THE COURT OF APPEAL

Record No. 2015/503
Finlay Geoghegan J.
Birmingham J.
Hogan J.

BETWEEN/

IAN BAILEY

PLAINTIFF /

APPELLANT

- AND -

THE COMMISSIONER OF AN GARDA SÍOCHÁNA, THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS/

RESPONDENTS

JOINT JUDGMENT delivered by Mr. Justice George Birmingham and Mr. Justice Gerard Hogan on the 26th day of July 2017

Part I: General Introduction

1. At some stage in the late evening of Sunday, 22 December 1996 or the early morning of Monday, 23 December 1996, the French film producer, Mme. Sophie Toscan du Plantier, was brutally murdered outside her holiday home which was located near Toormore, Schull, Co. Cork. Mme. du Plantier's body was later found in the lane leading to her house in the course of the mid to late afternoon of 23rd December 1996.

2. No person has to date ever been charged with her murder in this jurisdiction. The failure to apprehend her killer and the circumstances which surrounded the subsequent police investigation have all given rise to enormous controversy in the twenty years which have ensued in the interval.

3. As might be expected, the murder shattered the tranquillity of the West Cork community and gave rise to a major Garda investigation. The plaintiff, Mr. Ian Bailey, was the major focus of this investigation. Mr. Bailey is a British journalist who resides in Schull. It is only fair to record that he has always steadfastly denied any involvement in the murder.

4. Mr. Bailey was, however, twice arrested – once on 10th February 1997 and then subsequently on 27th January 1998 – in relation to this murder. The plaintiff's dwelling was searched on 21st September 2000. While files were sent to the Director of Public Prosecutions, the DPP decided that there was insufficient evidence to justify a prosecution against Mr. Bailey. This decision not to prosecute has, apparently, been reviewed by the Director on a number of occasions, most recently in 2007, but the original decision has always been confirmed. The reasons for the decision not to prosecute have been set out in a detailed document (running to some 44 pages) prepared by Mr. Robert Sheehan in May 2001, who was then a senior official employed in the DPP's office. This document loomed large in evidence given in the High Court and we propose to return to this matter at a later stage in this judgment.

5. Returning, however, it the narrative, it should also be said that the French Republic sought the surrender of Mr. Bailey in respect of the murder of Mme. du Plantier pursuant to the provisions of the European Arrest Warrant Act 2003. Mr. Bailey was arrested on 23rd April 2010 pursuant to that request and then released on bail on the following day. This request was ultimately refused by the Supreme Court by a decision of 1st March 2012: see *Minister for Justice, Equality and Law Reform v. Bailey* [2012] IEHC 16, [2012] 4 I.R. 1.

6. How, then, did these events give rise to the present proceedings? Shortly put, Mr. Bailey has alleged that (named) members of An Garda Síochána involved in the investigation engaged in a conspiracy to injure his reputation and to violate his constitutional rights. Specifically, his contention was that they sought to procure statements from a number of persons – including a Ms. Marie Farrell – which either incriminated Mr. Bailey or which placed him close to the scene of the crime in a manner which was either unlawful in itself or which, even if the means were lawful, was actuated by malice and improper motives. Ms. Farrell was, in many respects, one of the most critical witnesses in the course of this trial, since she was the only person who has ever made a statement (which she has since retracted) which identified a person corresponding to Mr. Bailey close to the scene of the crime, namely, an alleged sighting at Kealfadda Bridge on 23rd December 1996.

7. The present proceedings were accordingly commenced on 1st May 2007. The reliefs claimed in the plenary summons were in the following terms:

> "(i). Damages, for unlawful arrest, false imprisonment, malicious prosecution, assault, battery, and trespass to the person, intentional infliction of emotional and psychological harm, harassment, intimidation, terrorising and oppressive behaviour, severe personal injuries.
>
> (ii.) Aggravated damages in that the defendants, their servants or agents, engaged in abuse of authority and the defendants and their servants and their agents continued their actions against the plaintiff when they knew or ought to have known that no such actions were justified and amounted to continuing assault and trespass to the person of the plaintiff and were continued in a malicious manner against the plaintiff.

(iii.) Costs incidental to and arising from the proceedings.

(iv.) Interest pursuant to statute."

8. It is, perhaps, only fair to observe at the outset that the plenary summons was supplemented by a very detailed statement of claim delivered on the 8th August 2007. The prayer for relief included some new claims as follows:

> "And the plaintiff therefore claim damages for unlawful arrest, false imprisonment, *conspiracy, unlawful means conspiracy*, assault, battery, trespass to the person, intentional infliction of emotional and psychological harm, harassment, intimidation, terrorising and oppressive behaviour *and breach of his constitutional rights*." (emphasis supplied)

9. The claims we have taken the liberty of highlighting are new. Possibly through an oversight, however, there is no claim for either malicious prosecution or personal injuries, although such was pleaded in the indorsement of claim in the plenary summons.

10. The date on which the proceedings were commenced is of some importance because of the six year limitation period contained in the Statute of Limitations 1957 ("the 1957 Act") and many of the events which were said to constitute the conspiracy pre-dated the six year limitation period prescribed by s. 11 of the 1957 Act. These proceedings ultimately came on for trial in the High Court (Hedigan J. and a jury) on 4th November 2014.

11. After a lengthy and eventful trial in which a host of witnesses gave evidence on behalf of both the plaintiff and the defence, the question of whether the claims were statute-barred was addressed towards the close of the trial with counsel for both sides making formal submissions on the limitations point on days 60 and 61. In his ruling delivered on day 62, Hedigan J. ruled that most of the plaintiff's claim was statute-barred. He did, however, rule that part of what was described as "over-arching" conspiracy claim was not statute-barred and, in the event, two specific questions were put to the jury regarding the alleged suborning of Ms. Marie Farrell to give evidence and to make statements implicating Mr. Bailey in the murder and the jury ultimately ruled adversely to the plaintiff.

12. The questions as put to the jury were:

> "(a) Did Detective Gardaí Jim Fitzgerald, Kevin Kelliher and Jim Slattery or any combination of them conspired together to implicate Ian Bailey in the murder of Sophie Toscan du Plantier by obtaining statements from Marie Farrell by threats, inducement and intimidation which reportedly identified him as the man she saw near the scene of the murder at Kealfadda Bridge in the early hours of the morning, 23rd December 1996 when they knew they were false?
>
> (b) Did Detective Sergeant Maurice Walsh conspire by threats, inducement or intimidation to get statements by Marie Farrell that Ian Bailey intimidated her when they knew they were false?"

13. The jury answered both questions in the negative. The plaintiff has now appealed to this Court against this decision and verdict. His appeal really takes the form of a challenge to the statute-barred ruling as well, as a variety of other challenges to particular rulings given in the course of the trial by the trial judge in relation, inter alia, to the admissibility of certain evidence. The State parties have cross-appealed insofar as they contend that the entire action should have been regarded statute-barred.

14. Before proceeding further, it may be convenient if, having given this general introduction, we were now to indicate the structure of the remainder of the judgment. In Part II we set out a summary of the key evidence and the rulings which occurred in the course of the trial. In Part III we address the question of whether the State was entitled to raise the Statute of Limitations and whether the action was indeed statute-barred, whether in whole or in part. In Part IV we address the rulings made by the trial judge in relation to opinion evidence and the evidence tendered by two former Directors of Public Prosecutions, Mr. Eamonn Barnes and Mr. James Hamilton, along with a senior official then working in the DPP's office. In Part V we address the question of certain other rulings made by the trial judge, including the admissibility of the opinion of a senior British police officer, Robert Quick, and a warning given by the trial judge to Ms. Farrell in the presence of the jury. In Part VI we summarise our conclusions.

Part II: The main evidence and the issues in the trial

15. As we have already indicated, the trial lasted for some 63 days with 79 witnesses. It would be impossible to do anything more than to effect a brief summary of the issues and the evidence. It is, in any event, unnecessary to do anything more than to outline these issues for the purposes of addressing the questions which arise on this appeal.

The legality of the arrests of Mr. Bailey

16. It is accepted that the first arrest took place on 10th February 1997 when Mr. Bailey was arrested under s. 4 of the Criminal Justice Act 1984 ("the 1984 Act") by Garda Paul Culligan. Garda Culligan gave evidence that the reasons for the arrest were as follows: First, he said that Mr. Bailey had been given an opportunity to account for his movements, yet he could not satisfactorily explain his whereabouts on the night in question. Second, he had scratches on both arms which Mr. Bailey put down to the fact that he killed turkeys in the run-up to Christmas, but which Gardaí suspected arose from the struggle between Mme. du Plantier and her killer. Third, the fact that he had been seen at Kealfadda Bridge at 3a.m. in the morning of the 23rd December 1996. Fourth, the Gardaí had information that Mr. Bailey had been very violent towards his partner, Ms. Jules Thomas. Fifth, Mr. Bailey had (apparently) told a number of local people not only that he had committed the murder, but also how he had done so (namely, with a rock).

17. The second arrest was effected on 26th January 1998 pursuant to a District Court order which had been made under s. 10 of the 1984 Act.(Given that there had been one arrest of the plaintiff already in respect of this charge, it was necessary for the purposes of s. 10 of the 1984 Act to secure a District Court order permitting Mr. Bailey's re-arrest). On this occasion, Superintendent Ted Murphy applied on a sworn information to the District Court for an order under s. 10 of the 1984 Act permitting a second arrest of Mr. Bailey. In that information Superintendent Murphy listed nine items he felt provided reasonable grounds for believing and suspecting that Mr. Bailey had committed the crime and that all that information had come to attention of the Gardaí since his first arrest in February 1997. These items included matters stated by Mr. Bailey to a number of journalists and others, alleged attempts to influence Ms. Farrell and statements made by Mr. Bailey to newspapers concerning the injuries suffered by Mme. Du Plantier and the interior of her home.

The taking of the statements from Ms. Marie Farrell

18. In 1996 Ms. Marie Farrell and her husband rented a house in Schull where they lived with their five children. They ran a drapery business in the Main St., Schull, but in the lead-up to Christmas 1996 Ms. Farrell also had a stall at the Coal Quay market in Cork.

19. Following the murder of Mme. du Plantier the Gardaí arranged for a house to house questionnaire of all local residents which Ms.

Farrell duly completed. The Gardaí then arranged for the first of twelve statements to be taken from Ms. Farrell on 27th December 1996 culminating in the final statement on 17th April 1998 in the course of the initial investigation. For completeness, it should also be added that Ms. Farrell also gave a series of interviews to other officers investigating the case between 2002 and 2004. She also made a series of statements retracting her earlier statements in 2006-2007. Ms. Farrell also made a statement to Gardaí in the presence of a French investigator on 5th October 2011. Finally, Ms. Farrell also made a series of statements to the Garda Síochána Ombudsman Commission in April, May and June 2012.

20. It is, however, the earlier statements to the initial investigating team which were the focus in these proceedings. The critical statement made by Ms. Farrell was, one dated 28th January 1997. In that statement she said that she had been travelling as a passenger in a car with a friend from Barley Cove to Goleen and from there on to Schull on the early morning of 23rd December 1996 when she saw a man whom she now recognised to be Mr. Bailey at the Kealfadda Bridge at about 3am. (Kealfadda Bridge lies close to where Mme. du Plantier's body was found on the 23rd December 1996.) This was a critical aspect of the statement, because it was the only identification evidence which directly placed Mr. Bailey close to the scene of the crime.

21. Ms. Farrell was subsequently asked to make a number of other statements to the Gardaí. In particular, Ms. Farrell was asked to identify the person with whom she had been travelling by car on the evening of the 22nd December and the early morning of the 23rd December, something which steadfastly refused to do. We propose to return to consider Ms. Farrell's evidence and the warnings given to her about her evidence by Hedigan J. at a later stage of this judgment.

The efforts made to ensure that Martin Graham would befriend Mr. Bailey and seek to obtain an admission from him
22. Mr. Martin Graham was an acquaintance of Mr. Bailey. It appears that the Gardaí became aware of this fact after Mr. Bailey had spoken with Mr. Graham after his release from custody in January 1997. Mr. Graham went back and informed the Gardaí that Mr. Bailey had been very stressed by the experience and that he (Mr. Graham) considered that Mr. Bailey needed a "good smoke" (*i.e.*, cannabis) in order to relax. (It appears to be accepted that Mr. Bailey was at the time a cannabis smoker). Mr. Graham maintained that named members of the Gardaí offered him cannabis so that he could join Mr. Bailey, smoke some cannabis with him and then to see whether he said anything about the murder of Mme. du Plantier which might be of interest to the Gardaí.

23. It is only proper to record that the Gardaí in question emphatically denied making an offer of this kind. It was, however, accepted that they did supply some clothes, tobacco and money to Mr. Graham with a view to assisting the latter to befriend Mr. Bailey.

24. It was also suggested that Mr. Graham had told a Garda Leahy that Mr. Bailey had made an admission to him regarding the murder of Mme. Du Plantier. This, however, was also strenuously denied by Mr. Graham.

The Malachy Boohig incident
25. The Garda file had been sent to the DPP in September 1997 and the initial indications were that no prosecution against Mr. Bailey would be forthcoming. The Gardaí involved in the investigation were admittedly unhappy with this. This unease was communicated to the State Solicitor for Co. Cork at the time, Mr. Malachy Boohig. Mr. Boohig said that in March 1998 he had been asked by senior Gardaí to attend a case conference in the matter in Bandon Garda Station where their unhappiness with the DPP's attitude was made known. Mr. Boohig said that as he left the meeting one of the senior Gardaí approached him privately to inquire whether he had not been to College with the then Minister for Justice (Mr. John O'Donoghue T.D.). Mr. Boohig further stated that this officer then said that as he (*i.e.,* Mr. Boohig) knew the Minister personally he inquired whether Mr. Boohig could not approach him with a view to getting Mr. O'Donoghue to put pressure on the Director to direct a prosecution against Mr. Bailey.

26. Mr. Boohig was naturally perturbed by these comments and, indeed, contacted the Director immediately thereafter to discuss this matter and to express these concerns. There the matter rested until 2011 when the former Director (Mr. Barnes) learnt that there was a real possibility that Mr. Bailey might be surrendered to France in the EAW proceedings. Mr. Barnes then contacted the then DPP (Mr. Hamilton) because of his concerns and reminded the then incumbent of what had occurred in 1998 in relation to Mr. Boohig and sent a detailed email him to this effect. Given that the EAW appeal involving Mr. Bailey was then pending before the Supreme Court, the matter was then referred to the Attorney General. She determined that the relevant files and Mr. Barnes' email in 2011 should be disclosed by the State authorities to Mr. Bailey. This was how this particular information first came to Mr. Bailey's attention.

The libel proceedings against the newspapers
27. Following his arrest in February 1997, Mr. Bailey was named as a suspect in the murder by a number of newspapers. He then commenced defamation proceedings which were heard in the Circuit Cork in November 2003. The Circuit Court found against the plaintiff. Mr. Bailey then appealed this decision to the High Court where the proceedings were ultimately settled and compromised. Mr. Bailey maintains that Gardaí improperly disclosed information gleaned from the Marie Farrell statements to the newspapers in advance of the Circuit Court hearing.

The European Arrest Warrant proceedings
28. The plaintiff was arrested on a Friday evening in April 2010 was brought before the High Court on the following day pursuant to the European Arrest Warrant request from the French authorities. As we have already noted, the Supreme Court ultimately ruled that an order for surrender to France should not be made.

Part III: Whether the State was entitled to raise the Statute of Limitations and whether the action was statute-barred, whether in whole or in part

29. In his ruling on the statute-barring issue given on day 62 of the hearing, Hedigan J. said as follows:

> "The Statute of Limitations is clear and provides for this type of action no grace based upon a date of knowledge. These proceedings were issued on 1st May 2007. It is agreed the statutory period is six years. The claims made are in the nature of trespass against the person and are actionable per se. In relation to such actions the statute runs from the date of accrual. The date of accrual runs from the time when the act is committed. Where there is a continuing trespass a fresh cause of action arises *die in diem*. Thus any claims based upon actions occurring prior to 1st May 2001 are barred by operation of law, save those that gave rise to a continuing trespass.
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> Dealing first with the two arrests, one in February 1997, the second in June 1998. These two arrests are discrete claims each standing on their own facts. They are each events occurring and completed in, respectively, February 1997 and January 1998. The action arising there from is, therefore, statute-barred. I may say that not only are they barred by the Statute but having heard all of the evidence I think they would also likely have been withdrawn from the jury on the basis

that no jury, properly instructed, could reasonably find that the Gardaí did not have reasonable suspicion upon which they could base a lawful arrest. The grounds for suspicion in both arrests were so strong that had the Gardaí not arrested Ian Bailey, they would have been derelict in their duty.

It should be noted that these arrests were based on suspicion grounded on numerous reasons other than the statements of Marie Farrell, each of which together or separately would, in my judgment, give grounds for reasonable suspicion of involvement in the offence in question and, thus, reasonable grounds for arrest.

What of the rest of the case?

A. Damages for loss of reputation ought to be brought under the provisions of the Defamation Act. Such proceedings were, in fact, brought again the newspapers in 2003, they cannot be pursued in proceedings such as herein.

B. There is no general supervisory role of the courts over the Garda Síochána as to the manner in which they conduct investigations. No claim pleaded can proceed on such a basis.

C. The claim concerning Martin Graham is also caught by the Statute occurring prior to May 2001. The events surrounding Martin Graham also are actions, if his evidence were accepted, without any consequence for Ian Bailey since no confession or prejudicial information was, in fact, obtained.

D. Damaging ongoing publicity or media attention. It is impossible to disentangle the pre and post 2001 media coverage. Claims arising from the former are statute-barred and the latter was inevitable and uncontrollable by anyone. No claim can arise out of that on the evidence that has been brought before the Court.

E. The libel actions: These claims were settled by accord and satisfaction following an appeal to the High Court. The terms have not been disclosed by the plaintiff. By virtue of this no claim can arise herein based upon those proceedings. It must be noted that Marie Farrell had retracted her statements after the date of the Circuit Court judgment and before the High Court appeal.

F. The European Arrest Warrant: The authorities of the French Republic applied to the Ministry of Justice on foot of a European Arrest Warrant and pursuant to the Mutual Assistance Act provisions. This warrant was dated 19th February 2010. The French had applied originally in 2006 for mutual assistance in their investigation into the murder of Sophie Toscan du Plantier. It was not until the Garda Síochána informed the Department that there would be no prosecution that the Department was free to activate the 2008 request, according to Mr. Fennell. What transpired was a process in which Ian Bailey was brought before the District Court, the High Court and, finally, the Supreme Court. It was a process provided by law in accordance with Ireland's international obligations as a part of the fight against crime on a European level. It resulted in a refusal by the Supreme Court, on legal grounds, to deliver Ian Bailey to the French authorities. I can readily accept that such a process may be highly stressful and frightening for one subjected to it, it is, however, a process provided by law and no Garda misdeeds could stymie such a process. Moreover, it is clear from the evidence that the French authorities conducted their own investigation, they obtained the full Garda file, including evidence of retractions of her statements by Marie Farrell. They interviewed Gardaí, and other witnesses, including Marie Farrell. They sent a forensic team to examine microscopic samples of certain exhibits held by the Gardaí, they still have outstanding a request for further interviews of witnesses. It is, thus, impossible to speculate as to what reasons the French had or have for their investigations. No action can arise from these European Arrest Warrant proceedings.

The attempt alleged to pressure the Director of Public Prosecutions was an act that occurred in 1998 and is also statute-barred, knowledge not being a requirement.

The conspiracy claim: This claim is that a number of Gardaí, Fitzgerald, Kelleher, Walsh and Slattery conspired to implicate Ian Bailey in the murder of Mme. Sophie Toscan du Plantier by obtaining from Marie Farrell statements identifying him close to the scene of the crime on the same early morning around the time of its commission and statements accusing Ian Bailey of intimidating Marie Farrell when they knew these statements were false. The claim is that they procured these statements through threats and intimidation. The plaintiff claims this was a campaign to pervert the course of justice by fixing him with guilt for the murder in the full knowledge of his innocence. As a result the plaintiff claims he has endured years of vilification and demonisation in the eyes of the public.

The claim in respect of Marie Farrell's statements arises from the pre 2001 statute-barred period but is this, as the plaintiff claims, a continuing cause of action giving rise to a fresh cause of action to die in diem. I think it is in respect of Marie Farrell's statements for the following reasons:

The statements made by Marie Farrell remain in existence on a Garda file. The Gardaí insist these were true statements made by Marie Farrell and are an accurate account of what she said. The investigation of the murder is still alive. Ian Bailey remains a person of interest.

If the Gardaí did what the plaintiff alleges it was an action that was an affront to all norms of law and an attack on the rule of law. It would be, if true, an attempt to pervert the course of justice and remains a live attempt if true. Thus these statements remain lying heavily upon the reputation of the plaintiff, although retracted by Marie Farrell, who says now that they are false, the Gardaí insist today that they wrote down exactly what Marie Farrell said at the time.

In my judgment this alleged conspiracy, if it existed, is alive and continuing today. Whether it happened or not is a matter for the decision of the jury. It seems to me therefore in broad terms that the questions that remain for the jury are limited to what, indeed, seems to me in many ways to have been the central plank of the case from the beginning: Did Gardaí Fitzgerald, Kelleher, Walsh and Slattery, or any combination of them, conspire to implicate Ian Bailey as the murderer of Sophie Toscan du Plantier by obtaining statements from Marie Farrell by use of threats, inducements or intimidation identifying him as the man whom she saw at the scene of the murder when they knew these statements to be false? Secondly, did Gardaí Fitzgerald and Walsh conspire together to obtain from Marie Farrell by threats, inducements or intimidation statements that Ian Bailey had intimidated her? That is the end of the decision."

Whether the defendants should be permitted to raise the Statute of Limitations

30. The first question which the trial judge was required to confront was whether the defendants should be permitted to raise the defence that the action was statute-barred at such a late stage in the trial. The issue was raised towards the end of the trial after no less then 79 witnesses had given evidence and the two days (day 60 and day 61) were set aside after the completion of the oral evidence for legal argument on this point. It must be said, however, that the issue of the Statute had at all times been raised by and relied on by the defendants in their pleadings. Thus, paragraph 1 of the defendants' defence delivered on the 18th January 2008 pleaded by way of preliminary objection that the plaintiff's claim was barred by the operation of the Statute of Limitations. It should also be noted that the issue of the Statute was mentioned by the plaintiff's counsel in his opening to the jury, although the issue was not raised again until very late in the trial.

31. The plaintiff submitted that it was unfair for the defendants to raise this question so late in the trial. It is true, of course, that the court will not generally allow an amendment late in the course of the trial which raises the Statute for the first time: see *Kettemann v. Hansel Properties Ltd.* [1987] A.C. 189. In that case a majority of the House of Lords held that a defendant could not make an application to "amend to plead a limitation defence during the course of the final speeches." As Lord Griffiths explained ([1987] A.C. 189, 219):

> "If, therefore, no plea of limitation is raised in the defence the plaintiff is entitled to assume that the defendant does not wish to rely on a time bar but prefers the courts to adjudicate on the issues raised in the dispute between the parties. If both parties on this assumption prepare their cases to context the factual and legal issues arising in the dispute and they are litigated to the point of judgment, the issues will by this time have been fully investigated and a plea of limitation no longer serves its purposes as a procedural bar.
>
> If a defendant *decides not to plead a limitation defence and to fight the case on the merits he should not be permitted to fall back on a plea of limitation as a second line of defence at the end of the trial when it is apparent that he likely to lose on the merits.*" (emphasis supplied)

32. This, however, is not what occurred in the present case because, as we have already noted, the defendants had always pleaded the Statute from the very first paragraph of its defence.

33. It is also the case that there may be some circumstances where a defendant will be held to be estopped from raising the Statute, particularly where a plaintiff has been lulled into the belief that the Statute will not be raised. But in such circumstances, a "clear and unambiguous….promise, assurance or representation" that the Statute will not be raised is required: see *Doran v. Thompson Ltd.* [1978] I.R. 223, 231, per Griffin J. In the present case it cannot be suggested that there was ever a promise, assurance or representation to this effect from the defendants such as might have lulled the plaintiff into a false sense of complacency regarding the Statute or which suggested that the question of whether the action was time-barred did not at all times remain a live issue.

34. One may agree that in other circumstances it might possibly have been more satisfactory had the question of the Statute been more fully addressed at an earlier point in the trial. But the plaintiff's essential claim was a complex one of an over-arching conspiracy on the part of the Gardaí. In those circumstances the question of whether and if so, to what extent, the claim was statute-barred did not lend itself to easy adjudication in advance of the Court hearing all the relevant evidence. In these circumstances, this Court is obliged to conclude that Hedigan J. correctly held that it was not unfair to permit the State defendants to raise the application of the Statute and there is no question of any estoppel in this regard arising in favour of the plaintiff.

The plaintiff's conspiracy claims and the Statute of Limitations

35. Section 11(6) of the Civil Liability Act 1961 ("the 1961 Act") provides that:

> "For the purposes of any enactment referring to a specific tort, an action for a conspiracy to commit that tort shall be deemed to be an action for that tort."

36. The 1957 Act is, of course, an enactment which refers to specific torts. It follows, therefore, that the limitation periods for specific, nominate torts contained in the 1957 Act are accordingly deemed also to apply to any conspiracy to commit such torts by virtue of s. 11(6) of the 1961 Act. Section 11(2)(a) of the 1957 Act, as amended by s.3(2) of the Statute of Limitations (Amendment) Act 1991 ("the 1991 Act"), provides that:

> "Subject to paragraphs (b) and (c) of this subsection, an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued."

37. It should be added that these limitation periods also apply to any claim brought by the plaintiff for breaches of constitutional rights. Insofar, therefore, as the plaintiff is maintaining a claim for a breach of constitutional rights which is separate and distinct from any claim for a breach of a nominate torts, it should be recalled that such a claim is, in any event, a "tort" for the purposes of the Statute of Limitations: see *McDonnell v. Ireland* [1998] 1 I.R. 134. It may also be observed that the various nominate torts (and associated claims) advanced by Mr. Bailey in his pleadings are not claims to which a "date of knowledge" exception applies by virtue of s.2 of the 1991 Act. Counsel for the plaintiff did not at any stage seek to argue otherwise.

38. The fundamental questions which accordingly confronted the trial judge were, first, was it permissible for the defendants to raise the Statute issue at this late stage of the trial. Second, on the assumption that it was, what was the date at which the plaintiff's cause or causes of action can be said to have accrued and, third, whether these causes of action have continue to subsist *die de diem*. It is to a consideration of these issues to which we can now turn.

39. It is important here to stress that there was no real dispute that the majority of the nominate torts (however described) were clearly statute-barred, even if the plaintiff's account of events were otherwise to be accepted.

40. If, for example, either one of the plaintiff's arrests were unlawful, then the six year limitation period had expired at the latest by January 2004 (*i.e.*, six years from the date of the second arrest in January 1998). It is true, of course, that the unlawful disclosure of confidential information to members of the media by members of the Gardaí may amount either to negligence (*Hanahoe v. Hussey* [1998] 3 I.R. 69) or to a violation of the constitutional right to privacy (*Gray v. Minister for Justice* [2007] IEHC 52, [2007] 2 I.R. 654). But if so, then subject to one possible exception in relation to the defamation proceedings against the newspapers in 2003, any such unlawful disclosure occurred at the latest in September 2000, so that the present proceedings commenced several months after the expiration of the statutory period in September 2006.

41. The first of these alleged improper acts of disclosure occurred in January 1997 when photographers were present to see the plaintiff being brought to Bandon Garda Station following his arrest, Mr. Bailey's surmise being that the Gardaí had alerted the media in

advance to the fact that he was going to be arrested and brought to the Garda Station at a particular time and place. Other claims of improper disclosure are also said to have occurred either during the 1997-1998 period or, possibly, in the immediate aftermath of the search of Mr. Bailey's dwelling in September 2000. Again, however, subject to the defamation proceedings issue, all of such claims are plainly statute-barred for the reasons just mentioned.

42. If Mr. Graham was wrongly suborned by members of the Gardaí with offers to supply him with money, clothes and cannabis with a view to getting him to talk privately with Mr. Bailey about the murder and, perhaps, thereby secure an admission from him, then the action for misfeasance of public office crystallised at some stage in mid-1997 when all of this is said to have occurred.

43. In *Taylor v. Smith* [1991] 1 I.R. 142, 170 McCarthy J. approved of the earlier reasoning in *McGowan v. Murphy* (Supreme Court, 10th April 1967), saying:

> "If conspiracy be inchoate it is difficult to see how it can have caused damage, a necessary ingredient of every tort. If it be executed, then the cause of action derives from the execution whether it be because of the unlawful nature of the act done or the unlawful means used."

44. It seems to follow from this judgment that the execution of the conspiracy is the event which triggers the cause of action, in part because it seems that damage is presumed by reason of the very execution of the conspiracy. At all events, it seems clear from *Taylor* that in conspiracy cases, time runs from the date of the execution of the conspiracy.

45. What, then, was the alleged over-arching conspiracy? Even taking the plaintiff's case at its highest – and expressing no view at all on either the factual or legal merits of these claims - this conspiracy was indeed put into effect between 1997-1998. On the plaintiff's view of the case, then during this period Ms. Farrell was suborned by Gardaí to make a false statement implicating Ms. Bailey; Mr. Bailey was falsely arrested, not once, but twice; Mr. Graham was supplied with money, clothes and cannabis with a view to befriending Mr. Bailey in the hope that the latter would make an admission and Mr. Boohig was spoken to by senior Garda officers in the hope that he would speak to the then Minister for Justice with a view to pressurising the DPP to launch a prosecution.

46. It is true that Mr. Bailey's dwelling was searched at a slightly later stage in September 2000, but even then any cause of action arising from the search had become statute-barred in September 2006, several months before the present proceedings were commenced.

47. Accordingly, in the light of the comments of McCarthy J. in *Taylor,* we find ourselves compelled to the conclusion that, subject to two important exceptions, Mr. Bailey's cause of action in conspiracy crystallised at this point – at all events no later than 1998 – because on his version of events the conspiracy was executed by members of the Gardaí during this period. It is not necessary for this Court to determine precisely what the relevant dates in 1997 and 1998 for this purpose actually were, because, on any view, these events long pre-dated 2nd May 2001, i.e., the last day of the six year time period permitted by s. 11 of the 1957 Act (read in conjunction with s. 11(6) of the 1961 Act) given that these proceedings were issued on 1st May 2007.

48. There are, we think, two exceptions to this. First, we agree with the ruling of Hedigan J. to the effect that if the plaintiff's fundamental contention was correct and there had been a conspiracy on the part of the Gardaí to suborn Ms. Farrell as a witness, this was a continuing conspiracy which operated *die de diem*. After all, Ms. Farrell's statement implicating Mr. Bailey remained on the Garda file and it was capable of being acted upon by the authorities. In this respect, therefore, we agree with Hedigan J. that this particular aspect of the plaintiff's claim was not statute-barred and that he was accordingly correct in allowing this matter to go to the jury. To that extent, therefore, we would dismiss the State defendant's cross-appeal against this aspect of the findings of the trial judge.

49. The other exception relates to the alleged unlawful disclosure of confidential information by the Gardaí to the media in anticipation of the hearing of the defamation proceedings by the Circuit Court in November/December 2003. It is true that an order for third party discovery of such witness statements was made by the Circuit Court at the start of the trial, but the plaintiff's case is that there had already been an unlawful disclosure of such information by members of the Gardaí to, inter alia, the solicitors for the defendant newspapers in advance of any such order and that he accordingly has a cause of action for either unlawful means conspiracy and/or a breach of his constitutional right to privacy.

50. This issue was raised by counsel for the plaintiff, Mr. Creed S.C., with the trial judge on day 60. The trial judge ruled as follows:

> "Mr. JUSTICE HEDIGAN: Well, I think that you are on very thin ground but I think it probably is just about something for the jury to decide. Why weren't the solicitors called, who were intended to be called if such evidence was actually given. So, its all highly speculative, but it may well be something for the jury to deal with.
>
> Mr. CREED: If the jury accept that that information came from the Gardaí and I absolutely accept, judge, it's a matter for the jury, that they are entitled to say my privacy was breached thereby."

51. We acknowledge, of course, that the plaintiff's defamation appeal was ultimately compromised on terms which remain confidential to the plaintiff and the various newspapers. If, however, there was a conspiracy which was put into effect – as the plaintiff alleges – then, in the light of the comments of McCarthy J. in *Taylor*, this would seem to be actionable in itself. This matter is not statute-barred and while it is true that viewed against the large panorama of complaints against members of the force this, may, on one view, amount to issue of lesser importance, the Court cannot, with respect, agree with the trial judge that if such disclosure occurred it was impossible to separate it out from earlier advance publicity which had been generated prior to 2001 and accordingly statute-barred.

52. The Court is, accordingly, of the view that the appeal must be allowed in respect of this separate discrete claim and this claim (namely, whether there was an unlawful disclosure of information contained in witness statements by members of the Gardaí to, inter alia, the solicitors for the defendant newspapers in advance of any such discovery order and that he accordingly has a cause of action for a breach for either unlawful means conspiracy and/or a breach of his constitutional right to privacy. must be remitted to the High Court for a re-hearing.

Part IV: The rulings in relation to opinion evidence

53. In this Part we address the rulings made by the trial judge in relation to opinion evidence and the evidence tendered by two former Directors of Public Prosecutions, Mr. Eamonn Barnes and Mr. James Hamilton, along with a senior official then working in the DPP's office.

54. A further issue on the appeal arises from constraints that were imposed on the plaintiff/appellant at trial when he called a number of witnesses, referred to collectively by the shorthand "the expert witnesses". The witnesses are, in the order they gave evidence, Mr. Eamonn Barnes, former Director of Public Prosecutions, Mr. Robert Sheehan, formerly a professional officer in the Office of the Director of Public Prosecutions to whom reference has already been made in the course of this judgment, and Mr. James Hamilton, also a former Director of Public Prosecutions and the successor to Mr. Eamonn Barnes in that office.

55. It will be necessary to consider the appearances of each of these witnesses in greater detail, but at this stage, by way of overview, it should be explained that the State defendants were concerned to prevent the witnesses offering evidence, in the nature of opinion evidence in relation to the nature and quality of the Garda investigation and also concerned lest the witnesses' testimony would facilitate the introduction into the trial of large amounts of hearsay evidence.

56. The witnesses in question gave evidence on days 34 and 35 of the trial. Day 34 opened with an intervention by Mr. Luán Ó Braonáin, Senior Counsel for the defendants who expressed a concern that every effort should be made to ensure that the witnesses that it was anticipated would be giving evidence that day should avoid hearsay and every effort made to ensure that no opinion evidence would be adduced.

57. Mr. Tom Creed, Senior Counsel, responded to the intervention offering a degree of comfort. He explained that Mr. Malachy Boohig, the State Solicitor for West Cork would be giving evidence and that Mr. Sheehan and Mr. Barnes would be giving evidence of having been contacted by Mr. Boohig. He continued that when he called Mr. Sheehan to give evidence that he would not be seeking to put the witnesses' critique into evidence as the judge had already ruled on that matter. That was a reference to a debate and ruling that had occurred on Day 4 of the trial. Counsel added that the DPP was represented in court that day by counsel and that Mr. Sheehan had received certain directions from the Director about areas that he was not to address while giving evidence. It seems the concerns of the DPP were grounded in the fact that the Sophie Toscan du Plantier investigation remained live. Counsel for the appellant indicated that he was very alive to the fact that Mr. Sheehan could not be invited to say that particular material that had been gathered was true or false, however, he felt that he was entitled to ask Mr. Sheehan about the DPP's file and the dealings that Mr. Sheehan had with the Gardaí.

58. Counsel for the respondents indicated that it was difficult to adopt a firm position in the abstract as it were, as he was unclear just what evidence would be sought to be adduced, but that if it was intended to ask Mr. Sheehan to express an opinion on the investigation, then that was impermissible. In ruling on the matter the trial judge began his remarks by saying that in the absence of a concrete objection to a particular piece of evidence, it was difficult to say very much at that stage. He indicated that where persons were going to be called to give evidence, that the hearsay evidence rule might be relaxed to a certain extent in order to allow the evidence to be presented in a comprehensive and fluid fashion. In effect, therefore, the judge was indicating that if both parties to a conversation or a transaction were going to be called to give evidence then it was not necessary to impose artificial restrictions on one individual giving an account of what had occurred.

59. Mr. Malachy Boohig was then called and gave his evidence without controversy. The key aspect of his evidence was what he had to say about attending a meeting in Bandon Garda Station in March 1998 during the Cork Criminal Sessions and the fact that he said that at the end of the meeting he was followed from the room by Detective Chief Superintendent Sean Camon of the National Bureau of Criminal Investigation and he believed Detective Chief Superintendent Dwyer was also present. According to Mr. Boohig, Detective Chief Superintendent Camon said that he understood that Mr. Boohig had been in college with Mr. John O'Donoghue T.D., the then Minister for Justice. Mr. Boohig said that Detective Chief Superintendent Camon asked him to contact Minister O'Donoghue with a view to having him contact the DPP in order to secure the proffering of a charge. Mr. Boohig said that the following day he spoke by telephone to Mr. Barnes, informed him of what had occurred and that later that day also spoke with Mr. Sheehan. Some months later he attended at the Office of the Director of Public Prosecutions in Dublin in order to review the file with Mr. Sheehan and had a brief meeting with Director Barnes on that occasion.

60. Mr. Eamonn Barnes was then called who explained to the jury that he was appointed as the State's first Director of Public Prosecutions in January 1975 and served in that position until September 1999. He described from memory his involvement with the Sophie Toscan du Plantier file. It was a significant file with which he had a personal involvement and he also discussed the case with Mr. Sheehan and with other officials in his office. In 2011 he was on holidays in Spain, when he became aware *via an Irish Times* story that the French authorities were seeking the surrender of Mr. Bailey pursuant to an EAW. He was aware of judicial procedures in France and felt that perhaps the whole story of the Bailey case was not being made known to the French authorities and felt that it might be important that it should be. He made contact with the Office of the DPP while journeying home, ringing from Paris, and spoke to a senior official there. He expressed his anxiety about the matter and said that he felt that the issue should be brought to the attention of the Attorney General. Having reflected on the matter further on his return, he contacted his successor, Mr. James Hamilton, who asked him to put his concerns in writing. He then wrote and sent an e-mail.

61. Counsel for the appellant asked him what was in the e-mail, inviting him to refer to it if he wanted to. Counsel commented "he is entitled to refresh his memory". This gave rise to an intervention from counsel for the defendants to say that the e-mail was quite clearly not a contemporaneous note of Mr. Boohig. With the acquiescence of the judge, Mr. Barnes then began to read the e-mail, which was a very lengthy one, to the Court and jury. At one stage counsel for the defendants intervened to protest that what was happening was that a statement was being read out rather than that evidence was being given. It appears that up to that stage the trial judge had not got the e-mail before him, but he was provided with a copy and his attention was directed to the concluding section. The jury was then sent for an early lunch and it would seem that the matter was considered further over lunch by the trial judge because when the Court resumed, in exchanges with counsel he commented, "not only is it a question of an opinion being expressed by Mr. Barnes, which of course he is perfectly entitled to hold, but it also goes to the very core of what the jury is here to actually decide. The judge indicated that his particular concern was with the last six lines of the memo. He then observed,

> "There is then an outline of Mr. Barnes' opinion of that particular investigation and that is the core issue before the Court. That is the core issue for the jury to decide and I think the law is fairly clear in that regard. Evidence of opinion of that sort ought not to be given because it is their function to decide, not Mr. Barnes' role. That indeed is what I was referring to when I dealt with the French summation of the case against Mr. Bailey, which I said also was highly prejudicial and was an assessment of the very core issue that was for the jury to decide, and equally the Sheehan one."

62. In response counsel for the plaintiff made lengthy submissions. In particular he made the point that he was anxious that the jury should know why Mr. Barnes intervened as he did. He said that if that happened he would have no problem with the judge reminding the jury, at the conclusion of the evidence of Mr. Barnes, that it was they and not Mr. Barnes who decided the case. The judge concluded with the judge ruling as follows,

> "I have considered the matter. The first moment that I read this just before lunch, it positively leapt off the page at me

as being a highly prejudicial opinion expressed by somebody who is perfectly entitled to hold that opinion and I have not the slightest doubt holds it in a *bona fide* [manner] but it is a highly prejudicial opinion expressed on a matter which is, as I referred to earlier, as the core issue before the Court which, in fact in the submissions that have been put to me is described also as, I think, the ultimate issue. I think you can use the two words as one wishes. The authority is *Midland Bank v. Hett*, *Stubbs and Kemp (a firm)* [1979] Ch. 384 Mr Justice Oliver, in a phrase that has been repeatedly referred to in the Irish courts and often opened before me, there said:

> "… whilst evidence of the witnesses' view of what, as a matter of law, the solicitor's duty was in the particular circumstances of the case is, I should have thought, inadmissible, for that is the very question which it is the court's function to decide."

The end of that e-mail, starting with "presumably" and going down to the end "appropriate attention" is, in my view, clearly inadmissible as a highly prejudicial opinion expressed on the matter, which is the core issue for the jury to decide. I think it is a matter that should not be opened to the jury either in evidence now by Mr. Barnes nor, indeed, if it is intended to, is it intended to put this document in by the way? Did I understand or misunderstand?"

Counsel commented:

"No, Judge."

The judge then added in exchange with counsel that there was the option of putting in the document with the section that he had excluded redacted. At that point and arising from what had occurred there followed what might be described as preliminary skirmishing about the position of Mr. Sheehan, counsel for Mr. Bailey commenting that his colleague could not, as he put it with one fell swoop, before any evidence of Mr. Sheehan was adduced seek to have it excluded. Counsel for the appellant was told that the Court's ruling was there and that counsel had to interpret it and that court time should not be wasted in pointless objections. During the course of further exchanges the trial judge addressed counsel for Mr. Bailey in order to remind him, that evidence which had been ruled inadmissible should not be referred to. In later remarks the judge referenced the Sheehan Report and the EAW making clear that he had taken a similar position to each and had done so for similar reasons.

63. The section of the Barnes e-mail to which successful objection was taken was, as set out in the written submissions on behalf of the defendants/respondents as follows:

> "There is now, apparently, a real possibility that Bailey may be charged in France and perhaps receive a lengthy prison sentence, presumably on the basis *inter alia* of "evidence" and "conclusions", provided by what I regarded at the time as having been a thoroughly flawed and prejudiced Garda investigation culminating in a grossly improper attempt to achieve or even force a prosecutorial decision which accorded with that prejudice. I felt accordingly that as a matter of ordinary justice to bring the matter to appropriate attention."

64. We find it hard to see on what basis it could be contended that an e-mail drafted and sent in 2011 could be admissible in the context of a case primarily concerned with events that occurred in 1997 and 1998. The most that could properly be said was that Mr. Barnes became concerned in 2011 that Mr. Bailey faced being surrendered to France and therefore contacted his successor. What he had to say to Mr. Hamilton or anybody else in a written document was simply not admissible. We cannot see that any witness was entitled to say that he regarded, or was of opinion, that the Garda investigation was thoroughly flawed and prejudiced.

65. It may be noted that this section of the e-mail read to the Court prior to objection being taken included the statement

> "I expressed my gratitude and praise to Mr. Boohig for his action in coming to me, which I assumed was because he wanted me to be aware that the Garda investigation was lacking in objectivity and was, indeed, heavily prejudiced and also to forewarn me of the possibility of further pressure being brought to bear on the office."

Overall, the Court does not believe that there was any unfairness to the appellant in how the evidence of Mr. Barnes was dealt with.

66. The second of the so-called expert witnesses was Mr. Robert Sheehan. He began his evidence by telling the jury that in November, 1996, he joined the Office of the DPP as a directing officer having previously served as head of the Criminal Trials Section in the Chief State Solicitor's Office. Then, in the course of what were essentially introductory remarks, he explained that at the time in question he was dealing with hundreds of files, some quite small, some quite large. This particular case was a huge one, involving thousands of pages of statements. So he expressed the hope that the judge would permit him, if necessary, rather than have him rely on a photographic memory, which he did not possess, to refresh his memory by reference to notes, an exercise which he felt might be very useful to the jury. He then proceeded to continue

> "In that context I might add that yesterday in preparation for my testimony…"

at which point counsel for the defendants interjected,

> "If they are contemporaneous notes obviously…"

Mr. Sheehan continued,

> "If I might just finish, Judge – in that context in relation to preparation of my testimony today, I have dealt with some notes, which basically I have deleted all opinion from, and they contain only factual matters which relate to materials referred to the Office by the Gardaí and which would be quite impossible for me to simply regurgitate from memory. I am afraid I couldn't simply do that. If I am not permitted to do so, I will of course, do my best."

67. The circumstances in which Mr. Sheehan would be permitted to refresh his memory became a significant issue during the course of his evidence. The witness had prepared a document in advance of the hearing and that he would be curtailed in referring to this is understandable. Unfortunately, it never really emerged with any real clarity what document or documents were utilised by Mr. Sheehan in preparing for the hearing. He did say that he did not have access to the file since 2003, when he was taken off the case and it was assigned to somebody else. But it seems he did have access to what he described as "historical notes". He explained that he had removed all expressions of opinion. However, what did not really emerge was whether these historic notes were themselves created contemporaneously with the events with which they dealt, or at some time remove on a look back basis. The fact that they contained expressions of opinion which Mr. Sheehan felt proper to excise might suggest that the latter is more likely.

68. The judge was clear that Mr. Sheehan was free to refer to contemporaneous notes, referring to these as the gold standards but not to any other notes. He ruled on the matter in these terms:

> "I think contemporaneous notes, as you know, may well be referred to and, indeed contemporaneous notes are the gold standard of evidence because they tend to provide a clear indication of what actually happened at that time rather than all the overlay that people have in between the moment being recollected and the time they recollect which, of course, is always in the present. But contemporaneous notes only can be referred to. No other notes can be referred to other than documentation which you want to refer to along the way. You may be able to assist him in that regard but do the best you can, Mr. Sheehan, nobody expects you to be Superman."

69. As Mr. Sheehan continued to give evidence, a degree of what might be described as tetchiness developed between judge and witness. At one stage Mr. Sheehan was referring to the fact that he made clear to Gardaí that Ms. Farrell was absolutely unreliable, instancing the fact that she had made a statement in December 1996, in which she had described a man she had seen in Schull as being "average height and thin build" and then adding in language which reflected that of Mr. Sheehan's 44-page memo, that when the Gardaí wanted Mr. Bailey as a suspect lo and behold she changed her statement to saying "he was a very big man". This precipitated an intervention by counsel for the defendants, leading to the judge advising the witness to steer clear of expressions of opinion.

70. When the jury was asked to withdraw by counsel for the appellant, the judge indicated that he wanted evidence to be given in a completely calm and dispassionate manner, avoiding commitments to any particular position. In further exchanges the judge indicated that there should not be "any melodramatics such as 'lo and behold'", this a reference to the fact that Mr. Sheehan, in his report and when giving evidence, felt that Ms. Farrell having first provided one description, then "low and behold" provided another.

71. At this remove some of the skirmishing that surrounded the evidence of Mr. Sheehan seems somewhat unnecessary. Counsel for the plaintiff made clear that his interest was in establishing through the witness that at a very early stage the Gardaí were informed that in the view of the DPP's office Ms. Farrell was an unreliable witness. He stressed that insofar as Mr. Sheehan was expressing that view, this was not for the purpose of establishing that Ms. Farrell was or was not unreliable but for the purpose of highlighting that the Gardaí had been advised of Mr. Sheehan's assessment at the time.

72. The plaintiff was not in a position to establish as a fact because of the assessment made by the witness that the Garda investigation was flawed and deficient but he was in a position and did in fact establish that the witness formed a view at an early stage and that view was communicated to the Director.

73. The skirmishing, and the resulting tetchiness, was unfortunate, and no one, witness, counsel on either side or judge can perhaps be totally absolved from blame. It is, however, certainly not the case that the restrictions imposed on Mr. Sheehan rendered the trial unsatisfactory or the outcome unsafe. The real purpose of calling him was to establish that those charged with consideration of the matter within the Office of the Director of Public Prosecutions formed a particular view at an early stage and that view was communicated to An Garda Síochána and that objective was achieved.

74. Mr. Sheehan was followed to the witness box by Mr. James Hamilton. At the suggestion of Mr. Creed, Senior Counsel for Mr. Bailey, he was examined initially in the absence of the jury. When Mr. Hamilton completed his direct evidence in the course of the *voir dire*, counsel for the defendants indicated that he would have a problem with similar evidence being given in the presence of the jury as it had contained expressions of opinion and belief as opposed to factual statements. Counsel referred to the fact that Mr. Hamilton had said that there were many shortcomings in the investigation, and contended that this expression of opinion was inadmissible. In response to an invitation from the judge to list his concerns, he referred to the observations about "many shortcomings in the investigation". He referred also to what Mr. Hamilton had to say about media reports which indicated a familiarity with the case as advanced by the prosecution, such as a statement as fact that Mr. Bailey had been seen at Keelfadda bridge, that there were scratches on his person and so on. Mr. Hamilton had said that no one in his office was the source for these stories. Counsel instanced also that Mr. Hamilton had referred to the fact that his office was prepared to make its analysis document available to the Office of the Attorney General but it was declined. Mr. Hamilton, in the intervention, clarified that he should not have spoken of shortcomings, as the document, which slightly to Mr. Hamilton's irritation, was being referred to as the "Sheehan document", analysed shortcomings in the evidence. In some cases that was because evidence was not available and it did not suggest that the investigators did anything wrong.

75. Another issue of some significance that arose during the course of the voir dire was whether the French authorities were given the reasons why the DPP had decided not to commence a prosecution. Mr. Hamilton assumed that this was so following his interaction with the Attorney General, but it became clear that while that was his assumption, he was not in a position to state that was so as a matter of fact of his own knowledge. The issue was left somewhat in abeyance on the basis that Mr. Hamilton could be asked whether he provided his reasons to the Central Authority and then a witness from the Central Authority, when called, could be asked whether the reasons given to them were furnished to the French authorities. The evidence thereafter given by Mr. Hamilton in the presence of the jury was brief and largely non controversial.

76. The overall picture that emerges is that the evidence of the various professional witnesses gave rise to debate about the extent to which they could be permitted to express opinions on the issues that arose in the case. The trial judge took a strict approach to the issue and certainly he was fully entitled to do that and, indeed, probably was bound to do so.

77. The appellant's attitude was that the conclusions reached by those charged by statute to decide whether there should be a prosecution meant that the relevant statutory authorities had decided that the Garda investigation was deficient, or inadequate or ill-founded and that this was indicative of how the disputes between the parties should be decided and indeed determinative of how those issues should be decided. In the view of the Court, if that was the approach of the appellant then it was not soundly based. That that is so emerges clearly from the riposte of the respondents who ask rhetorically "what would the position have been if a different professional officer had submitted a different recommendation or a DPP had directed differently?"

78. This was the very point which was addressed by the Supreme Court *in Mannix v. Pluck* [1975] I.R. 169. In that case the plaintiff had sued the defendant lorry driver for negligence as a result of personal injuries sustained in the course of a collision. He had appealed to the Supreme Court against a jury finding that the defendant had not been negligent. In the course of the hearing it had been put to the plaintiff that neither he nor his solicitor thought very much of his chances of his success.

79. The Supreme Court held that this line of cross-examination was inadmissible and directed a new trial. As Ó Dálaigh C.J. explained ([1975] I.R. 169, 173-174):

"But the real question here is whether the plaintiff's opinion as to the strength of his own case (or his solicitor's opinion on the same subject) is relevant. The general rule as I understand is that opinions in so far as they are based on no evidence, or illegal evidence, are worthless and equally are to be rejected, where founded on legal evidence, as tending to usurp the functions of the tribunal whose province alone it is to draw conclusions of law and fact…..

This matter becomes clearer if we strip the case of inference and discuss it in terms of direct evidence. First, should a party in a running-down case be permitted, either on direct or on cross examination, to give evidence as to what he thinks of his own case; secondly, having given the evidence, should the jury be allowed to take it into account as a relevant factor? Evidence is a double-edged sword. If a plaintiff, being pressed in cross-examination about his opinion of the strength of his case says he believes, and is advised, that he had a strong case, may a jury give such weight to this as they think proper? I would answer my questions by saying:-"Surely not." This is for the tribunal to try. In the course of the trial of running-down cases, how often has a witness (whether party or not) been stopped from giving his opinion and told to confine his evidence to what he observed? When the question is posed in relation to a solicitor's opinion of his client's case, the enormity of the suggestion becomes apparent. In what circumstances could a solicitor be permitted to tell a tribunal that he did not think much of his client's case which was then at trial before the tribunal? In what circumstances could a judge in effect tell a jury that the poor opinion that the plaintiff's solicitor entertained of his client's case could, in deciding the case, be thrown into the balance against the plaintiff? The matter in my opinion does not require further discussion to demonstrate how untenable the defendant's ground is in this case."

80. Much the same could be said of the opinion evidence which the plaintiff had proposed to tender here. It amounted to saying that in the respective opinions of three (admittedly very distinguished) professional witnesses the prosecution case against Mr. Bailey was a poor one. But this is precisely the type of opinion evidence which, as the Supreme Court made clear in *Mannix,* cannot be tendered by either party.

81. It follows, therefore, that we are quite satisfied that the issues that arose during the course of the evidence of Mr. Barnes, Mr. Sheehan and Mr. Hamilton did not provide any basis for concluding that the trial was other than satisfactory.

Part V: Other rulings made by the trial judge

82. In this Part we address the question of certain other rulings made by the trial judge, including the admissibility of the opinion of a senior British police officer, Robert Quick, and a warning given by the trial judge to Ms. Farrell in the presence of the jury.

The exclusion of the evidence of Robert Quick

83. The plaintiff sought to tender as an expert witness, Mr. Robert Quick, who is a former Assistant Commissioner of London's Metropolitan Police Service. Mr Quick's evidence was heard by way of *voir dire* in its entirety before being ruled out by the trial judge. It should be said immediately that Mr. Quick possessed extensive experience in the investigation of serious and organised crime, counter-terrorism and counter-corruption. He certainly had enormous experience qua senior police officer.

84. This, however, was not the basis upon which the State defendants sought to have his evidence excluded. Their case rather was that Mr. Quick had insufficient expertise in terms of Irish police practice and procedure to qualify as an expert for the purposes of this trial. This was, in effect, the entire thrust of his cross-examination by counsel for the State defendants on Day 36:

"MR O'HIGGINS. What was the law in Ireland about taking statements in 1996 and 1997?

A. Well, forgive me, I thought you asked me whether there had been changes.

Q. We are talking about your proposing to give expert evidence about something that happened in 1996/1997?

A. Yes.

Q. Do you know anything about the Supreme Court decisions in Ireland as to what the law was?

A. No.

Q. Nothing?

A. No…..

Q. You don't know anything about what the situation was in Ireland?

A. I wouldn't profess to be an expert on Irish law at all.

Q. Including what the Supreme Court had laid down as being the circumstances of the admissibility of statements taken?

A. Including that, yes……..

Q. You mentioned highly trained officers taking statements. Do you know anything about what the position was here?

A. Not verbatim, I have a vague impression from my contact with Garda officers.

Q. Can I ask you, you talked about the alteration of a statement being a very serious thing, what do you know about the circumstances in which any statement is said to have been altered in this case?

A. I don't know anything about the circumstances. I've been allowed to read some transcripts.

Q. What transcripts?

A. Transcripts of interview.

Q. Yes?

A. Sorry, of telephone conversations.

Q. Yes?

A. I have read verbatim those transcripts and the context of the wider conversations as well as specific words that were indicative of an intent to change the statements.

Q. Are you aware of all the relevant evidence which has been given in the case in relation to these matters?

A. No, of course not, no.

Q. You haven't examined even the transcripts of evidence?

A. No.

Q. The trial has being going on for 35 days?

A. Absolutely, not, I have not followed this case and I don't know the detail of the evidence……

Q. Do you know what happened in this case? I mean do you know what Mr. Bailey is suing for?

A. Only in the vaguest terms.

Q. So, you don't know what is alleged in the case?

A. On one level I hope I am not sort of contaminated by the story in its wider sense. I have been asked as an experienced police officer with some experience of working with Garda and other countries to give a comment or give some evidence in relation to some transcripts of telephone conversations. So, I have read those transcripts

Q. Based on a tiny fragment of evidence in circumstances where you have never heard the tapes and don't know anything about the context?

A. I wouldn't purport for it to be anything other than I have read those transcripts of those telephone conversations and I have commented upon them as per my evidence earlier today……

Q. Can I suggest to you that no expert should ever give an opinion, assuming they are doing it in the question of expertise, which I suggest it is not scientific or vocational expertise can assist, no expert should do that without informing themselves of all the relevant evidence to the expression of that opinion and that you have informed yourself of almost none?

A. There may be pros and cons in that but all I can say is that I have been asked to examine transcripts of telephone conversations and I have given my evidence about them."

85. The purpose of Mr Quick's evidence was, it seems, to allow him to give his expert view, by reference to approved police practice, of the correct manner of giving and taking statements and of handling witnesses and informants. The difficulty, however, is that while Mr. Quick is plainly a distinguished former police officer, he simply was not aware of the relevant law or standards applicable in Ireland at the time in question in 1996-1997. On that basis his proposed evidence as to standard police practice did not meet the threshold of an expert witness. As such, the evidence was inadmissible insofar as it was not probative of any material fact.

86. In relation to his opinion as to the meaning of the content of various tape recordings, it must be observed that it emerged from the cross-examination of Mr. Quick that he did not profess to have any real knowledge of the plaintiff's case, nor of the background to the recordings or the identities of the speakers. In effect, Mr. Quick would have being giving evidence as to what he understood by the use of certain words which was not, in any event, a matter for expert evidence. The question of interpretation of the recordings was fundamentally a matter solely for the jury.

87. In these circumstances the conclusion must be that the trial judge was correct to exclude the proposed evidence of Mr. Quick. The foundations by which expert evidence might properly have been given by him in respect of the taking of statements, police practices in this jurisdiction in 1996-1997 and so forth were simply not laid in his evidence on the *voir dire*. Much the same can be said of the evidence he proposed to give in relation to the interpretation of certain other evidence, a matter which, in any event, was principally a matter for the jury. Any other conclusion would have presented the grave risk that inadmissible evidence which would otherwise have fallen foul of the rules of evidence with regard to hearsay, opinion evidence, expert evidence and evidence as to the ultimate issue might well have tendered.

The evidence of Marie Farrell

88. So far as the evidence of Ms. Marie Farrell is concerned, it should be noted that she commenced giving evidence on Day 16. Her cross-examination commenced on Day 19. On the morning of Day 21 as she was being cross-examined as to identity of the identity of the individual in her company on 22-23 December 1996 when she (allegedly) witnessed Mr. Bailey at Kealfadda Bridge, Ms. Farrell abruptly stood up from the witness box and left the court. She returned to Court that afternoon and her cross-examination continued until Day 24.

89. Before this Court, the plaintiff made two fundamental complaints about the rulings of Hedigan J. First, it was said that he ought not to have issued warnings to Ms. Farrell in the presence of the jury. Second, it was suggested that counsel for the defendants ought not to have asserted in his opinion that Ms. Farrell was telling lies in the course of putting questions to her in the course of cross-examination.

90. There is no doubt but that in many respects Ms. Farrell was a very singular witness. She had admitted at the outset of her evidence that she was a perjurer and that she had made a dishonest claim in respect of an insurance policy. The critical evidence related, of course, to the various statements which she had first made (on a variety of occasions) to members of An Garda Síochána in relation to Mme. du Plantier's murder but which she either later retracted or significantly varied, claiming that she had been suborned by members of An Garda Síochána.

91. Ms. Farrell had originally contacted the Gardaí by telephone in the wake of the murder, saying that she had seen a strange man loitering outside her shop in the days preceding the murder. She completed a questionnaire which Gardaí had circulated to local residents in the immediate aftermath of the murder saying that she had seen a man on Saturday 21 December 1996 "hanging around" outside her shop. She stated that he was in his late 30s and was about 5ft 10ins.

92. Ms. Farrell then made a series of formal statements to Gardaí, some of which we have already described. It is, perhaps, unnecessary for present purposes to record all of the (apparently) inconsistent and contradictory statements made by Ms. Farrell in the course of her evidence in the days leading up to the judge's warning, but the following three instance may be given as representative.

93. In the course of the trial on Day 16 Ms. Farrell stated that the stranger she had seen outside her clothes shop on 21st December 1996 was wearing a cost which had been adorned with silver buttons. This was a detail which had never featured in any of the many statements which she had previously made concerning the stranger she had seen on that day. Not surprisingly, her failure to mention this detail was a matter which the State defendants raised in the course of cross-examination and it was put to her that her failure to mention this previously undermined her credibility.

94. On Day 21 Ms. Farrell was pressed in cross-examination to identify the person who accompanied her on the evening of 22nd/23rd December 1996 at the time of the sighting at Kealfadda Bridge. At that point Ms. Farrell was prompted to walk out of the courtroom saying that she wanted "nothing more to do with it." She, however, returned to court that afternoon.

95. When she returned to court and resumed giving evidence, Ms. Farrell stated that she had not encountered any difficulties with the Department of Social Services in the U.K. when she had lived there with her husband. On the application of the State defendants, a video was then played of a recording of her interview with An Garda Síochána Ombudsman Commission ("GSOC"). This GSOC recording dated from April / May 2012 and in the course of which she acknowledged in some detail that she had fraudulently claimed income support from the British Department of Social Services.

96. Ms. Farrell also denied in evidence that when Mr. Bailey entered her shop on the 28th June 1997 he had threatened her with personal information in relation to these events. She denied that Mr. Bailey had threatened to inform on her to the British Social Services. She maintained on the contrary that a Garda statement ascribed to her on the 10th July 2007 detailing these matters as false. She confirmed this in cross examination. At that point a further video recording of her interviews with GSOC was played. In that video recording, (which this Court had itself seen), Ms. Farrell can be seen and heard reciting that Mr. Bailey had indeed threatened her and, specifically, had threatened to report the fact that she had committed benefit fraud to the U.K. Department of Social Services.

97. Ms. Farrell was then pressed by counsel for the State defendant as to explain the conflicting versions. In response, Ms. Farrell replied she could merely state that she was "getting confused with fact and fiction" and was "mixed up". Shortly after this point Hedigan J. warned Ms. Farrell in the presence of the jury as follows:-

> "Q. Mr. Justice Hedigan: Just two things, Ms. Farrell, any further walkouts will be your last walkout of these proceedings, do you understand that…?
>
> A. Ms. Farrell: Yes, I apologise for that.
>
> Q. Mr. Justice Hedigan: Secondly, I would like you to give very careful consideration to the manner in which you are giving evidence and bear in mind that there are very severe penal sanctions for people who commit perjury.
>
> A. Ms. Farrell: I'm not, I am telling the truth.
>
> Q. Mr. Justice Hedigan: Just don't say anything. Think about it overnight, if you would be so kind."

98. Hedigan J. subsequently rejected an application made by and on behalf of Mr. Bailey to have the jury discharged by reason of the fact that these comments were made in the presence of the jury. This argument was rejected by him in the course of an ex tempore ruling given on the following day, Day 22. In the course of that *ex tempore* ruling Hedigan J. said:

> "…I think every judge has a duty to give a warning to witnesses while giving evidence in court where it appears that it is appropriate to do so but they should bear in mind that there are severe criminal penalties that are available in relation to anybody who is found to commit perjury, which is a scandalous thing to do in any kind of place but particularly, of course, in court in a case of such enormous importance. A warning is not a conclusion, this is a complete misunderstanding of what occurred yesterday on the part of [counsel] to work on the basis that he does that the warning is somehow a conclusion. It is obviously not and never could be. As I say, a judge has a duty to warn anybody in court that may be getting themselves into that situation. That is particularly appropriate in a case in which the witness in question is somebody on the plaintiff's own case which participates on the falsification of statements on the plaintiff's case - not the defendant - whether under pressure from the Gardaí or otherwise as the case may be. It is obviously more appropriate in the case of a witness, who is apparently giving false evidence in libel proceedings, practically one of the first pieces evidence that she gave. It is something that this witness must be warned about and I am satisfied that the warning was thoroughly appropriate. … as the effect it has on the jury that lies basically on the responsibility of the witness herself."

99. Hedigan J. returned to this issue on Day 64 in the course of his closing address to the jury. He said:-

> "I am not going to go into Ms.Farrell's evidence. You've heard it all but I was simply asking you to note that she presented in Court at the outset as a person who admitted that she had lied on the evidence she gave in the Circuit Court…is that story true or is it false, like the evidence she gave in the Circuit Court. That is alone for you to decide."

100. Hedigan J. further stated in respect of the warning he had given on Day 21:

> "You heard me during the course of her evidence at a particularly dramatic time in the cross examination of her, warn her about the serious implications for committing perjury and I want you to careful to remember this: a warning is not a conclusion, it is a warning. It is not often that a judge has to warn a witness to consider their position, but it does happen. It is a warning and that is all it is. The decision on the credibility of Marie Farrell is yours and yours alone."

101. The plaintiff's contention is that the trial judge was wrong to have administered a warning to Ms. Farrell regarding her evidence

and that he compounded that error in the presence of the jury.

102. While it is true that a trial judge should generally be slow to warn a witness as to the credibility of their evidence, practical experience has shown that this is sometimes necessary. If, however, there was ever a case where such a warning was necessary it was probably in the case of Ms. Farrell. She was a key witness who had previously been given a myriad of opportunities to tender a true account of what she had seen in the days leading up to the murder and its immediate aftermath. She had already retracted her statements, saying that she had been suborned by members of the Gardaí. Central to all of this was the issue whether she had been pressurised by members of An Garda Síochána to make the statement(s) against the plaintiff or whether she had retracted those statements by reason of what amounted to blackmail on the part of the plaintiff.

103. This evidence, therefore, had assumed a vital significance for the trial. Yet Ms. Farrell had immediately prior to the warning unilaterally left the witness box and, upon her return, just given evidence on these critical issues which was diametrically at variance with the detailed evidence she had given under solemn circumstances to GSOC less then three years previously and which had been recorded on video. Given the dramatic inconsistencies between the two accounts, it would be hard to avoid the conclusion that at least in one or other accounts the witness had told a deliberate untruth. Ms. Farrell had, in any event, admitted in her evidence that she had previously committed perjury.

104. In these circumstances, a warning was both appropriate and timely. It must be recalled that the Supreme Court has stressed that even in the context of a criminal prosecution "it is open to a judge in an appropriate case to express an opinion that a particular verdict of guilty is the only one which would be reasonable or proper on the evidence, but that must of necessity fall short of the right to direct a verdict of guilty": see *The People (Director of Public Prosecutions) v. Davis* [1993] 2 I.R. 1, 14, *per* Finlay C.J.

105. If this is so, it follows a fortiori that in a civil action for defamation the judge is entitled to express a view as to the evidence given by a witness, provided the ultimate role of the jury in assessing credibility is not thereby compromised. The trial judge could not, of course, have usurped the function of the jury to make a decision as to the credibility of the witness, but we are quite clear that in the present case Hedigan J. was at pains not to do so. Indeed, this is what he stressed to the jury in his address to them at the close of the trial some forty days later.

Conclusions on the warning issue
106. It is true that in ordinary circumstances it might have been preferable had the warning not been administered in the presence of the jury. But given the dramatic circumstances of the day's evidence the judge can hardly be faulted for administering the warning in the presence of the jury. In any event, this was just one single episode in the context of a lengthy trial and, moreover, the trial judge was scrupulously careful to stress to the jury in his summing that the assessment of the credibility was entirely a matter for them.

The cross-examination of Ms. Farrell
107. It is next necessary to consider an objection to a particular question or statement made by counsel for the defendants in the course of the cross-examination of Ms. Farrell where he stated that he believed that she was lying. The background to this objection is as follows.

108. In the course of her evidence in chief Ms. Farrell had stated that one of the investigating Gardaí, Garda Fitzgerald, had committed an unnamed act that would cause him embarrassment were she to reveal it. On Day 20 counsel for the State defendants then cross-examined Ms. Farrell regarding this issue:

> "Q. Can I ask you so we are not all trying this case in blinkers please what is the dark secret which you seek to hold over Detective Garda Fitzgerald?
>
> A. It is just something personal.
>
> Q. I am not prepared to deal with just something personal in a public trial. We all have to look at reality in this case, what was the matter which you have never told Mr. Buttimer about Detective Garda Fitzgerald, or anybody else, which I believe is what you are say."

109. There then followed the following exchanges:

> "MR. O'HIGGINS: Let us hear what it was now because I need to know because Detective Garda Fitzgerald needs to deal with this in evidence when he gives it. Let us not have hidden agendas. Let us hear just what is there please?
>
> MR. JUSTICE HEDIGAN: You are obliged to tell the truth, the whole truth and nothing but the truth, so you must tell the whole of the story, not part of it. You must answer the question
>
> A. Okay. When I lived in Schull I looked after a house for an English doctor and I would clean it on a Saturday if there were changeovers, it was let to some tourists at times, and one particular Saturday Jim Fitzgerald called to the house, he called just to see the house and at one stage I went upstairs and when I came down Jim Fitzgerald was in a downstairs bedroom, he was stripped naked and he asked me for sex.
>
> Q. What happened then?
>
> A. I told him to "get the fuck out".
>
> Q. Okay. You hadn't told anyone that publicly for how many years? What year did this happen by the way?
>
> A. Maybe '97 or '98, I am not exactly sure. It was well after I met him.
>
> Q. It happened in 1997 or 1998, why didn't you tell anyone since then?
>
> A. It is not something that you would go round telling.
>
> Q. Well it didn't restrain you from saying things about Detective Sergeant Walsh, did it?
>
> A. No.

Q. Yeah. Do you believe that a Garda who would do something like that...(INTERJECTION)

A. It did happen.

Q. Do you think that a Garda who would do something like that is fit to be a Member of An Garda Síochána released on duty before members of the public?

A. That is what happened….. Do you think that I am sitting here telling this lightly? I already had to explain to my daughter about Maurice Walsh, now...(INTERJECTION)

Q. Ms. Farrell I think you are sitting there telling the jury lies as you feel like doing?

A. I am not telling lies, I am not. Do you think I want to be sitting here and another headline in the paper about Marie Farrell and what was going on?

Q. Mrs. Farrell I really don't know what your relationship with newspaper headlines is, we may take a look at that, I don't know and I am still trying to work you out Mrs. Farrell. Can I ask you what was the doctor's name please?

A. The doctor who owned the house?

Q. Yes.

A. John Smith.

Q. Where was the house?

A. It was, it was outside Schull, it was called Heather Rock.

Q. For how long did you clean it?

A. A few years….

Q. By agreement with whom did you clean it?

A. With the people who owned it.

Q. Yes. When do you say that this episode took place?

A. I don't know was it '97 or '98.

Q. Are you really seriously telling the Ladies and Gentlemen of the Jury that you cannot tell when an incident like that happened whether it was 1997 or 1998?

A. I don't know it was one, it was summer of '97 or '98.

Q. Mrs. Farrell really...(INTERJECTION)

A. I cannot remember the exact month, it was a year or so maybe after I met him.

Q. How often do naked policemen parade themselves wholly or partly in your vicinity?

A. Well I have had two episodes.

Q. You say that you were a put upon person who was in terrible trouble having to keep making statements at the instance of Detective Garda Fitzgerald and others, can I suggest to you that if ever you wanted to get out of ever having to make any more statement ever again all you needed to do was to tell Detective Garda Fitzgerald that that is it?

A. I did tell him many times that is it.

Q. Didn't you know that you had him exactly where you wanted him, so to speak, if you were going to release what you say is the truth?

A. Look if you think I am telling lies –

Q. Yes, I do think you are telling lies, Mrs. Farrell?

A. -- low down on his stomach he had like a little, a growth. How would I know that unless he stripped naked in front of me? I am telling you that did happen. I am not a liar. I am not a liar.

Q. Mrs. Farrell can I suggest to you it is wholly incredible, wholly incredible...(INTERJECTION)

A. Everything that happened down there was wholly incredible.

Q. That this should happen in circumstances where you cannot remember even as to the year when it did?

A. I can't remember exactly. It did happen, I am not lying. It did happen."

110. Objection is taken by the plaintiff to the two questions put by counsel for the defendants which we have underlined. It is true that in the course of the examination of witnesses counsel should normally refrain from expressing personal views, since – certainly if unchecked – it would tend to blur the line between the true questioning of the witness and the incorporation of inadmissible comment. This would be unfair to the witness.

111. This was the very point which was made by the English Court of Appeal observed in *R. v. Farooqi* [2013] EWCA Civ. 1349 :

> "We do not suggest that the principle of fairness to the witness requires the somewhat dated formulaic use of the word "put" as integral to the process. Assuming that there is material to justify the allegation, "Were you driving at 120 mph?" is more effective than, "I put it you, that you were driving at 120 mph?" *What ought to be avoided is the increasing modern habit of assertion, (often in tendentious terms or incorporating comment), which is not true cross-examination. This is unfair to the witness and blurs the line from a jury's perspective between evidence from the witness and inadmissible comment from the advocate.*"

112. So far as the facts of the present case are concerned, the two comments made by counsel were isolated in character and would readily be understood by all concerned – judge, opposing counsel, jury and not least the witness – as amounting to a suggestion that Ms. Farrell was lying. The basic for that suggestion had been fully laid and explored with the witness in the course of the cross-examination. The failure to preface either question with the words "I suggest" or "Is it not the case" can at worst be regarded as a minor slip-up on the part of counsel. There can, therefore, be no question in the circumstances of any possible unfairness to the witness, which, after all, is the rationale for the rule against comment by counsel in the course of cross-examination.

113. In these circumstances we would entirely reject the argument that the failure to preface the questions with words "I suggest" or similar words amounted to any unfairness on the part of State counsel and such a failure was at worst a form of harmless error.

Part VI - Conclusions

114. It remains only to summarise our conclusions. As will have been seen, the Court is of the view that, save in one minor respect, the appeal should be dismissed and the cross-appeal brought by the State defendants should also be dismissed.

115. First, while it may be that in other circumstances it might possibly have been more satisfactory had the question of the Statute been more fully addressed at an earlier point in the trial. But the plaintiff's essential claim was a complex one of an over-arching conspiracy on the part of the Gardaí. In those circumstances the question of whether and if so, to what extent, the claim was statute-barred did not lend itself to easy adjudication in advance of the Court hearing all the relevant evidence. In these circumstances, this Court is obliged to conclude that it would not be unfair to permit the State defendants to raise the application of the Statute and there is no question of any estoppel in this regard arising in favour of the plaintiff.

116. Second, with one single exception, the rest of the plaintiff's claim in respect of nominate torts and breaches of constitutional rights occurred even on his account of matters all prior to May 2001, *i.e.*, six years before the present proceedings were commenced in May 2007. These claims are accordingly statute-barred.

117. Third, the claim in respect of the alleged unlawful disclosure by members of the Gardaí of confidential information prior to the hearing of the defamation proceedings is not statute-barred and, to that limited extent, the appeal should be allowed and a re-trial ordered.

118. Fourth, we agree with the ruling of Hedigan J. to the effect that if the plaintiff's fundamental contention was correct and there had been a conspiracy on the part of the Gardaí to suborn Ms. Farrell as a witness, this constituted a continuing conspiracy which operated *die de diem*. In this respect, therefore, we agree with Hedigan J. that this particular aspect of the plaintiff's claim was not statute-barred and that he was accordingly correct in allowing this matter to go to the jury. To that extent, therefore, we would dismiss the State defendant's cross-appeal against this aspect of the findings of the trial judge.

119. Fifth, we agree with the trial judge's rulings in respect of the evidence of Messrs. Sheehan, Hamilton and Barnes.

120. Sixth, we agree that the trial judge was correct to exclude the proposed evidence of Mr. Quick following a *voir dire* in the absence of the jury. The foundations by which expert evidence might properly have been given by Mr. Quick in respect of the taking of statements, police practices in this jurisdiction in 1996-1997 and so forth, were simply not laid in his evidence on the *voir dire*. Much the same can be said of the evidence he proposed to give in relation to the interpretation of certain other evidence, a matter which, in any event, was principally a matter for the jury. Any other conclusion would have presented the grave risk that inadmissible evidence which would otherwise have fallen foul of the rules of evidence with regard to hearsay, opinion evidence, expert evidence and evidence as to the ultimate issue might well have tendered.

121. Seventh, we consider it was permissible for the trial judge to administer the warning to Ms. Farrell. Even if he was wrong to have done this in the presence of the jury, he was at pains to stress that the assessment of her credibility was entirely a matter for the jury and we are satisfied that there was no real prejudice to the plaintiff.

122. As will have been seen, we are, accordingly, of the view that, save in one minor respect, the appeal should be dismissed and the cross-appeal brought by the State defendants should also be dismissed. We would, however, allow the appeal in respect of the ruling that the claim in respect of the alleged wrongful disclosure of the information by the Gardaí in advance of the defamation proceedings in December 2003 was statute-barred and direct a re-trial in respect of that part only of the plaintiff's claim.