excluded and the plaintiffs would indeed have failed to prove their case.

[61] Counsel contended that the request to the Dublin court to take evidence was fatally flawed because the address of Denis O'Connor was not provided in the request document. She argued that it was a mandatory requirement to state the address of the proposed witness and the failure to do so deprived the Dublin court of jurisdiction to take evidence pursuant to the request. Secondly, the Dublin court was bound to act in accordance with Irish law in executing the request. Only a witness summons issued strictly in accordance with Order 44 of the District Court Rules 1997 could satisfy the "in accordance with law" requirement in the relevant European Regulation. Thirdly, counsel contended that Articles 10-16 of the Regulation did not empower the Irish court to entertain an adversarial process involving cross-examination. The court could only examine witnesses by keeping strictly to the specified questions raised by the requesting court. Fourthly, Article 16 of the Regulation in requiring the Irish court to send "the documents establishing the execution of the request" precluded the Irish court from sending a CD recording of the evidence as heard in the District Court. As a result, Ms Higgins contended, the trial judge had no jurisdiction to receive anything other than a documented record of the evidence admitted in Dublin. Fifthly, the Dublin court had, under Irish law, no jurisdiction to hear or accept the hearsay evidence of Mr Grennan and the trial judge was bound to disregard evidence which should have been excluded in the Irish hearing.

The relevant European Regulation

[62] The Regulation falls to be interpreted and applied uniformly between Member States. This applies even if there is any divergence between the various language versions in the community text. The provisions in question must be interpreted by reference to the purpose and general scheme of the rules of which the relevant provision forms part (see EKW v Wein and Co [2000] ECR 1-1157 paragraph 42 and Borgman [2004] ECR 1-3219 paragraph 25). Regard must be had to the recitals of the Regulation which are very relevant to ascertaining the purposes and intent of the legislation.

[63] The Regulation contains the following material recitals.

(a) Recital 7 states:

"As it is often essential for a decision in a civil or commercial matter pending before a court in a Member State to take evidence in another Member State, the Community's activity cannot be limited to the field of transmission of judicial and extra-judicial documents in civil or commercial matters which falls within the scope of Council Regulation (EC) No: 1348/2000 of 29 May 2000 on the serving in the Member States of judicial and extra-judicial documents in civil or commercial matters. It is therefore necessary to continue the improvement of co-operation between members of Member States in the field of taking of evidence."

(b) Recital 8 states:

"The efficiency of judicial procedures in civil or commercial matters requires the transmission and execution of requests for the performance of taking of evidence is to be made directly and by the most rapid means possible between Member states."

(c) Recital 9 states:

"Speed in transmission of requests for the performance of taking of evidence warrants the use of all appropriate means provided that certain conditions as to legibility and reliability of the document received are observed …"

(d) Recital 12 states:

"The requested court should execute the request in accordance with the law of its Member State."

(e) Recital 13 states:

"The parties and, if any, their representatives, should be able to be present at the performance of the taking of evidence, if that is provided for by the law of the member state of the requesting court in order to be able to follow the proceedings in a comparable way as if evidence were taken in the Member State of the requesting court. They should also have the right to request to participate in order to have a more active

role in a performance of the taking of evidence. However, the conditions under which they may participate should be determined by the requested court in accordance with the law of its Member State.

(f) Recital 14 states:

> "The representatives of the requesting court should be able to be present at the performance of the taking of evidence, if that is compatible with the law of the Member State of the requesting court, in order to have an improved possibility of evaluation of evidence. They should also have the right to request to participate, under conditions laid down by the requested court in accordance with the law of its member state, in order to have a more active role in the performance of the taking of evidence."

[64] The Regulation contains the following relevant provisions:

(a) By Article 4(1) the request shall be made using Form A or where appropriate Form 1 in the Annex. It is to contain details therein set out. These include at paragraph (e) where the request is for the examination of a person "the name(s) and address(es) of the person(s) to be examined".

(b) By Article 8(1) it is provided that if a request cannot be executed because it does not contain all of the necessary information pursuant to Article 4 the requested court shall inform the requesting court thereof without delay and, at the latest, within 30 days of receipt of the request using a Form C in the Annex and shall request it to send the missing information, which should be indicated as precisely as possible.

(c) By Article 11(3) it is provided that:

> "If the participation of the parties and, if any, their representatives, is requested at the performance of the taking of evidence, the requested court shall determine, in accordance with Article 10, the conditions under which they may participate."

(d) Articles 12(1) and (2) provide:

> "(1) If it is compatible with the law of the Member State of the requesting court, representatives of the requesting court have the right to be

present in the performance of the taking of evidence by the requested court.

(2) For the purpose of this Article, the term "representative" shall include members of the judicial personnel designated by the requesting court, in accordance with the law of its Member State. The requesting court may also designate, in accordance with the law of its member state, any other persons, such as an expert."

(e) By Article 16 it is provided:

"The requested court shall send without delay to the requesting court the documents establishing the execution of the request and, where appropriate, return the documents received from the requesting court. The documents shall be accompanied by a confirmation of execution using Form H in the Annex."

[65] It is clear that it is for the requested court, in this instance the District Court in Ireland, to execute the request in accordance with Irish law. It was, thus, for the District Judge, applying Irish law, to determine the way in which the request from the Northern Ireland court should be executed. Procedural issues and questions as to the admissibility of evidence fell to be determined in accordance with Irish law. It was for the District Judge to rule on whether a witness was properly before the court, whether and how parties should participate, what questions were permissible, whether a representative of the Northern Ireland court should be permitted to attend and whether any piece of evidence was or was not admissible. It was not for the requesting court to consider the correctness of the District Judge's rulings. The Regulation confers on the requested court the duty to execute the request in accordance with its legal system. It would frustrate the manifest purpose of this European-wide regulation if requesting courts were to question and overrule legal decisions made in accordance with the legal system of the requested court. The principles of comity and respect for the legal system of other Member States having the function of deciding questions of law and practice applying in their jurisdiction require proper recognition to be given to the decisions made by the court of competent jurisdiction in other jurisdictions. It may be that under Irish law it would have been open to Daly to challenge any of the legal rulings made by the District Judge by appropriate proceedings in the Irish courts. Short of such a challenge the District Judge's rulings fell to be accepted by the Northern Ireland Court as properly made in accordance with Irish law. For this reason we must reject Daly's arguments as to the impropriety of the witness summons, the acceptance by the Irish court of

the testimony of Denis O'Connor notwithstanding the absence of an address in the request and the admissibility of the hearsay evidence given by Mr Grennan.

[66] Apart from the fact that District Judge's rulings on these issues must be accepted as correctly made under Irish law we see no substance in the proposition that the absence of an address in the request in relation to Denis O'Connor could have been fatal to the request nor do we see any weight in the proposition that there had been a breach of the District Court Rules in relation to the admissibility of the evidence of the witness having regard to the length of notice given on the witness summons. The Regulation falls to be interpreted in a broad and purposive way, the intent of the Regulation being to improve the efficiency of judicial procedures and to enable evidence to be gathered in other Member States in an efficient and effective way. Where a witness's address is not known at the time of the request and locating the address of that witness will require the assistance of other authorities within the Member State of the requested court, to exclude any jurisdiction from the requested court to hear the witness's evidence unless the address is identified at the time of the request would frustrate rather than further the intent of the Regulation. The approach put forward by Ms Higgins involves a narrow technical interpretation. Article 8 enables a requested court to seek further information "which should be indicated as precisely as possible". The specification of an address is designed to assist the process, not to present a hurdle to be crossed. If the witness's whereabouts can be ascertained at a later date it would serve no purpose to stop the process in its tracks because the requesting court fails to provide information which is not available at the time of the request. Nor do we see any substance in the point that any short service of a witness summons invalidates the process of taking the evidence. The purpose of a witness summons is to ensure a witness's attendance. It is not a procedural step which, if not strictly complied with deprives the court of jurisdiction when the witness in fact turns up. Under Northern Ireland law there is no support for such a proposition and there is no reason to suggest that Irish law would be any different.

[67] We must also reject Ms Higgins' suggestion that the Regulation excludes any mechanism for allowing a witness to be properly cross-examined on any evidence given before the requested court. Recital 13 clearly envisages a meaningful participatory role for the parties if they wish it. It was a matter for the Irish court to determine the manner of participation. The procedural rules laid down by the District Judge for the conduct of the hearing clearly permitted meaningful cross-examination. Since Daly clearly had the right to participate and thus to cross-examine, inferences arising from his decision not to do so could properly be drawn by the trial judge. Further, Recital 14 clearly envisages that the trial judge is fully entitled to attend to evaluate the evidence.

[68] We also reject as erroneous Ms Higgins' proposition that the trial judge was bound to reject Mr O'Connor's and Mr Grennan's evidence because the District Judge had sent, not a written document, but a CD of a recording of the evidence and

submissions in an non-documentary form. While it is true that Article 16 requires the requested court to send "the documents establishing the execution of the request" under domestic law an object carrying information such as a photograph, tape recording or computer disc is a document for the purposes of discovery of documents. In Huddleston and another v Central Risks Information Services Ltd [1987] 2 All ER 1035 Hoffman J had to consider whether the court in that case should permit a party before action to examine a study of the activities of anti-apartheid groups in Europe as "property" which may be the subject of pre-litigation inspection. If however the material fell to be considered as "a document" then pre-action discovery was not permissible. Hoffman J said:

> "It seems to me that a written instrument or any other object carrying information such as photograph, tape recording or computer disc can be both "property" for the purposes of Section 33(1) of the Supreme Court Act 1981 and a "document" for the purposes of Section 33(2). Whether for the purposes of a particular case it is the one or the other depends on the nature of the question which it is said may arise. In my judgment Parliament intended, whatever Marshall McLuhan might have said, to distinguish between the medium and the message. If the question will be concerned with the medium, the actual physical object which carries the information, the application is to inspect "property" within Section 33(1) (of the Supreme Court Act 1981). If the question will be concerned with the message, the information which the object conveys, the application is for discovery and can be granted before writ only in the limited classes of proceedings to which Section 33(2) applies."

In that case the court was satisfied that what mattered was the message rather than the medium. It was, thus, not an application for inspection of property but an application for discovery. While the German language text clearly refers to a written document ("Schriftstücke"), the French text uses the word "pièces" which, while normally meaning a document in a legal context appears to be wide enough to cover other material which under our law of discovery would fall to be treated as disclosable. Advocate General Jacobs in a paper dated 26 November 2003 succinctly summarised the position thus:

> "Because of the multi-lingual nature of community law, the ECJ may take an approach inspired by Article 33 of the Vienna Convention; if comparison of different language versions reveals differences, the

> interpretation should be chosen which best reconciles the text and the purpose. … Legislative drafting styles may be divided into "fuzzy" or "fussy". Common law countries tend towards a fussy or very detailed style. The aim is that a person cannot misunderstand the provisions. A "fuzzy" style is typically used in civil law countries where legislation is framed in general terms and courts are left a freer hand in interpreting it. … Against that background the ECJ's approach to interpretation is clearly not a threat to legal certainty while there may be occasional surprises, those who are familiar with the ECJ's approach can usually predict the results. It must be viewed against the danger of disintegration if community law were examined through different lenses, even if it were written in a single language. Linguistic discrepancies can rarely be resolved just by comparison of different versions. National courts would be better advised to apply the ECJ's approach to interpretation and seek an effective and appropriate solution having regard to the context and the purpose of the provision."

Giving the Regulation, read as a whole, a broad purposive interpretation there is no reason why Article 16 should be restrictively and narrowly construed. The Regulation envisages the use of communication technology at the performance of the taking of evidence (see Regulation 10(4)). Recital (8) envisages the execution of requests to be "by the most rapid means possible" between Member States. The evidence in Dublin having been recorded and the rulings on admissibility having been clearly and duly made the transmission of a recording of the evidence by CD, in the words of Hoffman J, transferred the message contained in the recording. Daly's argument is that the only proper medium for the transmission of the message was by a written document. This narrow approach disregards the broad purpose of the Regulation which is to make more efficient and effective the gathering of evidence and its transmission to the trial court. The transmission of the evidence by a CD containing the message to be transferred was consistent with that purpose.

The judge's alleged cognitive bias

[69] Ms Higgins contended that the trial judge's judgment betrayed a cognitive bias, albeit one of which he was unaware, brought about by being tainted by the information and evidence contained in the judgment arising out of the first trial and by the contents of the judgment in the appeal in the first trial. We have already noted that the trial judge was careful to make clear that he was fully aware that the trial before him was a hearing de novo. The trial judge's obvious and entirely

legitimate concern that the parties should seek to agree as much as possible to shorten the trial and that legal rulings given by the Court of Appeal should be correctly followed and applied in no way indicated any pre-judgment of the issues remaining in dispute. We reject Ms Higgins' argument on this ground. She found no support for her arguments in any part of the judge's impressive and carefully formulated judgment which, quite contrary to Ms Higgins' submissions, reflects a close scrutiny of the facts, evidence and arguments as presented to him. The proposition that "the judge's analysis of the evidence and reasoning demonstrates a cognitive bias that has led to a tunnel vision on the part of the judge" has no basis.

[70] Much of counsel's attempt to make good that unjustified criticism of the trial judge's approach related to her criticism of his handling of the evidence in respect of Daly's apparent presence in the Lisburn area at a time and in a place suggestive of involvement in the Lisburn explosion. As we have already indicated in relation to the Banbridge evidence relating to Murphy, this line of evidence, if it was to be given any weight, points to a coincidence which may add something, though of relatively small weight, to the circumstantial case against Daly.

[71] The trial judge concluded entirely correctly that, leaving aside the Lisburn evidence, there was a sufficiently strong prima facie case for Daly to have a case to answer and that Daly had failed to provide any explanation, thus considerably strengthening the plaintiffs' case. As in the case of Murphy the evidence against Daly by close of the plaintiffs' case was sufficiently strong to comfortably pass the prima facie case test. We agree with the trial judge that the absence of any explanation by Daly; the absence of any real challenge to the evidence of O'Connor and Grennan; the overwhelming inference that he was the person to whom O'Connor spoke at 3.30pm on 15 August 1998; that he was located close to the time and place of the Omagh bomb; that the phone followed a route entirely consistent with being involved in the bomb plot; and his conviction, all taken together made a strong circumstantial case against Daly. While Daly's conviction for membership was not in itself admissible under Hollington v Hewthorne [1943] KB 587, the significant fact is that his plea of guilty amounted to an admission of guilt. The trial judge's analysis of this evidence at paragraph [154] of his judgment was in our view correct. The fact that a person admits to membership of a proscribed organisation which was self admittedly involved in the Omagh atrocity must play into the wider question of whether the plaintiffs had made good their case. In the ordinary run of things the unlikelihood of an individual involving himself in gross criminality of a terrorist nature plays into the question whether in a given case the plaintiff has proved his case on a balance of probabilities. Where a person by confession accepts he subscribes to the aims and means of an unlawful organisation which is prepared to commit terrorist outrages and has not disavowed any intent to carry on serious terrorist activities it becomes very much less unlikely that he could have been involved in the past in assisting such an organisation. We conclude that the judge was entitled to put this plea of guilty into the scales in determining whether the plaintiffs' case had been proved. The judge was entitled to reject Daly's

unconvincing reasons for pleading guilty (namely that he really had no choice because the police evidence would prove the case).

[72] Bearing in mind that the trial judge correctly concluded that, apart from the Lisburn evidence, the case against Daly was sufficiently proved, it is unnecessary to deal at great length with Ms Higgins' criticism of the trial judge's handling and treatment of the LKP5 evidence. Suffice it to say that the trial judge had sufficient evidence to conclude, as he did, that there was sufficient underlying admissible hearsay evidence to establish the bedrock for LKP5 which traced the calls in terms of location and timing. The trial judge accepted that the evidence in this regard had not been proved in the same way as the underlying data relating to the telephones involved in the Omagh area on 15 August 1998. Nevertheless, the cogency and accuracy of the Omagh data provided a basis for the trial judge to repose a sufficient degree of confidence in the likely accuracy of the underlying material in respect of Lisburn and Banbridge, obtained as it was from a similar source, to enable the trial judge to draw conclusions as to the strength of the evidence in respect of Daly's phone movement in relation to Lisburn on the day of the bomb. Accordingly, we conclude that there was sufficient evidence to give rise to a serious suspicion of Daly's involvement in the events in Lisburn to call for an explanation. None was forthcoming. This was another strand in an otherwise strong circumstantial case. As noted, however, the case was made out without the need to rely on that strand.

Disposal of the Appeals

[73] In the result neither Murphy nor Daly have persuaded us that the trial judge was in error in concluding that the plaintiffs/respondents had proved their case to the requisite standard. Accordingly, we dismiss their appeals.